The Magic of Privity in Express Product Warranty Claims: A Plaintiff's Perspective

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The law of Florida is increasingly clear on at least one point in the product liability arena. Implied warranties are generally not enforceable if there is no privity between the claimant and the manufacturer (with some exceptions).[1] But what of express warranties? Indeed, what of express manufacturer warranties that come with the product to the first retail purchaser? Surely, an express, written product warranty with the manufacturer's name on it accompanying a brand new product sold to the first retail purchaser through an authorized dealer or retailer is enforceable against the manufacturer, is it not? Not according to many manufacturers. And the case law is just murky enough for manufacturers to succeed sometimes with that argument.

A Working Hypothetical

Before considering the case law, consider the following hypothetical. A pick-up truck catches fire while parked unattended with no keys in the ignition. The fire is the result of a clear product defect. Indeed, the truck manufacturer, Giant Motor Company, sent a recall on the truck the very day of the fire – too late for the truck's owner, Mr. Trucker. Trucker bought the truck

new last year at a Giant dealership called World Giant. Trucker hires attorney Lil Lawyer to pursue a claim against Giant. Lawyer sues Giant for, among other counts, breach of implied warranty and breach of an express four-year warranty issued by Giant on the vehicle. Lawyer does not sue the dealership because the dealer issued a disclaimer stating that buyer's only remedies are the remedies set forth in Giant's express four-year warranty.

Giant hires the behemoth firm of Bigg Wynn to defend the case. The Bigg Wynn lawyers file a motion to dismiss all counts arguing that the economic loss rule bars all tort counts and the privity rule bars all warranty claims. Lil Lawyer is dumfounded as she reads the motion. Bigg Wynn argues that Trucker's purchase through "middleman" World Giant defeats privity with Giant and thus defeats even the *express* warranty count. The Bigg Wynn lawyers argue unabashedly that the express written warranties Giant extends to purchasers of new Giant trucks are unenforceable in the State of Florida unless the buyer buys the truck either through mail order or directly at Giant's facility in Michigan. To Lil Laywer, the argument seems just plain wrong. But is it? Lil Lawyer reads on.

According to Bigg Wynn, the case law is clear. 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. Bigg Wynn relies heavily on language from the federal case of *T.W.M. v. American Medical Systems, Inc*.[2] There, 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 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).[3]

Deconstructing *T.W.M.*

Lil Lawyer notes that the doctor in *T.W.M.* probably was not in the business of dealing penile implants to direct purchasers, unlike her case involving a direct sale through an authorized dealer of Giant products. Lil Lawyer pulls the cases cited in *T.W.M*. Upon close scrutiny, none of them -- not *Kramer* or *West* or *Stearman* – support the broad language in *T.W.M*. *Kramer* involved injured passengers on a plane who purchased the service of air travel, not a product governed by the Uniform Commercial Code (UCC) as in her case. *West* simply established a cause of action for strict liability in the absence of privity of contract. *Stearman* is a total of five sentences long, the fourth of which simply states, "Privity is required in order to recover damages from the seller of a product for breach of express or implied warranties."[4]

Stearman describes the case as one of misrepresentation and breach of warranty pertaining to a computer system sold by Intergraph to John E. Stearman, whereas the claimant was Stearman, P.A. which acquired the system used through John Stearman. Not only was Stearman, P.A. not in privity with Intergraph, but it acquired the system second hand, either through a gift or a sale by John Stearman (the opinion does not state which). Unlike in Lil Lawyer's case, the plaintiff was not a first purchaser who purchased through a retailer or dealer.

Lil Lawyer then reviews the cases cited in *Stearman – Affiliates for Evaluation & Therapy, Inc. v. Viasyn Corp.*[5] and *Brown v. Hall*.[6] Neither involve express warranty claims and neither state that express warranty claims require privity. *Brown* involved an injured service station attendant's claim for breach of *implied* warranty against seller of a used dump truck for injuries sustained while he changed a wheel and tire. As in *Stearman*, the product was acquired used. *Viasyn Corp.*, however, hits closer to home. It involved a computer that was sold new to

the plaintiff through a retailer. However, the problem at issue was related to repair work done by the retailer after the sale and Plaintiff's claim against the computer manufacturer was limited to breach of *implied* warranty and negligent selection of the retailer. The court did not analyze whether the retailer had a close enough relationship with the manufacturer to be deemed an authorized agent of the manufacturer for purposes of establishing privity. The court merely looked at what was alleged in the pleadings on the issue and stated, "Second, the breach of *implied* warranty counts cannot stand because they fail to allege an essential element of the action, to wit: privity of contract between the plaintiff and the defendant."[7] Lil Lawyer wonders if the decision in *Viasyn Corp.* would have been different if the attorneys had alleged privity and then engaged in discovery to flush out the extent to which the retailer could be deemed an agent of the manufacturer.

Lil Lawyer decides to delve deeper into the issue, hoping to find cases contrary to those cited in Bigg Wynn's lawyers' motion. She finds solace in those applying the Uniform Commercial Code (UCC).

The UCC Analysis

Lil Lawyer discovers that under Florida's version of the UCC, 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. For example, in *Monsanto Agricultural Products Company v. Edenfield*,[8] the court applied a UCC analysis and held manufacturer liable for an express warranty despite lack of technical privity. There, a farmer sued a weed killer manufacturer. The farmer purchased the weed killer through a local farm supply dealer, but sued the manufacturer directly for, *inter alia*, breach of express warranty. The

court gave effect to the terms of the express warranty, finding them to be part of the basis of the bargain under the UCC:

> 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., Manheim v. Ford Motor Company*.[9] 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.[10]

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.

The court went further in *In Re Bob Rigby, Inc*.[11] 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. The purchaser brought an express warranty claim. Building from the UCC analysis of *Monsanto*, the *Bob Rigby* decision assigned warranty liability to the manufacturer, despite lack of technical privity, on the grounds that the term "seller" under Article 2, section 313 of the UCC (Florida Statute § 672.313), should be read to include manufacturers, despite a "literal reading" of the term "seller":

> 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.[12]

The "Outer Limits" of Privity

Lil Lawyer then broadens her research to examine the term "privity" itself, hoping to find cases clarifying its definition. After much sifting, she comes upon *Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of American, Inc.*,[13] a case discussing the "outer limits" of privity. The case involved a claim by a hospital against the manufacturer of x-ray equipment which the hospital purchased through a dealer. The court allowed the warranty claim to stand, despite lack of privity in the "strictly literalist" sense, because the manufacturer had made certain representations directly to the hospital. Unlike any of the decisions cited in Bigg Wynn's brief, the *Cedars* case provides an extensive 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.*[14] that "privity no longer obtains in an implied warranty suit by a consumer against a manufacturer."[15] 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."[16] During that debate, as noted in *Cedars*, three lines of cases developed. One set of cases, starting with *West v. Caterpillar Tractor Company*,[17] adopted the strict liability doctrine, thus "eliminat[ing] privity as a doctrinal barrier to filing suit against a manufacturer of a defective product."[18] Another line 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.[19]

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.*[20]; *Chrysler Corp. v. Miller*[21]; *Rehurek v. Chrysler Credit Corp.*[22] 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.*,[23] 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, 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).[24]

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 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. [n. 4] 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.[25]

To Lil Lawyer, it seems the *Cedars* court dealt with the privity issue by declining to decide whether there is an exception to the privity rule for UCC transactions but by creating a broad standard for what might constitute privity – a sort of "quasi" privity exception to technical privity.

Applying *Monsanto, Bob Rigby,* and *Cedars*

Thus far, Lil Lawyer finds that the only cases with facts similar to hers are *Monsanto, Bob Rigby*, and *Cedars*, all favorable to her client. She checks to see if they have been overturned. They have not. She looks for any case attempting to reconcile those three cases with the cases cited by Bigg Wynn. She finds none. She has no way of predicting how a judge would rule on her express warranty count. Lil Lawyer can hope that Florida's High Court or Legislature will clear up the uncertainty. But she is not about to hold her breath.

Lil Lawyer considers her response to the motion to dismiss. She could prepare an opposing memorandum of law noting the UCC analysis of *Monsanto* and *Bob Rigby*. She could argue that Florida is a notice pleading state and ask for leave to conduct discovery to show quasi privity consistent with *Cedars*. But the lesson of *Viasyn Corp.* is that failure to allege the magic

word, "privity," may be fatal. Lil Lawyer decides to address the dilemma by filing an amended complaint with the following allegation that blends the UCC and quasi privity approaches:

> In the course of buyer's purchase of the product, defendant through persons authorized by defendant made contacts with buyer such that defendant extended an express warranty to buyer warranting that the product 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 defendant that occurred as part of the course of the sale of the vehicle were sufficient to create privity between defendant and the buyer and/or were sufficient for defendant 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.

Lil Lawyer is confident that the UCC analysis of *Monsanto* and *Bob Rigby* and the quasi-privity analysis of *Cedars* give her a good faith basis to allege privity and engage in discovery on the issue. Discovery may well reveal the type of circumstances noted in *Cedars*, [26] in which a vehicle manufacturer's contacts might be considered pervasive enough to amount to privity, even if not a "strictly literalist" form of privity. Lil Lawyer suspects, for example, that Giant (1) heavily advertises it products to consumers such as Trucker, (2) only sells its products through dealerships such as World Giant, (3) expressly authorizes its dealerships to directly extend Giant warranties to first purchasers, (4) receives consideration for the warranties it extends to buyers, (5) routinely honors buyers' warranty claims, (6) is aware that dealerships routinely disclaim any warranties other than those of Giant, (7) may actually *instruct* dealerships to disclaim any warranties other than those of Giant. Such facts would certainly establish UCC liability under the *Monsanto* and *Bob Rigby* analysis. Will they rise to the level of quasi privity under the *Cedars* analysis? Perhaps. And if privity is so found, even her implied warranty counts would survive.

Conclusion

It is difficult to imagine that a national vehicle manufacturer or any manufacturer can issue an express warranty to a first purchaser but not honor its terms. But under current Florida law, there is no predicting how a particular judge might rule on that question in a case like the hypothetical presented above. As it stands, privity remains a concept with almost magical allure. Until the Florida Supreme Court or Legislature clarifies its meaning and its importance in the context of warranty law, manufacturer's can attempt to hide behind the curtain of their dealers and retailers and pull a dismissal out of a hat. Presto, chango, and the bargained-for express warranty disappears.

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[1] *Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of American, Inc.*, 444 So. 2d 1068 (Fla. 3d DCA 1984); *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). *See also Continental Ins. Co. v. Montella*, 427 So.2d 796 (Fla. 4th DCA 1983); *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So.2d 689, 692 n.3 (Fla. 2d DCA 1979).

[2] 886 F. Supp. 842 (N.D. Fla. 1995).

[3] 886 F. Supp. at 844.

[4] 555 So. 2d 1282, 1283 (Fla. 2d DCA 1990) (citing *Brown v. Hall*, 221 So.2d 454 (Fla. 2d DCA 1969), *Affiliates for Evaluation & Therapy, Inc. v. Viasyn Corp.*, 500 So.2d 688 (Fla. 3d DCA 1987)).

[5] 500 So.2d 688 (Fla. 3d DCA 1987).

[6] 221 So.2d 454, 458 (Fla. 2d DCA 1969).

[7] 500 So.2d at 693 (emphasis added).

[8] 426 So. 2d 574 (Fla. 1st DCA 1982).

[9] 201 So.2d 440 (Fla.1967).

[10] 426 So.2d at 576.

[11] 62 B.R. 900 (M.D. Fla. 1986).

[12] 62 B.R. at 905-906 (citing *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)).

[13] 444 So. 2d 1068 (Fla. 3d DCA 1984).

[14] 177 So.2d 364 (Fla. 3d DCA 1965), *aff'd*, 181 So.2d 641 (Fla.1966).

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

[16] 444 So. 2d at 1071.

[17] 336 So. 2d 80 (Fla. 1976).
[18] *Id*.
[19] *Id.*
[20] 201 So.2d 440 (Fla.1967).
[21] 310 So.2d 356 (Fla. 3d DCA 1975).
[22] 262 So.2d 452 (Fla. 2d DCA), *cert. denied*, 267 So.2d 833 (Fla.1972).
[23] 32 N.J. 358, 161 A.2d 69 (1960).
[24] Footnote 3 omitted.
[25] *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.).
[26] quoting *Rehurek v. Chrysler Credit Corp.*, 262 So.2d 452 (Fla. 2d DCA), *cert. denied*, 267 So.2d 833 (Fla.1972).