BREACH OF WARRANTY: BRIGHT LINES AND BORDERLANDS

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ABSTRACT

Breach of warranty, despite some confusion in the cases and literature, is fundamentally a breach of contract. This Article notes the existing confusion, both in relation to whether breach of warranty is more a breach of contract or a tort, and to whether breach of warranty and breach of contract are mutually exclusive.

The Article begins by suggesting that warranties have three identifiable characteristics—that a warranty is part of a voluntary exchange, that liability for breach of warranty is strict, and that a warranty involves a special undertaking, distinguishing it from other contractual undertakings. The Article then explores how each of the three characteristics sheds light on the characterization of warranties. First, the fact that a warranty is part of a voluntary exchange belies the suggestion that warranty and contract are mutually exclusive. Second, while much of the confusion related to strict liability arose as both contract law and tort law evolved to allow products liability claims by third parties, providing for such liability is not incompatible with maintaining the distinction. Third, the special undertaking involved in a warranty underscores the contractual nature of warranty.

Contract law and tort law are fundamentally separate and protect different interests. While conceding possible exceptions based on terminology, the goal of this Article is to provide a conceptual framework for understanding the contractual nature of warranty and for protecting the underlying purposes of contract and tort law by maintaining a bright line between the two.

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I. INTRODUCTION

A woman goes to the grocery store and buys cans of refried beans, which she cooks that evening and serves to her husband, her children, and her mother. Everyone who eats the food becomes violently ill and is hospitalized for several days, suffering great discomfort. It is later determined that the beans she bought were unfit for consumption. The grocer was unaware of the problem, as the beans were bought from a wholesaler, who bought them from a manufacturer. Who can sue whom and under what theories? Several possibilities may come to mind, including a potential claim for breach of warranty. Is such a claim available under these facts, and, if so, to whom is it available, and why?

This Article will explore the nature of a claim for breach of warranty. Is it tort, contract, or something else? On the one hand, it seems self-evident that a breach of warranty, even an implied warranty, is a breach of contract, and there is much authority for that proposition.[1] Yet for a proposition that seems so clearly

1. *See, e.g.*, Manley v. Hain Celestial Grp., Inc., 417 F. Supp. 3d 1114, 1121 (N.D. Ill. 2019) ("The statutes for both implied warranties refer to contracts, and, under Illinois law, a

correct, there is a surprising amount of confusion and discussion of a "borderland" between contract and tort.[2] One encounters statements such as "breach of warranty and breach of contract are distinct causes of action to which different rules . . . may apply,"[3] and implied warranty is a "freak hybrid born of the illicit intercourse of tort and contract."[4] The latter quote is related to a long-standing discussion about whether breach of warranty is more a breach of contract or a tort.[5] The former relates to a surprising, and confounding, more recent development—the suggestion that, apart from any tort analysis, a breach of warranty is not a breach of contract.[6]

The confusion about warranties is not just of academic interest. How a warranty is characterized may have implications, for example, for determining the

claim for breach of implied warranty is a contract claim requiring privity of contract."); Forest City Stapleton, Inc. v. Rogers, 393 P.3d 487, 488 (Colo. 2017) ("[B]ecause breach of the implied warranty of suitability is a contract claim, privity of contract is required in such a case.").

2. *See* Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1368–69 (N.Y. 1992). As stated by the New York Court of Appeals:

> [T]he borderland between tort and contract, [is] an area which has long perplexed courts. As we observed more than a century ago:
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> > "Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult."

Id. (citing Rich v. New York Cent. & Hudson River R.R., 87 N.Y. 382, 390 (1882)).

3. Timothy Davis, *UCC Breach of Warranty and Contract Claims: Clarifying the Distinction*, 61 BAYLOR L. REV. 783, 784 (2009); *see also* Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576 (Tex. 1991) ("The UCC recognizes that breach of contract and breach of warranty are not the same cause of action.").

4. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960).

5. *See, e.g.*, Rogers v. Toni Home Permanent Co., 147 N.E.2d 612, 615 (Ohio 1958) ("[Some] writers have no hesitancy in asserting that in the beginning an action on 'breach of warranty' was a tort action to give relief for the breach of a duty assumed by the seller . . . .").

6. Davis, *supra* note 3; *Sw. Bell*, 811 S.W.2d at 576.

applicable statute of limitations,[7] for calculating damages,[8] for identifying potential plaintiffs and defendants,[9] and even for determining whether a claim is available at all.[10] It is important to discern the underlying basis of the claim so that the rules and remedies that result are consonant with the nature of the claim. This Article will focus first on the confusion about whether breach of warranty is distinct from breach of contract.[11] The remainder of the Article will focus on the various "borderland" claims, why they belong in either tort law or contract law, and why true warranty claims fit most naturally in contract law.[12] For the most part, the rare warranty claim that fits neither in tort nor contract is beyond the scope of this Article.[13]

7. *See, e.g.*, Garcia v. Tex. Instruments, Inc., 610 S.W.2d 456, 462–63, 465 (Tex. 1980) ("[T]he majority of jurisdictions that have considered the question have recognized the existence of a cause of action for personal injuries under the Code for breach of implied warranty, [thus giving effect to the Code's Statute of Limitations]."); Berry v. G.D. Searle & Co., 309 N.E.2d 550, 554 (Ill. 1974); Maly v. Magnavox Co., 460 F. Supp. 47, 48–49 (N.D. Miss. 1978) ("The court finds that section 75-2-725 applies to that part of plaintiffs' action which is based on breach of implied warranties of merchantability and fitness for a particular purpose.") (citation omitted); *see also* RICHARD E. KAYE, BREACH OF IMPLIED WARRANTY ACTIONS—VIEW THAT U.C.C. § 2-725 APPLIES § 47:16 (2024).

8. *See* RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM. L. INST. 1979).

> While the law of contracts gives to a party to a contract as damages for its breach an amount equal to the benefit he would have received had the contract been performed . . . the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.

Id. These different goals will necessarily often result in different damage amounts.

9. *See infra* Parts III.B.3.b, III.B.3.c (discussing horizontal and vertical privity and its effect on determining when a party is an appropriate plaintiff or defendant in a breach of warranty case, as well as comparing the basis of an action in tort).

10. *See, e.g.*, Forest City Stapleton, Inc. v. Rogers, 393 P.3d 487, 491 (Colo. 2017) (denying recovery for breach of warranty under contract principles) ("[C]ontract claims require different proof than tort claims and should be treated separately. . . . [R]ecognizing the necessity of privity of contract for breach of implied warranty claims is consistent with the boundary between tort and contract claims.") (citation omitted).

11. *See infra* Part II.

12. *See infra* Parts III, IV.

13. *See infra* Part V. While warranties do exist that do not easily fit into the contractual context, they often deal with limited circumstances that do not change the analysis herein. For example, a warranty of good title can arise in the context of a gratuitous transfer of real property; but, while that may be technically correct, whether that warranty creates an actionable claim is up for debate. *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 11.13 at 915, n. 64 (3d ed. 2000) (citing differences about recoverability of damages in cases of

Before one can hope to characterize warranty, one must first consider what, exactly, a warranty is. When seeking a definition of a legal term, one often turns to Black's Law Dictionary.[14] The current dictionary definition of warranty contains two parts.[15] While the first part is designated "*Property*,"[16] it relates to covenants[17] made in deeds by grantor to grantee, suggesting a promissory character of the warranty, often made in a contract.[18] The second part explicitly relates to contract as follows: "*Contracts*. An express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; [especially], a seller's promise that the thing being sold is as represented or promised."[19] The definition emphasizes the contractual nature of warranty, and further supports the special nature of a warranty promise as a "guarantee" or a particular promise about the quality of the "thing being sold."[20] By its nature, a guarantee is result-oriented, and does not brook excuses for failure to produce the result. Notably, no part of the definition refers to tort.[21]

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gratuitous transfers). A brief explanation of why some other warranty claims fall outside this analysis is included in Part V.

14. *See generally*, BLACK'S LAW DICTIONARY (11th ed. 2019).

15. *Warranty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

16. *Id.* (defining property as "[a] covenant by which the grantor in a deed promises").

17. *Covenant*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining covenant as "[a] formal agreement or promise, [usually] in a contract or deed, to do or not do a particular act").

18. If the warranty *is* part of a contract, it fits squarely within the reasoning in this Article. Granted, if the transfer is gratuitous, the warranty would not be contractual, nor would it be part of tort law. *See infra* Part IV.

19. *Warranty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

20. *Id.* The definition of a written warranty in the Magnusson-Moss Warranty Act similarly emphasizes these two aspects of a warranty. The Act defines "written warranty" as:

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
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> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6) (emphasis added).

21. *See Warranty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

The definition of warranty thus consistently has three important features. First, warranty is part of a voluntary exchange.[22] It is based on "[a]n express or implied promise,"[23] a term which itself suggests a contractual context.[24] The promise relates to the bargained-for item or performance and becomes part of the agreement, and thus contractual.[25] Second, a warranty is breached if the promise is not kept.[26] Liability for breach of warranty is strict.[27] Negligence or intent to breach is not required.[28] Third, the promise is something more than a general promise to perform.[29] Not every promise constitutes a warranty.[30] The "something more," which will be referred to hereinafter as the "warranty promise," can be a guarantee, or at least a specific representation about the subject of the contract.[31] As the Supreme Court of Utah stated in 1983 in *Groen v. Tri-O-Inc*., "[a] warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself."[32] The court's statement encapsulates not only the promissory nature and the strict liability character of warranties, but also adds the crucial element of a specific representation or assurance about the subject of the contract.[33] The first two characteristics are shared with contracts generally and underscore the fact that warranties are part of contract law.[34] The third emphasizes that a warranty,

22. *See infra* Part II.

23. *Warranty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

24. *See* RESTATEMENT (SECOND) OF CONTS. § 1 (AM. L. INST. 1981) ("A contract is a promise or a set of promises . . . .").

25. *See Warranty*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also infra* Part II.A (discussing the promissory, or contractual, nature of both express and implied warranties).

26. *See, e.g.*, CITGO Asphalt Refin. Co. v. Frescati Shipping Co., 589 U.S. 348, 356 (2020) ("[D]ue diligence and fault-based concepts of tort liability have no place in the contract analysis required here. Under elemental precepts of contract law, an obligor is 'liable in damages for breach of contract even if he is without fault.'"); *see also infra* Part III.A (discussing the strict liability nature of contract liability, and thus, of liability for breach of warranty).

27. *Warranty*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[A] warranty must be strictly complied with . . . .").

28. *See id.*; Groen v. Tri-O-Inc., 667 P.2d 598, 604 (Utah 1983) ("Breach of warranty does not require that the person making the representation or promise be aware that it is false . . . .").

29. *See Groen*, 667 P.2d at 604.

30. *See, e.g.*, *id.*

31. *See infra* Parts IV.A, IV.B.1 (discussing the need for a "warranty promise" to create a warranty, as opposed to a mere contractual promise and discussing the potential confusion created when that promise is an implied promise).

32. *Groen*, 667 P.2d at 604.

33. *See id.*

34. *See supra* notes 22–25 and accompanying text.

while part of a contract, is a special kind of contractual undertaking, and that not every breach of contract is a breach of warranty.[35] The undertaking involved in the creation of a warranty is key to some of the confusion about, and to the understanding of, the nature of a warranty.

Each of these characteristics will be examined in more detail below in the context of some of the areas of confusion about warranties. While there are many more examples of confusion in this area, the focus will be on a few significant examples that illustrate how losing sight of the basic characteristics of a warranty lead to the confusion. This Article will suggest that breach of warranty is indeed a breach of contract and that, with very limited exceptions, areas that appear to be borderlands, on closer analysis, either fall on the contract side of the line or do not really implicate warranties at all.[36] The Article will emphasize that a true breach of warranty is a breach of contract, and suggest that, for the most part, the line between contract and tort remains bright.[37]

II. THE VOLUNTARY EXCHANGE: IF IT LOOKS LIKE A CONTRACT

A. *The Contractual Context*

A warranty is in virtually every instance based on a contractual promise,[38] and a breach of warranty is a breach of that contractual promise.[39] An examination of statutory warranties, particularly those found Article 2 of the Uniform Commercial Code (UCC or Code), illustrates this point.[40] Article 2 of the UCC deals with sales of goods.[41] The Article 2 treatment of warranties makes clear that warranties are part of the contract. Because the warranties sections of the UCC

35. *See* Davis, *supra* note 3, at 791.

36. *See infra* Parts III, IV; STOEBUCK & WHITMAN, *supra* note 13, at 915 and accompanying text.

37. *See infra* Part II.A (discussing the contractual nature of warranties and the application of contract law, versus tort law, in warranty cases).

38. *See supra* notes 23–24 and accompanying text.

39. *See supra* notes 22–26 and accompanying text.

40. *See* U.C.C. §§ 2-312 to -315 (AM. L. INST. & UNIF. L. COMM'N 2022). There are, of course, many other statutory warranties, an examination of which supports the same conclusion. *See, e.g.*, N.Y. GEN. BUS. LAW § 777-a (McKinney 2024) (codifying housing merchant implied warranty); MINN. STAT. § 327A.02 (2024) (depicting warranties in "every sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed").

41. *See* U.C.C. § 2-101 (AM. L. INST. & UNIF. L. COMM'N 2022) ("This Article shall be known and may be cited as Uniform Commercial Code--Sales."); U.C.C. § 2-102 (AM. L. INST. & UNIF. L. COMM'N 2022) ("Unless the context otherwise requires . . . this Article applies to transactions in goods . . . .").

simply describe the promises that are part of the contract, a breach of one of those promises is necessarily a breach of contract.[42] As stated in the comments, "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell."[43] When the seller does not perform as agreed, he has breached the contract.[44]

The UCC defines both express and implied warranties, clearly tying each to the contract for the sale of goods.[45] Regarding express warranties, the Code identifies promises and representations that create warranties.[46] Express warranties are, by definition, those that "become[] part of the basis of the bargain," thus they are necessarily part of the bargained-for exchange and are clearly contractual.[47] The definition of express warranty is clear and expansive. The Code emphasizes that it is "not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty."[48] There is a warranty under the statue if the "affirmation of fact or promise," the "description of the goods," or a "sample or model" are "part of the basis of the bargain."[49]

Implied warranties, on the other hand, raise the potential for confusion because they are implied as a matter of law and not specifically addressed by the parties.[50] Yet, closer analysis makes clear that they are also part of the bargain, and thus contractual. The question of why the policy overtones of implied warranties do not change their contractual nature will be addressed more fully later in this Article.[51] The important point for this analysis is that implied warranties are part of the bargain, and whether they become part of the bargain is generally within the

42. *See* U.C.C. §§ 2-313 to -315 (AM. L. INST. & UNIF. L. COMM'N 2022); *see also* Davis, *supra* note 3, at 786.

43. U.C.C. § 2-313 cmt. 4 (AM. L. INST. & UNIF. L. COMM'N 2022).

44. *See* RESTATEMENT (SECOND) OF CONTS. § 235(2) (AM. L. INST. 1981) ("When performance of a duty under a contract is due any non-performance is a breach.")

45. *See* U.C.C. §§ 2-313 to -315 (AM. L. INST. & UNIF. L. COMM'N 2022).

46. *See id.* § 2-313.

47. *See id.* § 2-313(1).

48. *Id.* § 2-313(2).

49. *Id.* § 2-313(1).

50. *Cf. id.* § 2-314 cmt. 2 ("The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade."); *id.* § 2-315 cmt. 1 ("Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting.").

51. *See infra* Part IV.B (discussing both policy and practical reasons to draw a clear line between contract and tort).

control of the parties.[52] Implied warranties are compatible with what seems to be the reasonable, albeit unexpressed, expectations of the parties.[53] Consider, for example, the implied warranty of merchantability.[54] One statutory characteristic of merchantability is that the goods "are fit for the ordinary purposes for which such goods are used."[55] While that may be good policy, it also seems to align with the reasonable expectations of the parties. And if does not, the parties are free to exclude the warranty, underscoring the contractual nature of the warranty.[56] Similarly, the implied warranty of fitness for a particular purpose seems to align with the parties' presumed intent.[57] Surely a buyer who "is relying on the seller's skill or judgment to select or furnish suitable goods" for their purpose, a purpose of which the seller is aware, expects the seller to supply such goods.[58] Thus, implied warranties ultimately define the nature and scope of the contractual promises, but in a way that presumably is consistent with the discernable intent of the parties.[59] These warranties are subject to exclusion or modification by the parties, who ultimately control the content of their contract.[60]

The above reasoning also applies to common law warranties, which are generally contractual in nature as well. If there were no contract, there would be no context for implying a warranty. The context is contractual: A warranty may be implied when a new home is sold,[61] when an apartment is rented,[62] when a repair

52. *See, e.g.*, U.C.C. §§ 2-314 to -315 (AM. L. INST. & UNIF. L. COMM'N 2022). (demonstrating that implied warranties under these sections apply "unless excluded or modified").

53. *See, e.g.*, Horner v. David Distrib. Co., 599 S.W.2d 100, 102–03 (Mo. Ct. App. 1980) ("Warranties are implied according to the presumed intention of the parties. . . . Courts do not imply warranties contrary to the experience of mankind nor read into a sale unreasonable conditions.").

54. *See* U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N 2022).

55. *Id.* § 2-314(2)(c).

56. *See id.* § 2-316.

57. *See id.* § 2-315.

58. *See id.*

59. *See id.*

60. *See id.* § 2-316.

61. *See, e.g.*, Forest City Stapleton Inc. v. Rogers, 393 P.3d 487, 490 (Colo. 2017) ("Over time, Colorado courts have recognized a series of implied warranties. Such warranties in the construction context include the implied warranty of habitability and the implied warranty of suitability."); McClure v. Sennstrom, 642 N.E.2d 885, 889 (1994) (recognizing that buyers of new homes are entitled to an implied warranty of habitability).

62. *See, e.g.*, Pugh v. Holmes, 405 A.2d 897, 900 (Pa. 1979) ("[W]e find that the doctrine of Caveat emptor has outlived its usefulness and must be abolished, and that, in order to keep

is undertaken,[63] among other possibilities. But without a contract, we would not be discussing warranties at all.[64] Any potential cause of action would have to arise under some other law, such as negligence.[65]

Judicial descriptions of warranties also emphasize the promissory character of warranty. Regarding express warranties, consider *Sullivan v. O'Connor*,[66] a case frequently appearing in contracts casebooks.[67] In *Sullivan*, the plaintiff sued in both tort and contract for damages caused by an unsuccessful operation on her nose.[68] She did not recover in tort because the jury did not find negligence on the part of the doctor.[69] The court, however, held that the defendant's express promise to achieve a guaranteed result, allowed her to recover in contract.[70] The Supreme Court of Utah applied similar reasoning in *Groen*.[71] In *Groen*, the defendant supplied rope to the plaintiff under a "contract to erect electrical towers and string

in step with the realities of modern day leasing, it is appropriate to adopt an implied warranty of habitability in residential leases.").

63. *See, e.g.*, Gonzales v. Sw. Olshan Found. Repair Co., 400 S.W.3d 52, 56 (Tex. 2013) ("We recognized the existence of 'an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner' . . . .") (citing Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987)).

64. *See, e.g.*, *Forest City*, 393 P.3d at 492 ("We hold that, because breach of the implied warranty of suitability is a contract claim, privity of contract is required to assert a claim for breach of this warranty.").

65. *Cf.* A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862, 865–66 (Colo. 2005) (discussing whether the economic loss rule precluded a tort claim against a subcontractor) ("Contract obligations arise from promises the parties have made to each other, while tort obligations generally arise from duties imposed by law to protect citizens . . . . Where there exists a duty of care independent of any contractual obligations, . . . the [tort] claim is based on a recognized independent duty of care . . . .").

66. 296 N.E.2d 183 (Mass. 1973).

67. *See, e.g.*, E. ALAN FARNSWORTH ET AL., CONTRACTS CASES AND MATERIALS 13 (10th ed. 2023).

68. 296 N.E.2d at 184.

69. *See id.*

70. *See id.* at 186. While the court did not use the term warranty, it discussed the importance of finding a guarantee of the result to the availability of the contract claim. *Id.* ("The law has taken the middle of the road position of allowing actions based on alleged contract, but insisting on clear proof . . . that a given result was promised.").

71. 667 P.2d 598, 604 (Utah 1983) ("A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself, and it amounts to a promise to answer in damages for any injury proximately caused if the fact warranted proves untrue.").

power line in Colorado."[72] The court found an express warranty that the rope the defendant supplied to the plaintiff "was strong enough for its intended purpose."[73]

On the other hand, implied common law warranties, like implied statutory warranties, generally follow public policy, but in a way that conforms to the probable intent of the parties. The implied warranty of habitability, for example, both promotes good policy,[74] and comports with the reasonable expectations of the parties.[75] The fact that the parties generally can disclaim the warranty if they so choose likewise supports the contract designation.[76]

Further, in neither case does the impact of policy preferences detract from the contractual nature of the warranty.[77] Some deference to public policy is entrenched in contract law.[78] Despite generally focusing on the bargain between the parties, contract law has never entirely eschewed policy principles.[79] An

72. *Id.* at 600.

73. *Id.* at 605. While the warranty related to the rope, it arose under a contract for services, and was thus a common law warranty. *See id.* at 604 ("[W]arranties have now been recognized in circumstances other than the sale of goods.").

74. *See, e.g.*, Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1157–58 (Ill. 1979) ("Because of the vast change that has taken place in the method of constructing and marketing new houses, we feel that it is appropriate to hold that in the sale of a new house by a builder-vendor, there is an implied warranty of habitability which will support an action against the builder-vendor by the vendee for latent defects and which will avoid the unjust results of Caveat emptor and the doctrine of merger.").

75. *See id.* at 1158 ("The vendee has a right to expect to receive that for which he has bargained and that which the builder-vendor has agreed to construct and convey to him, that is, a house that is reasonably fit for use as a residence."); *see also* Glasoe v. Trinkle, 479 N.E.2d 915, 919 (Ill. 1985) ("All tenants of residential property enter into leases with the legitimate expectation that the dwelling will be fit for habitation for the entire period of the tenancy.").

76. *See* Bd. of Managers of Village Centre Condominium Ass'n v. Wilmette Partners, 760 N.E.2d 976, 982 (Ill. 2001) ("[W]here disclaimer language is brought to a purchasers' attention, the consequences of the waiver are made known to the purchasers, and the purchasers knowingly waive their rights to pursue an action for any alleged breach of the implied warranty of habitability, there is an effective disclaimer of the implied warranty of habitability . . . ."). *But see* Albrecht v. Clifford, 767 N.E.2d 42, 47 ("[The implied warranty of habitability] cannot be waived or disclaimed . . . .)." *See also* infra Part V.

77. *See* Sullivan v. O' Connor, 296 N.E.2d 579, 582–83 (Mass. 1973).

78. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 178(1) (AM. L. INST. 1981).

79. *See id.* § 227 cmt. b. For example, public policy is a factor (both pro and con) in determining whether courts should find a condition causing forfeiture, while still respecting the right of the parties to bargain as they wish. *Id.* ("The policy favoring freedom of contract requires that, within broad limits . . . the agreement of the parties should be honored even though forfeiture results. When, however, it is doubtful whether or not the agreement makes an event

important and long-standing feature of contract law, for example, is the refusal to enforce agreements that are against public policy.[80] Contract law likewise favors contract interpretations that are consistent with public policy.[81] Contracts include an implied duty of good faith and fair dealing,[82] which is consistent with good public policy.[83] Thus, a nod to public policy is in no way antithetical to a contract law characterization.[84]

B. *Confusion Due to Failure to Recognize Warranty's Contractual Nature*

1. *The Suggestion That Breach of Warranty Is Not a Breach of Contract*

Even though breach of warranty fits so logically into the contract arena, an oddity has found its way into the law—a statement by some courts and scholars that a breach of warranty is not a breach of contract.[85] These statements refer not to the question whether a breach of warranty is a breach of contract or a tort, which will be discussed later, but rather to a kind of binary classification of breach in a contractual context as *either* breach of contract *or* breach of warranty.[86] The breach, according to these authorities, is one or the other, but cannot be both.[87]

Given the previous discussion, this makes no sense. Warranties are promises that become part of the contract, therefore it defies logic to say that a breach of

a condition of an obligor's duty, an interpretation is preferred that will reduce the risk of forfeiture.").

80. *Id.* § 178(1) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

81. *Id.* § 207 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.").

82. *Id.* § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

83. *See id.* § 205 cmt. a (explaining the meaning of good faith and its purpose in contract law).

84. *See, e.g.*, *id.* §§ 178, 207.

85. *E.g.*, Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576 (Tex. 1991) ("The UCC recognizes that breach of contract and breach of warranty are not the same cause of action."); State Farm Gen. Ins. Co. v. Oetiker, Inc., 273 Cal. Rptr. 3d 25, 34 (Ct. App. 2020) ("[C]laims for breach of implied warranty and breach of contract are distinct and separate."); Davis, *supra* note 3 (discussing the importance of distinguishing breach of warranty and breach of contract).

86. *See* Davis, *supra* note 3, at 800–02.

87. *See, e.g.*, *id.*; *Sw. Bell*, 811 S.W.2d at 576.

warranty cannot be a breach of contract.[88] It may be true that not *every* breach of contract is a breach of warranty, but, with few exceptions,[89] a breach of warranty *is* a breach of contract. Compare, for example, the statement that not all dogs are golden retrievers, but all golden retrievers are dogs. To say that a given dog is not a golden retriever is not to say that golden retrievers are not dogs. Likewise, to say that a given breach of contract is not a breach of warranty is not to say that no breach of warranty is a breach of contract. There are in fact situations in which, without the warranty (or guarantee), there would *be* no contract claim, as was the situation in *Sullivan*.[90] If the warranty is needed to find a breach of contract in the first place, there is really no argument that the breach of warranty is not a breach of contract, with all of the rights and remedies applicable to that breach.[91] The confusion created by this logical misstep is sometimes seen in a sale of goods context,[92] in a consumer protection context,[93] or both.[94] A discussion of each of these contexts follows.

2. *The Consumer Law Context*

Consumer protection statutes are designed to protect consumers from unfair and deceptive practices in consumer transactions.[95] Consumer protection law varies by jurisdiction, and state statutes vary from state to state.[96] As consumer protection law involves an inherent overlap with both contract law and tort law, it raises some of the questions discussed in this Article. Labeling someone a

88. *See* U.C.C. § 2-313 (AM. L. INST. & UNIF. L. COMM'N 2022) (defining express warranties as promises that become part of the bargain); *see also id.* § 2-314 (defining implied warranties).

89. *See supra* notes 13 and 18 and accompanying text.

90. *See supra* notes 66–70 and accompanying text. Further, while the *Sullivan* court did not use the use the term warranty, it did find a guarantee of a result, which is effectively a warranty. *See* Sullivan v. O'Connor, 296 N.E.2d 183, 186 (Mass. 1973).

91. *Sullivan*, 296 N.E.2d at 186 ("If an action on the basis of contract is allowed, we have next the question of the measure of damages to be applied where liability is found."). Probably the primary reason that *Sullivan* is such a staple in contracts courses is the court's discussion of contract damages.

92. *See, e.g.*, Davis, *supra* note 3, at 804–07.

93. *See, e.g.*, Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 573–76 (Tex. 1991).

94. *See, e.g.*, Ellis v. Precision Engine Rebuilders, Inc., 68 S.W.3d 894, 895–97 (Tex. App. 2002).

95. *See* DEE PRIDGEN & JOLINA C. CUARESMA, CONSUMER PROTECTION AND THE LAW §§ 4:1, 4:2 (2023).

96. *See id.* § 3:1 ("The jurisprudence of state unfair and deceptive practices acts is by no means a unified doctrine. General themes emerge, however . . . . [Yet,] because each state court is applying its own statute, with its own unique wording and history, variations are inevitable.").

consumer suggests a contractual, or at least attempted contractual, relationship.[97] A claim based on misrepresentation and deception suggests a connection with tort law.[98] Thus, facts that could give rise to a claim under a consumer protection statute might also give rise to a claim that sounds in tort or in contract.[99] Nonetheless, it is not the goal of consumer protection statutes to provide additional remedies for tort and contract claims generally, and such claims are not covered under the statutes.[100] The statutes promote specific policy goals relating to the sale of goods and services to consumers.[101] The statutes do not compensate for harm without consumer status,[102] nor do they compensate for breach of contract without meeting

97. *Cf. id.* § 4:15 ("In many states, there must be a completed transaction, or the consumer must have parted with something of value in order to have standing to sue under the state consumer protection act. Other states have explicit coverage of persons 'seeking' to purchase as well as those who are 'soliciting' customers.").

98. *See id.* § 3:1. It is well established that

> [a]ll state consumer protection statutes prohibit deceptive trade practices. Statutory deceptive practices, like common-law fraud, can include literal misrepresentations, misleading innuendo or half-truth, deception by omission or by action. . . . The statutory provisions are viewed as creating new substantive rights, not bound by the common-law definitions of deceit, fraud or misrepresentation. Thus . . . [w]hen a consumer plaintiff has proved a prima facie case of common-law fraud, she will almost automatically have made out a prima facie case under the state unfair and deceptive practices act.

Id.

99. At some point a claimant will have to choose which claim to pursue. *See, e.g.*, Smith v. Gulf Oil Corp., 79 S.E.2d 880, 885 (N.C. 1954). For instance, in *Smith v. Gulf Oil Corp.*,

> the Court . . . required the plaintiff to elect what cause of action he relied upon in seeking damages, breach of contract or for negligence. The plaintiff selected "tort . . . ." The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. The . . . underlying basis of the rule [is] the maxim which forbids that one shall be twice vexed for one and the same cause.

Id.

100. *See* PRIDGEN & CUARESMA, *supra* note 95, § 2:11 ("State statutes now provide an attractive *alternative* for consumers to the common-law actions.") (emphasis added).

101. *See id.* § 4:1; *cf. id.* § 4:2 ("Many states attempt to limit the right to sue to 'consumers' with respect to their personal or household purchases."). The authors also note that some states allow businesses to sue suppliers in consumer disputes. *Id*.

102. *See id.* § 4:1 ("The purpose of state consumer protection laws is to provide better legal protection *for consumers* in their marketplace transactions. The definition of consumer, however, varies widely. The majority of state legislatures took some care to limit the use of the new legal rights they created to the class of persons they sought to protect.") (emphasis added).

particular statutory requirements.[103] In making the distinction, courts often state that a "mere" breach of contract does not qualify as a violation.[104] To create a statutory cause of action, the breach of contract must also constitute a statutory violation.[105] The attempt of some courts to draw a line between claims that are covered and those that are not has likely contributed much to the confusion about whether breach of warranty is a different cause of action from breach of contract.[106]

The confusion can arise, for example, in jurisdictions in which a breach of warranty is a violation of the statute.[107] It is not surprising that a breach of warranty might be considered a violation, as failure to honor a guarantee could cause harm to a consumer.[108] Yet it often becomes important to distinguish a breach of warranty, which is actionable under the statute, from a "mere" breach of contract, which is not actionable under the statute.[109] In making this distinction courts have at times, unfortunately and unnecessarily, treated a breach of warranty differently than a breach of contract.[110] The treatment is unfortunate because, as previously explained, a breach of warranty *is* a breach of contract.[111] Attempts to describe it otherwise create other problems. It is unnecessary because, by definition, breach of warranty, while a kind of breach of contract, is a specific *kind* of breach of contract and thus distinct for purposes relevant to consumer law. It is not a *mere* breach of contract.[112]

103. *See id.* § 3:1 ("[E]ach state court is applying its own statute, with its own unique wording and history. . . . [S]tate consumer laws are limited in scope and contain various prerequisites to the filing of private actions.").

104. *See* Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 574 (Tex. 1991) ("Our first inquiry is whether FDP's allegations state a claim for breach of warranty, which is actionable under the DTPA, or *merely* a claim for breach of contract.") (emphasis added).

105. *See* 1A C.J.S. *Actions* § 185 (2024).

106. *Cf. Sw. Bell*, 811 S.W.2d at 573.

107. *See* PRIDGEN & CUARESMA, *supra* note 95, § 3:21 ("A material and substantial breach of warranty has been defined in several jurisdictions to constitute an unfair trade practice . . . ."). *But see id.* ("A good faith dispute over who damaged the goods in a breach of warranty case will not subject the merchant to liability for an unfair trade practice, . . . [n]or will a simple breach of warranty in many jurisdictions.").

108. *See id.* (discussing a Maine case where an antiques dealer who advertised "satisfaction guaranteed" but who then refused returns absent proof of inauthenticity violated the state Unfair Trade Practices Act).

109. *See Sw. Bell*, 811 S.W.2d at 574 ("Our first inquiry is whether FDP's allegations state a claim for breach of warranty, which is actionable under the DTPA, or *merely* a claim for breach of contract.") (emphasis added).

110. *See supra* notes 3, 6 and accompanying text.

111. *See supra* Part II.B.1.

112. *See supra* Part II.B.1.

3. *The UCC Context*

While it may be clear under Article 2 of the UCC that warranty is a contract concept,[113] there is still confusion in some analyses of the application of the Code. Some examples include a Texas Supreme Court case and a later appellate court opinion that appears to misapply relevant precedent.[114] In the former, the Court did state, somewhat confusingly, that the "UCC recognizes that breach of contract and breach of warranty are not the same cause of action."[115] It went on to compound the problem by misreading the structure of the statute as will be discussed later.[116] Yet the case dealt with a warranty made in the context of a sale of advertisement in the Yellow Pages,[117] not with a sale of goods.[118] Thus, any reference to the UCC would have to be by analogy, and not part of the holding in the case.[119] Further, in its holding the court acknowledged the contractual context,[120] and it further found that there was, on these facts, "some evidence to support the jury's finding that the defect in Bell's performance constituted a breach of its warranty to publish FDP's advertising correctly."[121] Thus the holding is consistent with the analysis in this Article.

In the later appellate court case,[122] Joseph Ellis sued the seller of a rebuilt engine for breach of contract, for breach of implied warranty, and for violations of the Texas Deceptive Trade Practices Act.[123] "[T]he engine did not work properly" on delivery, and had to be repaired three times.[124] The seller had raised three defenses, including waiver of implied warranties.[125] The trial court granted

113. *See supra* Part II.A (discussing why UCC Article 2 warranties are necessarily contractual).

114. *Sw. Bell*, 811 S.W.2d 572; Ellis v. Precision Engine Rebuilders, Inc., 68 S.W.3d 894 (Tex. App. 2002).

115. *Sw. Bell*, 811 S.W.2d at 576.

116. *See infra* Part III.

117. *Sw. Bell*, 811 S.W.2d at 573–74.

118. *Id.* at 574 ("Because Bell's sale of advertising is predominantly a service transaction, not a sale of goods, the warranty provisions of Article Two of the Uniform Commercial Code ('UCC') do not explicitly govern this case.").

119. The court specifically notes that "the case at bar involves a service transaction," but found that "reference to the Code is instructive." *Id.* at 575.

120. *Id.* at 576 ("We hold that Bell's omission of the display was a defect in the performance of its advertising contract.").

121. *Id.*

122. Ellis v. Precision Engine Rebuilders, Inc., 68 S.W.3d 894 (Tex. App. 2002).

123. *Id.* at 895–96.

124. *Id.*

125. *Id.* at 896.

summary judgment to the seller without articulating its reasons.[126] On appeal, Ellis, in his first point of error, argued that summary judgment was inappropriate "because Precision failed to perform on the contract claim."[127] The court rejected his argument on the basis that remedies for breach of contract are available only "when the seller fails to make any delivery,"[128] and that "[b]ecause Ellis's claim is based on the receipt of defective goods, he has a breach of warranty cause of action, *not* a breach of contract case."[129] The court relied in part on the *Southwestern Bell Telephone Co. v. FDP Corp.* dicta in finding a "distinction between breach of contract and breach of warranty claims."[130] A vigorous and persuasive dissenting opinion pointed out many of the flaws in the reasoning,[131] but the majority was unpersuaded.[132] Ultimately, the court's reasoning involves a misreading of Article 2 of the UCC, discussed below.

The misunderstanding in *Ellis v. Precision Engine Rebuilders, Inc.*, and in the *Southwestern Bell* dicta, seems to stem from a tendency to conflate the classification of promises that are made in a contract for the sale of goods and the types of remedies that are available for breach of contract under the UCC.[133] On the performance side, the reasoning divides breach into nonperformance, which is described as a breach of contract,[134] and defective performance, which is described as a breach of warranty.[135] On the remedial side, it states that the "remedies for breach of contract are set forth in section 2.711, and are available to a buyer '[w]here the seller fails to make delivery,'" whereas the "remedies for breach of warranty . . . are set forth in section 2.714, and are available to a buyer who has finally accepted goods, but discovers that the goods are defective in some manner."[136]

126. *Id.* ("Without specifying the grounds for its ruling, the trial court . . . rendered summary judgment for Precision.").

127. *Id.*

128. *Id.*

129. *Id.* at 897 (emphasis added).

130. *Id.* at 896. The court goes on to state that "breach of contract remedies are available to a buyer when the seller fails to make any delivery. . . . Conversely, when a seller delivers nonconforming goods, it is a breach of warranty." *Id.* at 896–97.

131. *See id.* at 898–900 (Schneider, J., dissenting).

132. *Id.* at 897 (majority opinion).

133. *See id.* at 896–97; Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576 (Tex. 1991); U.C.C. §§ 2-711, 2-714 (AM. L. INST. & UNIF. L. COMM'N 2022).

134. *Ellis*, 68 S.W.3d at 896–97.

135. *Id.*

136. *Id.* at 896 (alteration in original) (quoting Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576 (Tex. 1991)).

That is a misreading of the statutory structure. Much information needed to determine what constitutes a breach of contract can be found in parts of the statute dealing with obligations,[137] performance,[138] and breach.[139] Remedies are addressed in an entirely different part of the Code.[140] Nowhere does the Code tie specific promises to specific remedies.[141] A remedy that fits the circumstances is not off-limits due to the nature of the breach. It is true that the section dealing with damages in relation to accepted goods is often considered—somewhat imprecisely—to be *the* relevant section for "breach of warranty" damages.[142] But that is not in fact the term used in the statute. It is damages "in regard to accepted goods,"[143] and operates regardless of the contractual basis for the breach. Likewise, the sections dealing with damages for goods that, for whatever reason, are not finally in the possession of the buyer, apply to goods that have been delivered and rejected or their acceptance revoked, due to nonconformities,[144] not just to goods that are not delivered at all.[145]

Consider, for example, a promise by Seller to sell the deluxe model of a product. Seller has made an express warranty by making an "affirmation of fact or promise . . . to the buyer which relates to the goods and becomes part of the basis of the bargain."[146] If Seller delivers the regular model, that may constitute "performance," but it is also a breach of warranty, and thus a breach of contract. Buyer can choose to reject the goods and sue for damages,[147] *or* to accept the goods and sue for damages.[148] The damage measures will be different, but it is a breach of warranty either way. The breach of warranty is the *contract breach* that allows

137. *See, e.g.*, U.C.C. § 2-325(1) (AM. L. INST. & UNIF. L. COMM'N 2022).

138. *See, e.g.*, *id.* § 2-510.

139. *See, e.g.*, *id.* § 2-601.

140. *See, e.g.*, *id.* § 2-702.

141. *See* U.C.C. §§ 2-711, 2-714 (AM. L. INST. & UNIF. L. COMM'N 2022).

142. *See* Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576 (Tex. 1991) ("The remedies for breach of warranty, however, are set forth in section 2.714, and are available to a buyer who has finally accepted goods, but discovers that the goods are defective in some manner.").

143. U.C.C. § 2-714 (AM. L. INST. & UNIF. L. COMM'N 2022). The section is titled "Buyer's Damages for Breach in Regard to Accepted Goods." *Id.*

144. *Id.* § 2-711 (AM. L. INST. & UNIF. L. COMM'N 2022) ("[T]he seller fails to make delivery or repudiates *or the buyer rightfully rejects or justifiably revokes acceptance* . . . .") (emphasis added).

145. The assertion in *Southwestern Bell* is inconsistent with this reading. *See* 811 S.W.2d at 576 ("The remedies for breach of contract [as opposed to breach of warranty] are set forth in section 2-711, and are available to a buyer '[w]here the seller fails to make delivery.'").

146. U.C.C. § 2-313(1)(a) (AM. L. INST. & UNIF. L. COMM'N 2022).

147. *See id.* §§ 2-601, 2-711.

148. *See id.* § 2-714(1).

the buyer to choose to return the goods or to accept them and sue for damages under UCC § 2-714.[149]

The same reasoning would apply to implied warranties. Considering the woman described at the beginning of this Article,[150] the seller of the beans breached the implied warranty of merchantability by not providing beans fit for human consumption.[151] The beans were not "fit for the ordinary purposes for which such goods are used."[152] If, when she first opened the can of the beans, the buyer had initially realized the food was bad based on appearance, smell, or some other method, she could have returned them due to the breach.[153] Because a breach of warranty is a nonconformity, it is a breach of contract for which one remedy is the right to reject the goods, or revoke acceptance, and sue for damages.[154] The buyer is not required to accept the goods and sue for so-called "breach of warranty" damages just because it was delivered.[155] On the other hand, if she accepts the food thinking it is okay, eats it, and becomes ill, she can sue for the damages for the breach of warranty, including the personal injuries.[156]

Now consider the remedies available to a buyer when the breach is not a breach of warranty. Using our deluxe model example, let us assume now that the deluxe model is in fact the model delivered. Further assume it does not deviate in any way from the affirmations of fact, descriptions, or samples made part of "the basis of the bargain,"[157] nor does it violate any implied warranties. However, it is delivered one week late, and the late delivery causes unavoidable monetary damage to the buyer. Assuming no guarantee of the delivery time, there has been no breach of warranty, as the goods themselves conform to the contract, but there has been a breach of contract, as the goods were not delivered in a timely manner. The buyer could then reject the goods under the Perfect Tender Rule.[158] But she may prefer to accept the goods, and the Code gives her that option.[159] If the buyer

149. *Id.*

150. *See supra* Part I.

151. *See supra* Part I; U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N 2022). Food sold to be eaten that is not fit for consumption would breach this warranty.

152. U.C.C. § 2-314(2)(c) (AM. L. INST. & UNIF. L. COMM'N 2022).

153. *See id.* § 2-601.

154. *Id.* § 2-711.

155. *Id.* § 2-601.

156. *Id.* § 2-715(2).

157. *See id.* § 2-313.

158. *Id.* § 2-601 ("[I]f the goods *or the tender of delivery* fail in any respect to conform to the contract, the buyer may (a) reject the whole; or . . . .") (emphasis added).

159. *Id.* ("[I]f the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may . . . (b) accept the whole; or . . . .").

chooses to accept the goods, her remedy would fall under UCC § 2-714 for damages "in regard to accepted goods" (the so-called breach of warranty measure) even though there was no breach of warranty.[160] The section is the appropriate one for calculating the damages for this breach of contract.[161] It is significant that the section itself provides for "damages for any non-conformity of tender,"[162] which would include defects in tender that do not involve a breach of warranty.

The statute of limitations section in Article 2 also supports the conclusion that the drafters considered breach of warranty to be a breach of contract.[163] Subsection (1) of the statute provides that an "action for breach of any contract for sale must be commenced within four years after the cause of action has accrued."[164] There is no separate provision for, nor any mention in this subsection of, breach of warranty.[165] However, the next subsection elaborates on when the cause of action accrues, and specifically discusses when a breach of warranty occurs, as distinguished from when another contract cause of action accrues.[166] Yet if a breach of warranty is not a breach of contract, any discussion of breach of warranty in a statute dealing only with breach of contract would be entirely superfluous. Normal rules of statutory construction would prevent such a nonsensical construction.[167]

Finally, to the extent it is not displaced by specific provisions, the UCC provisions are supplemented by the common law of contract.[168] As discussed previously, a breach of warranty is a breach of contract under the common law of contract.[169] And as the above analysis indicates, the UCC supports, rather than displaces, this characterization.

160. *Id.* § 2-714.

161. *Id.* § 2-714(2).

162. *Id.* § 2-714(1).

163. *Id.* § 2-725.

164. *Id.* § 2-725(1).

165. *See id.*

166. *Id.* § 2-725(2).

167. *See, e.g.*, 20A ERIC C. SURETTE, MARYLAND LAW ENCYCLOPEDIA, *Construction of Statute as a Whole, Generally*, § 63 (2024) ("Courts should first, in construing a statute, attempt to ascertain the legislature's intent from the statutory language, . . . giving effect to all of those parts if it can, and rendering no part of the law surplusage."); 29 B. MICHAEL KORTE & ROBERT H. SIHNHOLD, MISSOURI PRACTICE SERIES: WORKER'S COMPENSATION, *Canons of Construction*, § 7.29 (2d ed. 2004) ("[C]anons of construction include: . . . (15) the legislature intends every word, clause, sentence, and provision of a statute to have effect and did not insert idle verbiage or superfluous language in a statutory provision.").

168. U.C.C. § 1-103(b) (AM. L. INST. & UNIF. L. COMM'N 2022).

169. *See supra* notes 75–92 and accompanying text.

III. STRICT LIABILITY: THE BORDERLAND PROBLEM

A. *The Strict Liability Nature of Warranty*

While the promissory nature of warranty is largely what *makes* it contractual, the strict liability feature of warranty applies *because* it is contractual.[170] Contract liability is strict.[171] Contract law deals with enforcing bargains.[172] The outcome in a contract case generally depends on *whether* the bargain was kept, not on *why* it may not have been kept.[173] Thus, liability for breach of warranty is strict,[174] and does not depend on either intent or lack of care.[175] This is a characteristic of warranty because it is a characteristic of contract, and a warranty is a contractual promise.[176]

For example, in *Sullivan*,[177] discussed earlier,[178] the trial court found no tort liability because there was no negligence,[179] but found that in some situations a physician's statements about expected outcomes could be treated as guarantees.[180] In such a case the doctor would be liable for breach of contract for failing to deliver

170. Davis, *supra* note 3, at 786; Groen v. Tri-O-Inc., 667 P.2d 598, 604 (Utah 1983).

171. *Groen*, 667 P.2d at 604.

172. RESTATEMENT (SECOND) OF CONTS. § 1 (AM. L. INST. 1981).

173. Exceptions to this statement do exist in contract law. One common example would be excuse based on the doctrine of impracticability. *See id.* § 261; *see also* U.C.C. § 2-613 (AM. L. Inst. & UNIF. L. COMM'N 2022) (defining the exception to the casualty of goods without fault of either party); U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM'N 2022) (defining the exception failure of presupposed conditions).

174. *Groen*, 667 P.2d at 604 ("Unlike liability for negligence, which is based on fault, breach of warranty sounds in strict liability.").

175. *Id.* ("Breach of warranty does not require that the person making the representation or promise be aware that it is false, and a person may be liable for breach of warranty despite his exercise of all reasonable or even all possible care.").

176. *But see supra* note 13.

177. 296 N.E.2d 183 (Mass. 1973).

178. *See supra* notes 66–70 and accompanying text.

179. 296 N.E.2d at 187–88 ("[I]n the case at bar . . . the doctor has been absolved of negligence by the trier . . . .").

180. *Id.* at 185–86 (noting its reluctance to treat such promises as guarantees, while also noting potential problems if they were never so treated, and ultimately choosing "the middle of the road position of allowing actions based on alleged contract, but insisting on clear proof").

that outcome.[181] Otherwise, he could not.[182] If a result is promised, the claim sounds in contract, and liability is strict.

B. *Confusion Related to the Strict Liability Characteristic*

1. *Respecting the Differences in Contract and Tort*

The above analysis worked well for a case like *Sullivan*. Tort law or contract law applied based on the nature of the undertaking, and the result fit well into each body of law. Contract law protected the plaintiff's economic expectations, and tort law, at least potentially, protected her interest in being protected from harm.[183] But what about the woman who buys the food that harms her family? Her claims for the nonconformity of the goods seem most logically to be addressed by contract law. Yet the inclination to provide protection for her family members seems to be grounded in public policy, and thus more likely part of tort law.[184] Because we are talking about the same basic harm, resulting from the same transaction, the question becomes: which body of law is best suited to provide a remedy?

Perhaps asking that question is one cause of the confusion. If we assume the remedy must come from one source, then, because of the apparent overlap, the borderland designation is attractive. But the initial assumption is flawed. There is no reason one set of circumstances cannot create independent causes of action with independent remedies. On the contrary, such situations are common in the law. Using a tort and contract example, fraud can be addressed by avoiding the contract

181. *Id.* Such contracts are sometimes referred to as contracts to cure. *See, e.g.*, Robins v. Finestone, 127 N.E.2d 330, 333 (N.Y. 1955) ("While it may be unusual for a physician to enter into a special *contract to cure* rather than to undertake only to render his best judgment and skill, since the practice of medicine is not an exact science, it cannot be doubted that there are occasions when such contracts are made.") (emphasis added). *See generally* Jack W. Shaw, Jr., Annotation, *Recovery Against Physician on Basis of Breach of Contract to Achieve a Particular Result or Cure*, 43 A.L.R.3d 1221 § 2[a] (1972).

182. *See Sullivan*, 296 N.E.2d at 185–86.

183. *See, e.g.*, Budgetel Inns, Inc. v. Micros Sys., Inc., 8 F. Supp. 2d 1137, 1142 (E.D. Wis. 1998) ("In regard to the tort versus contract distinction, the court said that while contract law rests on obligations imposed by bargain, the law of torts rests on obligations imposed by law. While contract law seeks to hold commercial parties to their promises, ensuring that each party receives the benefit of their bargain, tort law protects society's interest in human life, health, and safety.").

184. *See* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986) ("Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty.").

or by suing in tort,[185] or even contract,[186] for damages. Each remedy is distinct and involves a choice to be made by the plaintiff. Yet there is no compulsion to designate fraud as a borderland claim. Likewise, a victim of a conversion may choose to sue for damages in tort or to seek restitution,[187] which could, in some situations, significantly increase his recovery.[188] Under the same reasoning, the same facts can give rise to a tort cause of action or a breach of warranty claim.

The distinctions between the two are important,[189] and should be respected. This Article suggests that, while both tort and contract law developed in ways that addressed similar concerns about protecting consumers, they work independently so that the character of each claim is protected. For all the attention paid to the blurring of the lines between contract and tort, the common law generally has developed in a way that preserves these important differences.[190] The economic loss rule, for example, is designed largely to maintain the distinction between contract and tort,[191] as is the refusal of some courts to allow "fracturing" of a negligence claim by treating it as a breach of contract.[192] The result is that some

185. *See* RESTATEMENT (SECOND) OF CONTS. § 164(1) (AM. L. INST. 1981) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."). RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. L. INST. 2020) ("One who fraudulently makes a material misrepresentation . . . for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other's justifiable reliance on the misrepresentation.").

186. *See* U.C.C. § 2-721 (AM. L. INST. & UNIF. L. COMM'N 2022) ("Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach.").

187. Olwell v. Nye & Nissen Co., 173 P.2d 652, 653 (Wash. 1946) ("It is uniformly held that in cases where the defendant *tort feasor* has benefited by his wrong, the plaintiff may elect to 'waive the tort' and bring an action in assumpsit for restitution.").

188. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 cmt. b (AM. L. INST. 2011) ("[A] conscious wrongdoer may be liable to disgorge more than the value of what was taken or obtained in the first instance.").

189. *See supra* notes 7–10 and accompanying text.

190. *See, e.g.*, Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1369 (N.Y. 1992) ("This Court has identified several guideposts for separating tort from contract claims.").

191. *See* A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862, 865 (Colo. 2005) ("The economic loss rule is intended to maintain the sometimes blurred boundary between tort law and contract law[, and] . . . a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law.").

192. *See, e.g.*, Cooper v. Harris, 329 S.W.3d 898, 905 (Tex. App. 2010) ("If the gist of a client's complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be

claims sound in tort and others in contract, rather than in an amorphous borderland. Some claims can be brought in either tort or contract.[193] The decision as to which to ultimately choose will depend on which will provide the best relief based on the goals of the plaintiff.

Given the importance of drawing the line, the next step is to determine *how* to draw the line. To do that, it is helpful to first consider the different goals of each body of law. Contract law and tort law are fundamentally different. The differences lie largely in the different purposes served by each. A tort is a civil wrong.[194] Tort law seeks to remedy harm caused by the violation of certain norms imposed by the law for the protection of persons, property, and other interests.[195] As stated by one court, "[t]he fundamental purposes of our tort system [is] to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims."[196] The law provides remedies based on the harm caused by the violations and deterrence against such violations.[197] While the remedy may focus on the harm caused, the *reason* for the remedy focuses on the violation that causes the harm.[198] Thus, tort law by definition relates to public policy goals related to conduct.[199]

Contract law, on the other hand, focuses on enforcing agreements made by private parties.[200] Contract law might be affected by public policy considerations, but it is not fundamentally *about* public policy.[201] The law is largely agnostic

pursued as a negligence claim, rather than some other claim. If, however, the client's complaint is more appropriately classified as another claim, for example, breach of fiduciary duty or breach of contract, then the client can assert a claim other than negligence.").

193. *See, e.g.*, Allis-Chalmers Corp. v. Leuck, 471 U.S. 202, 219–20 (1985) (" [T]he whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. ").

194. *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. A civil wrong, *other than breach of contract* . . . a breach of a duty that the law imposes on persons who stand in a particular relation to one another.") (emphasis added).

195. *See id.*

196. Roberts v. Williamson, 111 S.W.3d 113, 118 (Tex. 2003).

197. *Id.*

198. *See* RESTATEMENT (SECOND) OF TORTS § 6 (AM. L. INST. 1965) (stating that the Restatement uses the word tortious "to denote the fact that *conduct* whether of act or omission is of such a character as to subject the actor to liability under the principles of the law of Torts.") (emphasis added).

199. *See id.*

200. *See* RESTATEMENT (SECOND) OF CONTS. § 344 cmt. a (AM. L. INST. 1981) ("The law of contract remedies implements the policy in favor of allowing individuals to order their own affairs by making legally enforceable promises.").

201. *See, e.g.*, Trimble v. Ameritech Publ'g, Inc., 700 N.E.2d 1128, 1129 (Ind. 1998) ("Courts in Indiana have long recognized the freedom of parties to enter into contracts and have

regarding the content of the bargain.[202] Contract law deals primarily with results. The question generally is whether the party *performed* as promised, regardless of his efforts.[203] Thus, where tort law tends to focus on standards dictated by public policy, contract law focuses on promises made by the parties to form a bargain and on the results achieved.

It makes no sense, nor is it necessary, to equate two concepts that have different purposes. There is no reason both claims cannot exist, and there is good reason to protect the important differences between them.[204] Conflating the two inevitably leads to difficulties.[205] Ultimately, any individual claim must be either in tort, contract, or something else,[206] and the recovery must reflect the purposes of the claim chosen.[207]

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presumed that contracts represent the freely bargained agreement of the parties. We continue to believe that 'it is in the best interest of the public not to restrict unnecessarily persons' freedom of contract.'") (citations omitted). The court noted the possibility that a particular contract could contravene public policy, but it found that the contract in question did not. *Id.* at 1130.

202. *Cf. id.*

203. *See supra* notes 170–73 and accompanying text.

204. For example, punitive damages would be addressed very differently under tort law. *See, e.g.*, DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 318 (Hornbook Series, 3d ed. 2018) ("[I]f the facts otherwise warrant, the [punitive damage] award . . . may be made in a variety of tort cases, both intentional and negligent . . . ."). *Id.* § 12.5(2), at 826 ("The firmly established common law rule holds that punitive damages are not to be awarded for simple breach of contract."). Punitive damages would also be addressed differently under a consumer protection statute, for example. *See, e.g.*, *id.*, § 3.12, at 363 ("Many statutes now authorize or require the award of a double or treble damages . . . . Consumer protection statutes also often provide for multiple damages, and so do many others.") (citations omitted).

205. *See, e.g.*, Philip E. Cleary, *Benevolent Maleficence: How a Well-Intentioned Legislature and a Deferential Court Combined to Stunt the Development of Massachusetts Product Liability Law*, 8 U. MASS. L. REV. 14, 17–18 (2013) (discussing problems created by the application of a Massachusetts statute, which failed to recognize strict products liability, instead basing such claims on warranty law, thus producing "several problems of both substantive law and statutory interpretation").

206. A claim might be brought under a consumer protection statute, for example. *See supra* notes 95–101 and accompanying text.

207. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §21 cmt. a (AM. LAW INST. 1998). The Restatement (Third) of Torts: Products Liability recognizes

> [t]wo major constraints on tort recovery . . . . First, products liability law lies at the boundary between tort and contract. Some categories of loss, including those often referred to as "pure economic loss," are more appropriately assigned to contract law and the remedies set forth in Articles 2 and 2A of the Uniform Commercial Code. When the Code governs a claim, its provisions regarding such issues as statutes of

2. *Solutions in Contract and Tort*

The overlap designation further seems to stem from an important relationship between contract and tort that contributed to the development of the law protecting purchasers. As each body of law developed, the connections to the other contributed to the borderland confusion. Each discipline had to deal with an impediment to recovery that could partially be addressed by the other.[208] Privity was an obvious obstacle in contract,[209] but not necessarily in tort. Strict liability was problematic in tort, but not in contract, as it was already an element of contract law.[210] Warranty, then, seemed a natural basis for the cause of action, since negligence is not required in a breach of warranty case.[211] Yet if the contractual nature of the warranty was the reason negligence was not required, a contract would be required for liability to be strict, raising privity concerns. Thus, privity becomes an important aspect of the developments protecting consumers of dangerous products.[212]

While a discussion of the development of the law of tort and contract in this area could fill an entire volume or more, the important consideration for this Article is how that development, which has relied on concepts found in each body of law,[213] has contributed to the idea that warranty occupies space in a borderland

> limitation, privity, notice of claim, and disclaimer ordinarily govern the litigation. Second, some forms of economic loss have traditionally been excluded from the realm of tort law even when the plaintiff has no contractual remedy for a claim.

Id.

208. *Cf.* Catherine M. Sharkey, *The Remains of the Citadel (Economic Loss Rule in Products Cases)*, 100 MINN. L. REV. 1845, 1845–46 (2016). As Professor Sharkey stated,

> [a]t the outset of the twentieth century, product defect claims were squarely within the province of contract law—one could only recover if in privity of contract with the product seller . . . . Finally, the rise of the theory of strict products liability fueled this transformation of product defect claims from contract into tort. By the 1960s, an injured consumer not in privity with the manufacturer could often successfully sue using both a breach of contract (implied warranty) theory and a tort theory (either negligence or strict liability).

Id. (citations omitted).

209. *See id.; see also infra* Part III.B.3.a.

210. *See supra* notes 170–76 and accompanying text.

211. *See supra* notes 26–27 and accompanying text.

212. *See infra* Part III.B.3 (discussing privity in more depth).

213. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §1 cmt. a (AM. L. INST. 1998) (dealing with the "Liability of Commercial Seller or Distributor for Harm Caused by Defective Products") ("The liability established in this Section draws on both warranty law and tort law.").

between contract and tort.[214] Courts have long been attuned to the need to protect consumers,[215] but often went about achieving it in different ways. At times the focus was on tort,[216] other times on contract,[217] and sometimes on neither.[218]

Throughout the development of the legal principles involved, there has been a tension between contract and tort concepts. The early cases tended to deal with contaminated food or dangerous products.[219] In 1942, the Supreme Court of Texas found a manufacturer of contaminated food liable to the consumer "under an implied warranty imposed by operation of law as a matter of public policy."[220] According to the court, the warranty sounded neither in tort nor in contract.[221] Eventually, *Jacob E. Decker & Sons, Inc. v. Capps* became associated with strict liability in tort, yet the possibility of contractual liability for breach of warranty did not die.[222] The law, as it developed following *Decker*, provided the desired protection by following two separate paths: strict liability in tort and breach of

214. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §1 cmt. a (AM. L. INST. 1998) (recognizing that strict products liability "is not fully congruent with classical tort or contract law" and noting the "confusion spawned by existing doctrinal categories").

215. *See id.* ("The imposition of liability for manufacturing defects has a long history in the common law.").

216. *See, e.g.*, Barker v. Lull Eng'g Co., 573 P.2d 443, 454 (Cal. 1978); Bilotta v. Kelley Co., 346 N.W.2d 616, 621–22 (Minn. 1984). *See generally* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §1 cmt. a ("This Section states a general rule of tort liability applicable to commercial sellers and other distributors of products generally.").

217. *See, e.g.*, Hyundai Motor Am., Inc. v. Goodin, 822 N.E.2d 947, 954–55 (Ind. 2005) *See generally* U.C.C. § 2-318 (AM. L. INST. & UNIF. L. COMM'N 2022) (dealing with third party beneficiaries of express and implied warranties).

218. *See, e.g.*, Jacob E. Decker & Sons, Inc. v. Capps, 164 S.W.2d 828, 829 (Tex. 1942) ("Liability in such case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life.").

219. *See id.* ("Since very early times the common law has applied more stringent rules to sales of food than to sales of other merchandise."); *see also* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §1 cmt. a (AM. LAW INST. 1998) ("As early as 1266, criminal statutes imposed liability upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied contaminated food and drink.").

220. *Decker*, 164 S.W.2d at 829.

221. *Id.* ("Liability . . . is not based on negligence, nor on a breach of the usual implied contractual warranty . . . .").

222. *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967) (characterizing *Decker* as "the so-called rule of strict liability"); Burrus Feed Mills, Inc. v. Reeder, 391 S.W.2d 121, 126 (Tex. App. 1965) (extending *Decker*'s contractual liability to "feed manufactured or processed for consumption by animals").

warranty in contract.[223] Tort had the advantage of dispensing with the privity concern, while contract made strict liability easier. The developments in contract were somewhat less robust than those in tort and focused on extension of warranty protection to persons injured by goods that they themselves neither purchased (often referred to as a question of horizontal privity)[224] nor purchased directly from the defendant (a question of vertical privity).[225] Both involve a potential extension of the warranty.

Thus, two possibilities for liability emerge. One is an extension of contractual warranties to third persons, which deals with the privity issue. The other is the creation of a duty in tort that is independent of any negligence requirement—the strict liability issue. While it is tempting to say that the best way to deal with this conundrum is to simply create a borderland area, the law has instead addressed the concerns within the structure of each body of law.[226] Thus, the advantages of each are maintained and plaintiffs are afforded better, and more appropriate, options for relief. Because of the important historical connection between privity and strict liability, an examination of privity is important to understanding some of the confusion.

3. *The Privity Issue*

a. *Privity in Contract—Third-Party Beneficiaries.* If the claim is a contract claim then strict liability, as noted, is easy, but the privity question is trickier. The question is whether sellers can be contractually liable to someone with whom they have no contract or, more specifically, if breach of warranty is a contract claim, whether the plaintiff has a contractual basis for making the claim. This leads to the discussion of third-party beneficiaries of contractual warranties. Before launching into that discussion, it is important to distinguish third-party beneficiaries of the contract, which are not impacted by this discussion, and third-party beneficiaries

223. *See, e.g.*, Nobility Homes of Tex., Inc., v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977) ("Today, section 402A of the Restatement (Second) of Torts and the Uniform Commercial Code rather than Decker's 'implied warranty as a matter of public policy' should determine a manufacturer's liability.").

224. *See* Hyundai Motor Am., Inc. v. Goodin, 822 N.E.2d 947, 952 (Ind. 2005) ("'Horizontal' privity . . . refers to claims by nonpurchasers, typically someone who did not purchase the product but who was injured while using it.").

225. *See id.* ("'Vertical' privity typically becomes an issue when a purchaser files a breach of warranty action against a vendor in the purchaser's distribution chain who is not the purchaser's immediate seller.").

226. *See* Davis, *supra* note 3, at 798–99 (discussing courts drawing a distinction between contractual liability and tort liability within the two bodies of the law).

of warranties, which are an integral part of this analysis. While the difference is important, each application shares the characteristic of addressing privity under contract law.

Contract beneficiaries have standing to sue for a breach of a promise that was made for their benefit.[227] The promise is made, and the relationship formed, at the time the contract is entered.[228] If I buy a new car for my son, for example, the dealer is to deliver the car promised to my son. As a third-party beneficiary of the contract,[229] he is entitled to receive the car exactly as promised. If I bought a car with a sunroof, he is entitled to a car with a sunroof. If I bought a car with a warranty, he is entitled to a car with the warranty and everything it entails. In other words, he has a warranty claim, but not because of the extension of warranties under discussion here. He has a cause of action because he is an intended beneficiary of the contract,[230] and the warranty is part of the contract on which he has standing. It is now essentially his warranty.

On the other hand, if I buy a can of beans, presumably any warranty about the beans, at first blush, is given to me and to me only. I suppose it is possible that I could have a long discussion with my grocer about the fact that I am buying the beans specifically to serve to certain family members. I could then extract a promise from the grocer that the beans are safe for that purpose, thus making them third-party beneficiaries of the promise. If that were a requirement, however, the law would provide precious little protection for the ultimate consumers of beans. The law in this area is not so limited. There are of course good policy reasons why it should not be. The question is how the protection is expanded to third parties.

227. *See* RESTATEMENT (SECOND) OF CONTS. § 304 (AM. L. INST. 1981) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.").

228. *See id.* § 309(1) ("A promise creates no duty to a beneficiary unless a contract is formed between the promisor and the promisee . . . .").

229. My son is an intended beneficiary of the contract based on common law third-party beneficiary principles, which apply to the situation pursuant to U.C.C. § 1-103(b) (AM L. INST. & UNIF. L. COMM'N 2022).

230. To have standing, the beneficiary must be an intended beneficiary. *See* RESTATEMENT (SECOND) OF CONTS. § 304 (AM. L. INST. 1981) ("[T]he *intended beneficiary may enforce* the duty.") (emphasis added). The law does not lightly confer third party beneficiary status. It rather requires a rigorous analysis of intent to create the relationship. Then, and only then, does the beneficiary have standing. *See* Key Dev. Inv., LLC v. Port of Tacoma, 292 P.3d 833, 846–47 (Wash. Ct. App. 2013) ("It is *insufficient that performance* of a contract *may benefit* a third party; rather, the contract must have been entered for that party's benefit, or the benefit must be a direct result of performance within the parties' contemplation. The contracting *parties must intend* to create such a relationship . . . .") (emphasis added).

There are two potential third-party beneficiary analyses here. The first, just discussed, is that the beneficiary is a beneficiary of the contract.[231] The one more relevant to this discussion, and to the confusion, is that the beneficiary is a beneficiary *of the warranty* as is the case under section 2-318 of the UCC, discussed in the next Part, which is designed to simplify the question.[232] Warranties that extend to third parties may provide protection to consumers, including remote purchasers.[233] They also may provide protection more generally to some members of the public, all of which involves public policy concerns and contributes to the apparent "melding" of contract and tort law.[234] It is true that the public policy aspects of the extension of the warranties are not antithetical to contract law, as discussed previously.[235] Nonetheless, the privity/strict liability connection, the statutory nature of the extension, and the clear policy considerations, tend to create confusion in this area. Thus, while it is not hard to find a presumed intent that the beans I buy will not cause debilitating harm to my family members, for example, the UCC has not left the extension of warranties entirely to the courts to develop in the same way it has for third-party beneficiaries of contracts generally.[236] In the case of extending the warranties, the extension is codified.[237] The policy objective thus cannot be ignored. Yet the contractual character of the warranty, which is itself subject to disclaimer, remains.

231. *See supra* notes 227–30 and accompanying text.

232. U.C.C. § 2-318 cmt. 2 (AM. L. INST. & UNIF. L. COMM'N 2022) ("The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to 'privity.'").

233. *See id.*

234. *See id.* cmt. 3 (discussing connection to the RESTATEMENT (SECOND) OF TORTS § 402A) (AM. L. INST. 1965)).

235. *See supra* notes 79–82 and accompanying text.

236. Any analysis of third-party beneficiaries of the contract itself, including the warranties included in that contract, would proceed under the common law of contract. *See* U.C.C. § 1-103(b) (AM. LAW INST. & UNIF. LAW COMM'N 2022) ("Unless displaced by the particular provisions of [the UCC], the principles of law and equity . . . supplement its provisions.").

237. The provision in Article 2 of the UCC that deals specifically with third-party beneficiaries is § 2-318, which deals with third-party beneficiaries of warranties. *See, e.g.*, Reed v. City of Chicago, 263 F. Supp. 2d 1123, 1124–25, (N.D. Ill. 2003) (noting that Illinois determined that "privity is no longer an absolute requirement for breach of warranty actions"); Jackson v. PIM Brands, Inc., No. 2:22-cv-1433-AMM, 2024 WL 3381899, at *4 (N.D. Ala. Feb. 29, 2024) (noting that Alabama abolished the privity requirements for breach of warranty claims in actions involving injuries to natural persons); U.C.C. § 2-318 (AM. L. INST. & UNIF. L. COMM'N 2022).

b. *Extending Warranties in Contract.* One of the main purposes of the UCC is uniformity.[238] There are of course variations among jurisdictions related to some specifics and to statutory interpretation,[239] but it has been adopted in some form by all states.[240] One important variation relevant to the discussion herein is the state of Louisiana, which has not adopted Article 2.[241] Within Article 2, adopted by all other states, another important variation is found in section 2-318, which lies at the heart of much of the borderland analysis.[242] The borderland characterization seems especially compelling, as the lines do seem to blur. Yet there is still a line to be drawn, and good reason to respect it. Before continuing with the privity discussion, however, it is helpful to review the unique structure of UCC § 2-318.

The section originally extended warranties to members of the buyer's family or household, or buyer's guests, for certain personal injuries.[243] When it became clear that this particular section was not going to be uniformly adopted by the states, the UCC drafters proposed three alternative versions of the section:[244] Alternative A (the original version); Alternative B, which removed the limitation of family, household members, and guests, instead making any natural person who is personally injured a potential plaintiff; and Alternative C, which included legal persons, and removed the limitation regarding personal injury.[245] Thus, each successive alternative expands the reach of the statute. Alternative A, adopted by the majority of jurisdictions,[246] deals with horizontal privity[247] and with personal

238. *Id.* § 1-103 (listing "to make uniform the law among the various jurisdictions" as one of three purposes and policies of the Code).

239. *See* THOMAS S. QUINN, QUINN'S U.C.C. COMMENTARY & LAW DIGEST, App. A (3d ed. 2024); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 51[C] (5th ed. 2011) (noting that "[w]hile the statutory language [of UCC § 2-207] has been the subject of legitimate criticism, these defects have been multiplied through judicially manufactured complexity and confusion that pervades 2-207").

240. *See* QUINN, *supra* note 239.

241. *See id.*

242. *See* U.C.C § 2-318 (AM. L. INST. & UNIF. LAW COMM'N 2022).

243. *See* Hyundai Motor Am., Inc. v. Goodin, 822 N.E.2d 947, 954 (Ind. 2005).

244. *Id.* at 955 (noting that only three states—California, Louisiana, and Texas—had "failed to adopt one of these three versions").

245. U.C.C. § 2-318 (AM. L. INST. & UNIF. LAW COMM'N 2022); *see* WILLIAM D. HAWKLAND ET AL., THREE ALTERNATIVE APPROACHES TO EXTENSION OF WARRANTIES, 2 HAWKLAND UCC SERIES § 2-318:3, at 1–2 (2024).

246. *See Hyundai*, 822 N.E.2d at 955 ("The majority of states, including Indiana, retained or adopted . . . 'Alternative A.'").

247. *See id.* at 954, 956 (stating that the original version—now Alternative A—"eliminated 'horizontal' privity as a requirement for warranty actions"). The courts are invited to extend the protection to remote purchasers, however. U.C.C. § 2-318 cmt. 3 (AM. L. INST. & UNIF. LAW

injury.[248] Alternative B potentially adds claims by a larger universe of people, including a remote buyer ("any natural person who may reasonably be expected to use, consume or be affected by the goods")[249] and thus potentially deals with both vertical and horizontal privity.[250] It retains the limitation to personal injury.[251] Alternative C expands the universe of complainants even further, now including "any person,"[252] which includes legal persons and thus necessarily removes the requirement of personal injury, choosing instead "any person . . . who is injured."[253] The alternative leaves another question unanswered: whether the warranty extends to address personal injury and property damage only (traditional tort damages), or whether it also includes economic losses,[254] which, at least as related to remote parties, are normally in the purview of contract law.[255]

All these UCC § 2-318 options, which necessarily invite courts and legislatures to make policy decisions, feed the confusion between warranty as contract or as tort. Further, each version of the section prohibits exclusion or limitation of the warranty extension "with respect to injury to the person of an individual to whom the warranty extends."[256] In other words, while the *making* of the warranty itself is within the control of the parties, the *extension* of the warranty, at least in some circumstances, is not.[257] Most tellingly, the prohibition of exclusion of warranties regarding personal injury suggests strong public policy

COMM'N 2022) ("The first alternative expressly includes . . . the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.").

248. U.C.C. § 2-318, Alternative A (AM. L. INST. & UNIF. LAW COMM'N 2022).

249. *Id.* Alternative B.

250. *See Hyundai*, 822 N.E.2d at 955 ("Alternative B expands the class of potential plaintiffs . . . and also implicitly abolishes the requirement of vertical privity . . . .").

251. *Id.* ("Alternative B is applicable only to claims for personal injury.").

252. U.C.C. § 2-318, Alternative C (AM. L. INST. & UNIF. LAW COMM'N 2022).

253. *Id.*

254. *See Hyundai*, 822 N.E.2d at 956 ("Because Alternative C refers simply to 'injury,' plaintiffs sustaining only property damage or economic loss *in some states* have been held to have standing to sue under this language.") (emphasis added).

255. *See* Sharkey, *supra* note 208, at 1850 ("[T]he economic loss rule emerged to limit manufacturers' and sellers' liability for purely financial losses and thus defend this last bastion of privity.").

256. The quoted language is from Alternative C. It is not included in Alternatives A and B, but is implicit in that each of those sections apply only to personal injury and preclude exclusion or limitation of the "operation of [the] section." U.C.C. § 2-318 (AM. L. INST. & UNIF. L. COMM'N 2022).

257. *See id.* Alternative C.

considerations.[258] Thus, both the limitation on the bargain element and the special protection for personal injury, make this look like a true borderland area.[259] Yet even in the face of this apparent blurring of the lines, justifications for drawing the line remain. While tort and contract may overlap in some areas, potentially giving the plaintiff choices, each is an independent claim,[260] supported by different reasoning and governed by separate rules that impact the relief to which a plaintiff is entitled.

c. *Comparing Tort through a Privity Lens.* At first blush, it appears that privity questions are not involved in, and thus do not create any problems for, a tort cause of action. While liability in tort may require a duty of care,[261] that duty does not necessarily arise from a contractual relationship.[262] When I drive a car, I have a duty to the people around me to exercise reasonable care.[263] I do not have contracts with any of these people, nor do I need contracts with them to have potential liability. The duty is not created by contract—it is created by law due to the conduct involved and the likelihood of harm.[264]

Yet in other cases, it is the contractual relationship that *creates* the duty of care. If I am a doctor or lawyer, I have a duty to exercise reasonable care in treating or representing those who have sought my services.[265] I have no such duty to the public in general.[266] In such cases, the *duty* arises from contract, but the cause of

258. *See id.*

259. *See id.*

260. *See id.* cmt. 2 ("[This section] seeks to accomplish [its] purpose without any derogation of any right or remedy resting on negligence.").

261. 65 C.J.S. *Negligence* § 30 (2024) ("Negligence is defined as the breach of a legal duty, and where there is no legal duty between the person alleging injury and the defendant, there can be no actionable negligence.").

262. *See, e.g.*, Forest City Stapleton, Inc. v. Rogers, 393 P.3d 487, 491 (Colo. 2017) (quoting Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041, 1043 (Colo. 1983)) ("[A] tort claim for negligence is 'not limited by privity of contract.'").

263. *See* Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1368 (N.Y. 1992) ("Some claims plainly sound in tort—for example, the case of a pedestrian struck by a careless driver.").

264. *See id.* ("[T]he duty breached—to drive carefully—is not one imposed by contract but by law as a matter of social policy.") (citing WILLIAM L. PROSSER, TORTS § 613 (4th ed.)).

265. *See, e.g.*, Hoover v. Williamson, 203 A.2d 861, 863 (Md. 1964) ("[O]rdinarily recovery for malpractice or negligence against a doctor is allowed only where there is a relationship of doctor and patient as a result of a contract, express or implied, that the doctor will treat the patient with proper professional skill . . . .").

266. *See id.* The *Hoover* court does point out, however, a long-standing exception dealing with volunteer services. *Id.* ("[O]ne who assumes to act even though gratuitously, may thereby become subject to the duty of acting carefully . . . .").

action is in tort.[267] The same reasoning applies if the duty arises because the claimant is a third party beneficiary of an enforceable contract.[268] As long as the claim is based in negligence, it is still a tort claim.[269] That characterization does not change because a contract was involved in satisfying the duty element of the negligence claim.[270] Whether the claim is in tort or contract depends on the nature of the undertaking. For example, if my doctor has a duty to me because I hired him to remove my tonsils, his performance will be judged based on negligence principles, as they would be if I hired him to remove my daughter's tonsils. If I hired him to straighten my nose, with a guaranteed result, his performance would be based on contract principles, as it would be had I hired him to straighten my daughter's nose, again, with a guaranteed result.

Thus, while a duty in tort *can* arise from a contractual relationship, a contract is not *necessary* to find such a duty.[271] It can, and often does, arise *independent of* any contractual relationship.[272] The fact that the parties may have had a contractual relationship, or that there may be a tangential contractual relationship, does not prevent finding such a duty.[273] For example, the Colorado Supreme Court, in a 2005 opinion dealing with negligence claims against subcontractors, stated:

> In distinguishing between a tort obligation and a contract obligation, it is essential to discern the source of the party's duty. Contract obligations arise from promises the parties have made to each other, while tort obligations generally arise from duties imposed by law to protect citizens from risk of physical harm or damage to their personal property. Where there exists a duty of care independent of any contractual obligations, the economic loss rule has

267. *See, e.g.*, Kelley v. Middle Tenn. Emergency Physicians, P.C., 133 S.W.3d 587, 593 (Tenn. 2004) ("In most jurisdictions in which the issue has been addressed, courts continue to require the plaintiff in a medical malpractice case to prove the existence of a physician-patient relationship, but most courts also state that such a relationship [can be] implied . . . .").

268. *See* Hale v. Groce, 744 P.2d 1289, 1292 (Or. 1987) ("Because under third-party analysis the contract creates a 'duty' not only to the promisee, the client, but also to the intended beneficiary, negligent nonperformance may give rise to a negligence action as well [as a contract action].").

269. *See id.* at 1293 ("[Plaintiff's complaint] adequately allege[s] a claim that defendant was to use his professional skill to accomplish the donor's objectives and failed to do so. That is a tort claim . . . .").

270. *See id.*

271. *See Kelley*, 133 S.W.3d at 593 ("[T]he physician-patient relationship can arise in situations in which a 'contract' might not be found to exist under a strict application of contract principles.").

272. *See id.*

273. *See id.*

> no application and does not bar a plaintiff's tort claim because the claim is based on a recognized independent duty of care and thus falls outside the scope of the economic loss rule.[274]

The common law of tort has always focused on policy considerations.[275] It is the public policy imperative that supports finding a duty on the seller.[276] More specifically, the development related to products liability and related areas emerged based on the need to protect the public from physical harms caused by products.[277] Part of that protection is defining the universe of people to whom a duty is owed. Any expansion of that universe is undertaken for public policy reasons.[278]

If I am a manufacturer or seller of goods, I know that if I manufacture a dangerous product and introduce it into the stream of commerce, or if I am a seller that introduces a dangerous product into the stream of commerce by selling it, it could harm someone. I know this in much the same way I know that if I drive 90 miles per hour through a school zone, I might cause harm. Of course, if I do not know the product is dangerous, I may protest my innocence, but that is an issue of strict liability, not of duty. Duty must be addressed before liability is reached.[279] And if a duty is created by my conduct, tort liability can follow when the product causes harm.[280] The only remaining question is whether negligence is required.

4. *Liability without Negligence*

One advantage of tying the claim to breach of warranty is the ability to borrow the strict liability nature of contract law. But it is an advantage that comes

274. A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862, 865–66 (Colo. 2005) (citations omitted).

275. *See* RESTATEMENT (SECOND) OF TORTS § 901 (AM. L. INST. 1965).

276. Lynn E. Wagner & Richard A. Solomon, *Finally a Concrete Decision: The Supreme Court of Florida Ends the Confusion Surrounding the Economic Loss Doctrine*, 68 FLA. B.J. 46, 48–49 (1994) (stating that the "law of torts . . . is rooted in the concept of protecting society as a whole from physical harm," and discussing the policies involved).

277. *See id.*; E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986) ("Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty.").

278. *See* Wagner & Solomon, *supra* note 276; *E. River S.S. Corp.*, 476 U.S. at 866 ("[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.") (citation omitted).

279. *See, e.g.*, Romain v. Frankenmuth Mut. Ins. Co., 762 N.W.2d 911, 913 (Mich. 2009).

280. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (AM. L. INST. 1998).

with baggage, as other aspects of contract law come with it.[281] Yet, just as contract analysis is not necessary when dealing with privity issues in a tort claim, it likewise is not necessary when dealing with strict liability concerns. Confusion sets in if we assume that the duty must come from contract for liability to be strict. Such an assumption is not appropriate.

As noted in the Restatement (Third) of Torts: Products Liability, "In 1964 [t]he American Law Institute adopted § 402A as part of the Restatement Second of Torts . . . . It marked the first recognition by the Institute of privity-free *strict liability* for sellers of defective products."[282] Yet courts had much earlier begun expanding strict liability in sales-of-goods cases.[283] Eventually strict liability emerged as a vehicle to dispense with any negligence requirement in certain tort cases.[284] A contract analysis was no longer needed to support such a result.

The Third Restatement deals with such claims in a more comprehensive way, leaving little doubt that strict liability is now firmly embedded in this area of tort law.[285] For something so well-established in the law, one might wonder why strict liability should continue to cause confusion about the nature of warranty. The simple answer is that it should not. On the contrary, the admittedly tortuous development of the law in this area should no longer be a source of confusion about the nature of warranty. Even conceding that the concept of strict liability might have historical connections to contract concepts, the law has developed in a way that makes it clear that it is now firmly a tort concept, and the line between tort and contract remains clear.[286]

281. *See supra* notes 7–10 and accompanying text.

282. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. Introduction (AM. L. INST. 1998) (emphasis added).

283. *See id.* § 1 cmt. a ("In the late 1800s, courts in many states began imposing negligence and strict warranty liability on commercial sellers of defective goods.").

284. *Cf. id.* ("In the early 1960s, American courts began to recognize that a commercial seller of any product having a manufacturing defect should be liable in tort for harm caused by the defect regardless of the plaintiff's ability to maintain a traditional negligence or warranty action."); *see also* DAN B. DOBBS ET AL., THE LAW OF TORTS § 450 (2d ed. 2018) ("In Greenman, Justice Traynor held that strict liability would be imposed upon manufacturers of defective products[] . . . as a matter of tort law, not by implied warranty as a matter of contract law.").

285. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. Introduction (AM. L. INST. 1998) ("On almost every page of Restatement Third, Torts: Products Liability, the Institute has had to respond to questions that were not part of the landscape 35 years ago. This Restatement is, therefore, an almost total overhaul of Restatement Second as it concerns the liability of commercial sellers of products.").

286. *See id.*

The current view of strict liability in tort is the result of careful analysis and is based on sound legal reasoning. There is nothing unusual about applying legal concepts recognized in one area of law to another area of law. Examples include using a comparison in trust law to develop third-party beneficiary law *in contract*,[287] using tort principles to justify a more favorable recovery in restitution,[288] using a typical contract damage measure in tort,[289] or importing a causation standard usually associated with tort into contract law.[290] Strict liability, while originally a feature of contract law, was introduced into tort law for strong policy reasons.[291] It has since become part of tort law without the accompanying difficulties created by equating strict liability with breach of warranty.[292]

This reasoning is underscored by the differing rationales for strict liability under tort and contract law. In tort, for example, the basis of liability will vary depending on whether the defect is a manufacturing defect,[293] a design defect, or a question of inadequate instructions or warning.[294] All of these nuances are

287. *See* Lawrence v. Fox, 20 N.Y. 268 (1859). The court in *Lawrence v. Fox* used trust concepts to explain and support its decision, while rejecting the idea that trust was the controlling law. *Id.* at 273–74. The claim decidedly sounded in contract principles. *Id.* at 274.

288. Courts might refer to the situation as "waiving the tort" and suing in restitution. Olwell v. Nye & Nissen Co., 173 P.2d 652, 653 (Wash. 1946) ("It is uniformly held that in cases where the defendant *tort feasor* has benefited by his wrong, the plaintiff may elect to 'waive the tort' and bring an action . . . for restitution."). Yet the tort is not really *waived*. It impacts the restitution remedy by making clear that the tortfeasor is a conscious wrongdoer under restitution law. *Id.* at 654. Thus, tort concepts are considered in restitution, but the cause of action is in restitution, not in tort. *See id.*

289. *Compare* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. L. INST. 2020) ("One who fraudulently makes a material misrepresentation . . . for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other's justifiable reliance on the misrepresentation."), *with* U.C.C. § 2-721 (AM. L. INST. & UNIF. L. COMM'N 2022) ("Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach.").

290. Contract law "borrows" proximate cause from tort law for damages for consequential damages for "injury to person or property proximately resulting from any breach of warranty." U.C.C. § 2-715(2)(b) (AM. L. INST. & UNIF. L. COMM'N 2022). The claim still sounds in contract.

291. *See supra* notes 170–82 and accompanying text.

292. *See supra* notes 170–82 and accompanying text.

293. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. a (AM. L. INST. 1998) ("Strict liability in tort for defectively manufactured products merges the concept of implied warranty, in which negligence is not required, with the tort concept of negligence, in which contractual privity is not required.").

294. For these cases the Restatement (Third) of Torts: Products Liability § 1 comment provides:

carefully considered developments in tort law. However, in contract law, liability is strict—period.[295] The "rationale" for strict liability in contract is that it is a breach of contract.[296] The variables are whether a warranty was made, what it covers, and to whom it extends.[297] The tests do not coincide. Strict liability in tort developed through a common law process, reflecting the policies and priorities of various jurisdictions as each responded to changes in the law.[298] Those policies and priorities should not be lightly discarded.

IV. THE WARRANTY PROMISE: THE CRUCIAL CHARACTERISTIC

A. *The Nature of the Requirement*

Of the three characteristics listed above, the first, that warranty is part of a voluntary exchange, is descriptive. The contract provides the context for the warranty, although not all contractual promises are warranties. The second, strict liability, is a result of the contractual nature of the warranty. Thus, it is the third, the warranty promise, that is the crucial distinguishing feature of the warranty, and provides the real test for the existence of a warranty. It is the *fact* of the promise that makes a warranty contractual. It is the *nature* of the promise that makes the promise a warranty. This part of the analysis is in some ways the trickiest of the characteristics and, in some ways, the simplest. It has without a doubt contributed much to the confusion about warranties.

To illustrate, let us assume a couple of simple contracts: I promise to sell a cow to B for an agreed amount of money, or I promise to repair B's front porch for an agreed payment. Each of these promises are part of a voluntary exchange, and

> [T]he rule developed for manufacturing defects is inappropriate for the resolution of claims of defective design and defects based on inadequate instructions or warnings. These latter categories of cases require determinations that the product could have reasonably been made safer by a better design or instruction or warning[,] . . . rely[ing] on a reasonableness test traditionally used in determining whether an actor has been negligent. Nevertheless, many courts insist on speaking of liability [in these cases] as being "strict."

Id.

295. *See supra* notes 178–83 and accompanying text.

296. *See supra* notes 178–83 and accompanying text.

297. *See supra* notes 178–83 and accompanying text.

298. *See* RESTATEMENT (SECOND) OF TORTS Introduction (AM. L. INST. 1965) ("[T]here has been enormous change in torts, reflecting new conceptions of the social function of this branch of law . . . . [T]he scope of change wrought by the courts may, indeed, have transcended that in any other field.").

thus contractual.[299] Further, each promise, if breached, will result in liability for breach of contract.[300] Neither promise creates an express warranty, because neither involves more than the bare promise to perform.[301] If I do not deliver the cow, or repair the front porch, I have breached the contract.[302] I have not breached a warranty, because I did not make one.[303] It is the deceptive simplicity of this statement that largely contributes to the confusion described earlier in this Article in which courts somehow conclude that, because a breach of warranty could be different from a *mere* breach of contract, breach of warranty and breach of contract are entirely different things.[304] Given the position herein that a breach of warranty *is* a breach of contract, but does not cover the entire universe of breaches of contract, it is important to understand the distinction.

If the cow is delivered, but B complains that it is barren, or the porch was repaired, but B complains that it was not repaired well, a breach of contract suit will require finding a promise that was breached. B will have to prove, for example, that the cow was warranted to be fertile, or that the repair was warranted to be done in a good and workmanlike manner. If I did not make a warranty, I could not have breached a warranty. If I performed the promise I made, I did not breach the contract. The reasoning is straightforward and sound. Whether a warranty was given may be a matter of contract interpretation, but once it is determined that a warranty was given, the failure to honor it is a breach of contract.

The analysis of the cow contract is relatively easy, and accounts for the apparent simplicity of the test. I warranted a specific attribute of the cow, or I did not. But did I warrant anything about the way in which I would repair the front porch? Here, the analysis becomes more complex, and a new basis for the complaint arises. If I repaired the porch so sloppily that it gives way when B is sitting on it drinking lemonade, B is likely less concerned with his bargain than with his injuries. B can sue in tort based on my negligence without needing to find a warranty.[305] But to sue for breach of contract we must look for a warranty. If I

299. *See* RESTATEMENT (SECOND) OF CONTS. § 1 (AM. L. INST. 1981).

300. *See id.*

301. *See* U.C.C. § 2-313 (AM. L. INST. & UNIF. L. COMM'N 2022).

302. *See* RESTATEMENT (SECOND) OF CONTS. § 304 (AM. L. INST. 1981).

303. *See* U.C.C. § 2-313 (AM. L. INST. & UNIF. L. COMM'N 2022). This statement assumes no implied warranties, which will be discussed in the next Part.

304. *See supra* Part II.B.

305. 57A AM. JUR. 2D *Negligence* § 107 (1964) ("[N]egligent performance of a contract may give rise to an action in tort, if the duty exists independently of the performance of the contract."); *see also* RESTATEMENT (SECOND) OF TORTS § 299A (AM. L. INST. 1965) ("[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good

made an express warranty as to the quality of my work, there is little occasion for confusion about the contractual nature of the warranty. If the warranty is not express, however, the court must determine its existence as a matter of law. It is the warranty that is implied in law that creates many potential borderland questions.

B. *Confusion Related to Warranties Implied in Law*

1. *Duties in Tort and Implied Warranties in Contract*

A warranty expressly stated in the contract is clearly part of the contract.[306] In some cases, the existence of the warranty promise is crucial to finding a contract claim at all, inextricably linking the warranty to the contract.[307] Yet if the contract does not include the words to create the warranty, the lines seem to blur. Contrast the implied-in-law contractual warranty with the duty in a tort cause of action. The duty in tort is based on duties imposed by law for policy reasons,[308] rather than on duties voluntarily assumed by the parties. Yet because contract warranties may also have some public policy basis,[309] there can be confusion about the line between contract and tort. When the warranty is "supplied" by the court or by the legislature, often based on public policy considerations, there is a tendency to conflate warranty with tort.[310] Yet once the warranty is implied, it becomes part of the contract. When considering warranties implied in law, it is helpful to consider how and why they become part of the contract, which raises the question of how any unexpressed term becomes part of the contract. The focus here is on why a term would be added to a contract as a matter of law.

Many kinds of terms, not just warranties, may be implied as a matter of law in contracts. Courts may supply terms that the parties have not fully expressed, or even fully considered, in the memorialization or statement of a bargain they have clearly made.[311] The court does not make up terms out of whole cloth. Promises or

standing in similar communities."); *id.* cmt. b (noting that the section applies to a "skilled trade," including a carpenter).

306. *See supra* notes 46–49 and accompanying text.

307. *See supra* notes 65–70 and accompanying text.

308. *See* CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp., 497 N.W.2d 115, 117 (Wis. 1993) ("Tort law has generally been viewed as serving three broad social purposes . . . .").

309. *See supra* notes 73–80 and accompanying text.

310. *See, e.g.*, Berry v. G. D. Searle & Co., 309 N.E.2d 550, 554 (Ill. 1974) ("Although liability predicated on strict tort liability and breach of implied warranty under the Code are similar, as hereafter discussed, the latter is more restrictive in certain respects.").

311. *See* RESTATEMENT (SECOND) OF CONTS. § 204 (AM. L. INST. 1981) ("When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which

conditions are often supplied to fill a "gap" in the agreement.[312] If either the language or the circumstances of the contract indicate something different, the term will not be included.[313] When a statute supplies a default rule of contract construction, that construction is still inappropriate if the languages or circumstances indicate otherwise.[314] Once the promise *is* supplied by a reasonable contract construction, it becomes a real part of the contract—the private agreement of the parties—and is contractually enforceable. Often the rule in the statute may be good public policy, but the impetus to "fill the gap" is driven more by the need to define a term so that the contract can be enforced in a sensible way that is likely to have been the intent of the parties.[315]

To some extent, implied warranties *could* be explained in much the same way. As indicated earlier,[316] both the implied warranty of merchantability and the implied warranty of fitness for a particular purpose often simply construe the contract to include a promise that we assume comports with the true intent of the parties: that the new car I bought is drivable,[317] or that the hay I bought to feed my cattle is suitable for eating, not just for mucking out stables.[318] Yet in considering such warranties, one cannot entirely ignore the public policy overtones.

A default implied-in-law warranty may be created by courts and legislatures not just to provide a useful way to give meaning to contracts, but to effect, at least to some extent, policy goals that might not otherwise be realized.[319] The implied

is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.").

312. *See id.* cmt. c (distinguishing interpretation to find a term intended by the parties from construction to supply an omitted term).

313. For example, "[t]he time for shipment or delivery or any other action under a contract if not provided in this Article *or agreed upon* shall be a reasonable time." U.C.C. § 2-309(1) (AM. L. INST. & UNIF. L. COMM'N 2022) (emphasis added).

314. *See id.*

315. *Cf.* MURRAY, *supra* note 239, § 39[B][2] ("The reasonable term could be supplied on the assumption that it is probably the term the parties would have inserted had they thought about the matter at all.").

316. *See supra* notes 53–57 and accompanying text.

317. *See* U.C.C. § 2-314(c) (AM. L. INST. & UNIF. L. COMM'N 2022).

318. *See id.* § 2-315; Lester v. Logan, 893 S.W.2d 570, 575 (Tex. App. 1994) ("[W]e hold that the evidence is legally and factually sufficient to support the jury's finding that the hay was not fit for livestock consumption and that Lester breached the implied warranty of fitness for a particular purpose.").

319. *See* RESTATEMENT (SECOND) OF CONTS. § 204 cmt. d (AM. L. INST. 1981) ("[W]here there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.").

warranties of habitability,[320] and of good and workmanlike services,[321] for example, are supported by strong public policy arguments.[322] The UCC Implied Warranty of Merchantability, which presumes that goods sold by merchants "are fit for the ordinary purposes for which such goods are used,"[323] not only reflects the very likely intent and expectations of the parties,[324] but is also good policy.[325] The creation of the warranty is part of a long development of the law related to the sale of goods that began with a philosophy of caveat emptor, to one that recognized the need to protect consumer expectations.[326] The courts at some point saw a need, which was eventually recognized and then codified by legislatures.[327] Thus, there appears to be a public policy gloss on implied contract terms that is akin to the public policy considerations involved in finding duties in tort.[328] The contractual nature is preserved, however, because such warranties can be disclaimed, and because the court "believes" (legally, perhaps even somewhat optimistically) that it is consonant with the likely intent of the parties.[329] If the parties have in any way expressed a different intent, the term will not be inferred.[330]

While the control the parties have over the agreement preserves its contractual character, standards developed primarily to protect the public fall on the tort side of the line. If I buy a car, I normally assume it can be safely driven.

320. *See* HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 9:9 (2024 ed.) ("The sale of houses, apartments, and other living quarters often includes an implied warranty of habitability. The general rule applicable to builders . . . is that each sale includes an implied warranty that the dwelling is fit for habitation . . . .").

321. *See id.* § 9:11 ("The implied warranty of workmanlike construction . . . . 'is a judicially created doctrine implemented to protect an innocent home-buyer by holding the experienced builder accountable for the quality of construction.'") (citation omitted).

322. *See id.*

323. U.C.C. § 2-314(2)(c) (AM. L. INST. & UNIF. L. COMM'N 2022).

324. The parties are free to exclude the warranty if it does not. *See id.* § 2-314(1).

325. *See* Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 575 (Tex. 1991) (discussing the changing landscape of American commerce and how modern buyers have less opportunity to inspect goods before purchasing).

326. *See id.* at 574–75.

327. *See id.* at 575 ("This historical review illustrates that, although they may have helped accelerate emerging, pro-consumer trends, the two uniform acts upon which most twentieth century warranty cases are based essentially codified the common law of warranty.").

328. *See id.*

329. *See* Jacob & Youngs v. Kent, 129 N.E. 889, 891 (N.Y. 1921) ("Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable.").

330. *See* RESTATEMENT (SECOND) OF CONTS. § 204 cmt. c (AM. L. INST. 1981) ("Where there is tacit agreement or a common tacit assumption or where a term can be supplied by logical deduction from agreed terms and the circumstances, interpretation may be enough.").

But there are reasons I might buy a car that cannot be safely driven. I may buy it entirely for parts, in which case I may not care whether it is drivable or not. I may buy it because it is a classic, trusting in my own mechanical skills to make it drivable. In such situations, seller and buyer can agree to waive any potential warranty. On the other hand, it is harder to imagine a scenario in which I would be indifferent to whether my physician performs according to a reasonable standard of care. Further, if my physician were to try to exact a promise from me that he will not be responsible for his own negligence, the promise would likely be unenforceable.[331] My physician's duty to perform according to a reasonable standard of care is much more in the public policy domain than in the bargaining domain.[332] The public is thus protected by applying standards that are created for public policy reasons, not by creating warranties. The opposite reasoning is true for warranty. The warranty *is* part of the bargain of the parties. As long as it does not involve a promise that is affirmatively *against* public policy, public policy is not the issue. If my doctor makes a warranty, the warranty claim is in contract.[333] The claim is based on the failure to achieve the warranted result, not on the standard of care.[334] The law has chosen a bright-line distinction between contract and tort in such cases.

2. *Respecting the Lines*

The line between contract and tort protects different policies related to the harms to be addressed. Products liability in tort focuses on personal injury and property damage.[335] Breaches of warranty, especially under the UCC, which may include damages for personal injury and property damage,[336] often primarily involve economic damages.[337] Yet, a comment in the Restatement (Third) of Torts:

331. *See* Matthew J.B. Lawrence, Note, *In Search of an Enforceable Medical Malpractice Exculpatory Agreement: Introducing Confidential Contracts as a Solution to the Doctor-Patient Relationship Problem*, 84 N.Y.U. L. REV. 850, 851–52 (2009) ("[M]edical malpractice exculpatory agreements have been repeatedly invalidated, often under the mysterious 'void-for-public-policy' rationale.").

332. *See id.* at 863.

333. *See supra* notes 65–70 and accompanying text.

334. In *Sullivan*, the court did not find negligence on the part of the doctor but did find liability for breach of contract. 296 N.E.2d 183, 184 (Mass. 1973).

335. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. d (AM. L. INST. 1998).

336. *See* U.C.C. §§ 2-715(2)(b), 2-318 (AM. L. INST. & UNIF. L.COMM'N 2022).

337. *See id.* § 2-714(2) ("The measure of damages for breach of warranty is the difference . . . between the *value* of the goods accepted and the *value* they would have had if they had been as warranted . . . .") (emphasis added); *id.* § 2-715 (providing for incidental and consequential damages generally but including "injury to person or property" only in subsection (2)(b)).

Products Liability unfortunately adds to the confusion in stating that "courts may utilize the terminology of negligence, strict liability, or the implied warranty of merchantability, or simply define liability in the terms set forth in the black letter."[338] This statement goes too far. While there are important congruencies between product liability and implied warranty of merchantability, as discussed throughout this Article, treating the claims as interchangeable fails to address important differences between the contract claim and the tort claim. The comment does concede that the two claims are different in some respects, notably that they will often have different statutes of limitations and there will sometimes be advantages to one claim over the other.[339] Yet, unless the true nature of the claim is respected, there will be confusion about these differences and about what law applies.

The text of the comment itself devotes a lot of ink to describing the nature of the duty in products liability before then suggesting that it is interchangeable with the implied warranty of merchantability.[340] Yet the two tests cannot be truly interchangeable unless tort law cedes the application of strict liability to the contract definition of implied warranty of merchantability. The warranty is statutory and is defined in some detail.[341] Assuming there is no constitutional infirmity in the statute, it is not up to the courts to rewrite the definition. True, courts often interpret statutes, and a court may well bring the same proclivities to its statutory construction as it does to its development of the common law. Nonetheless, it must work within the parameters of the statutory language.[342] There is no indication that there is an appetite to so limit the development of tort law.[343]

In 2021, an Illinois District Court carefully analyzed the warranty claims made in a case that also claimed damages under strict liability and for negligence.[344] Rather than treating the breach of warranty claims as simply an alternative way to describe the overall complaint, it carefully considered the

338. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. a (AM. L. INST. 1998).

339. *Id.*

340. *Id.*

341. *See, e.g.*, IOWA CODE § 554.2315 (2024) (mirroring language in U.C.C. § 3-315); KY. REV. STAT. ANN. § 355.2-315 (West 2024) (same); W. VA. CODE § 46-2-315 (2024) (same); *see* U.C.C. § 2-315 (AM. L. INST. & UNIF. L. COMM'N 2022).

342. 73 AM. JUR. 2D *Statutes* § 53 (2024).

343. *See supra* notes 271–78 and accompanying text.

344. *See* Cameron v. Battery Handling Sys., Inc., 524 F. Supp. 3d 860, 863–68 (C.D. Ill. 2021) (discussing both vertical and horizontal privity in relation to breach of warranty claims made by a temporary employee who suffered personal injuries).

application of UCC § 2-318 as interpreted by the Illinois Supreme Court,[345] specifically addressing when a plaintiff can sue under the statute, and the specific nature of the warranties allegedly breached.[346] The court further addressed the damages available in a contract action based on extending warranties to third parties, emphasizing that while damages for personal injury may be available to a plaintiff who is not in vertical privity with the defendant, economic damages will not be available.[347] The reasoning respects the line between contract and tort in much the same way the economic loss rule does.[348] The court's in-depth analysis underscores the importance of respecting the differences between the bodies of law.

V. WARRANTIES THAT WILL NOT GO AWAY

One type of warranty remains that seems to fall outside of the above reasoning: the warranty that cannot be disclaimed. If it cannot be disclaimed, it lacks the control by the parties that is so important to contract.[349] While the borderland description arguably fits, the temptation to designate this as a hybrid claim must be resisted. As discussed earlier, important reasons to search for the true nature of the claim remain. The analysis in this area depends heavily on the nature of the limitation on disclaimer, which in some cases is more apparent than real.

Thus, the inability to disclaim may be separate from the warranty itself. For example, some consumer protection statutes provide a statutory claim based on a

345. *Id.* at 866 ("The Illinois Supreme Court considers [UCC §] 2-318 a nonexhaustive list of potential nonprivity plaintiffs.").

346. *See id.* at 864–68 (finding a potential claim by the plaintiff who was a temporary worker, as opposed to one who had been hired by a subcontractor, and denying the motion to dismiss as to the implied warranty of merchantability but dismissing as to the implied warranty of fitness for a particular purpose).

347. *See id.* at 865 ("Where a plaintiff claims breach of an implied warranty in a case involving only economic damages, 'he or she must be in vertical privity of contract with the seller': only the immediate seller may be sued. . . . [T]here is no such requirement in cases where the plaintiff seeks to recover for personal injuries . . . .").

348. *Compare id.*, *with* A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862, 865 (Colo. 2005) ("The economic loss rule is intended to maintain the sometimes blurred boundary between tort law and contract law[, and] . . . a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law.").

349. *See* Hugh Evander Willis, *Contracts: A Law of Rights, Powers, Privileges and Immunities*, 27 IND. L.J. 182, 182 (1952) ("[I]n contract law, so far as the making of contracts and the terms of contracts are concerned, freedom is the general rule.").

breach of warranty,[350] and further provide that the application of the statute may not be waived.[351] Yet, these provisions do not change the nature of the warranty. Any warranty is created (or not) outside of the statute.[352] It is subject to all the rules previously discussed, including the ability to disclaim.[353] It is the consumer protection statute application that cannot be disclaimed. The warranty is still very much in the control of the parties. Further, if the consumer chooses to sue under the statute, the claim is statutory, not contractual. Much like a contractual relationship can be a factor in finding a duty in tort without changing the nature of the claim as one sounding in tort,[354] the contractual warranty provides a cause of action under the consumer protection statute without making the claim one in contract.

In other cases, a court may state that a warranty cannot be disclaimed, but then further state that it can be superseded, as was the case in a 2002 Texas Supreme Court case.[355] The warranty in that case was an "implied warranty of good workmanship" in home construction.[356] Any loss of control caused by the inability to disclaim is ameliorated by the ability to agree to another standard that supersedes the implied warranty.[357] This scenario fits naturally within the analysis in this Article. The warranty is contractual.

350. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 17.50(a) (West 2024) ("A consumer may maintain an action where any of the following constitute a producing cause of . . . damages or damages for mental anguish: . . . (2) breach of an express or implied warranty . . . .").

351. *See, e.g.*, *id.* § 17.42(a) ("Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, ...) The statute provides for waiver if very stringent requirements are followed. *See id.*

352. *See, e.g.*, La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984) ("[The Deceptive Trade Practices Act] does not create any warranties; therefore any warranty must be established independently of the act.") (citing Cheney v. Parks, 605 S.W.2d 640, 642 (Tex. App. 1980)).

353. *See* U.C.C. § 2-316 (AM. L. INST. & UNIF. L. COMM'N 2022).

354. *See supra* notes 264–67 and accompanying text.

355. *See* Centex Homes v. Buecher, 95 S.W.3d 266, 274 (Tex. 2002) ("The implied warranty of good workmanship . . . . functions as a gap-filler whose purpose is to supply terms that are omitted from but necessary to the contract's performance. As a gap-filler, the parties' agreement may supersede the implied standard for workmanship, but the agreement cannot simply disclaim it."); *see also* Taylor Morrison of Tex., Inc. v. Kohlmeyer, 672 S.W.3d 422, 426 (Tex. 2023) (per curiam) ("[W]hether the purchase agreement's disclaimers and disclosures were sufficient to . . . supplant the implied warranty of good workmanship would depend on the particulars of the purchase agreement . . . .").

356. *Centex Homes*, 95 S.W.3d at 274.

357. *See id.*

Likewise, the warranties addressed in UCC § 2-318, discussed above,[358] logically fit within contract despite some apparent borderland characteristics.[359] The three options in the UCC section relate to all warranties, including express warranties.[360] Each option provides that the parties cannot "exclude or limit" the warranty extension to third parties where personal injury is involved.[361] For this limited purpose, then, the section removes some of the contractual control.[362] However, the parties can still disclaim, or simply not make, the warranty itself, thus retaining much control. The only thing they cannot control is the group to which a warranty, once created, extends.[363] This lack of control is clearly related to policy goals to be codified by the legislature.[364] The limitation thus affects the enforcement of the contract but does not appear to be within the control of the parties.[365] Under Alternative A, for example, the warranty that the beans will be merchantable (i.e., edible, not causing illness), if not disclaimed, extends not only to the buyer, but also

> to any natural person who is in the family or household of [the] buyer or who is a guest in [their] 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[,]

which very much coincides with the buyer's likely intent.[366] The entire warranty may be disclaimed, but not the extension.[367]

Yet the ability to disclaim, or not make, the warranty preserves its contractual character. Further, the limitations on disclaiming the extension also have a sound contractual basis. The basis for extending the warranty is based in third-party

358. *Supra* Part III.B.3.b.

359. See *supra* note 2 for a discussion on borderland characteristics.

360. U.C.C. § 2-318 (AM. L. INST. & UNIF. L. COMM'N 2022) (Each alternative begins: "A seller's warranty *whether express or implied* . . . .") (emphasis added).

361. *Id.*; *see supra* note 256 and accompanying text.

362. *See id.*

363. *See id.*

364. *See supra* notes 244–56 and accompanying text.

365. *See id.* Alternative C ("A seller's warranty . . . *extends to any person* who may reasonably be expected to use, consume or be affected by the goods and who is injured . . . .") (emphasis added).

366. *Id.* Alternative A.

367. *Id.* cmt. 1 ("[T]his section does not mean that a seller is precluded from excluding or disclaiming a warranty . . . .").

beneficiary analysis, which is a part of contract law.[368] Likewise, if the buyer is unwilling to disclaim the warranty, as it might impact his or her own safety, it is not a stretch to say that it would be bad public policy to allow the parties to disclaim it as to the described beneficiaries. Given that the public policy is one that has been expressly endorsed by the legislature, the attempted disclaimer could, consistent with contract principles, be considered unenforceable.[369] And finally, the fact that the section appears in the Code that specifically relates to contracts for the sale of goods underscores that contract law is controlling.[370]

But what about a warranty that *cannot* be disclaimed? Such a so-called warranty is not a warranty at all as defined herein. These "warranties" are generally created by a court or legislature for policy reasons.[371] They become part of the transaction and can be neither disclaimed *nor* superseded.[372] Calling this creation a warranty may be a nod to its similarity to warranty, but that does not make it a true warranty—it lacks the necessary bargain element.[373] Just as it is important to distinguish tort claims from contractual warranty claims, it is also important to recognize that some nominal warranties fall outside both areas of law. Consider, for example, the implied warranty of habitability as it exists in Texas.[374] The

368. *See* Pro. Lens Plan, Inc. v. Polaris Leasing Corp., 675 P.2d 887, 893–94 (Kan. 1984) (discussing the history of courts extending warranties to plaintiffs, with no privity of contract to the original seller and before provisions like UCC § 2-318 were adopted, by finding an implied warranty of either merchantability or fitness based on public policy).

369. *See* RESTATEMENT (SECOND) OF CONTS. § 178 (AM. L. INST. 1981). This section states,

> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms. . . .
>
> (3) In weighing a public policy against enforcement of a term, account is taken of
>
> (a) the strength of that policy as manifested by legislation or judicial decisions.

Id.

370. *See id.*

371. *See* Centex Homes v. Buecher, 95 S.W.3d 266, 273 (Tex. 2002) (citing Timothy Davis, *The Illusive Warranty of Warranty of Workmanlike Performance: Constructing a Conceptual Framework*, 72 NEB. L. REV. 981, 1019 (1993))

372. *See id.* at 275.

373. *See supra* Part II.A (discussing the necessity of the bargain element for a true contractual warranty).

374. The warranty, along with the warranty of good and workmanlike construction, was recognized in *Humber v. Morton*, and clarified in *Centex Homes*. Humber v. Morton, 425 S.W.2d 554, 555 (Tex. 1968); *Centex Home*, 95 S.W.3d at 273–74 ("[The] implied warranty

warranty is limited, applying only to defects that make a property unsuitable as a home.[375] Further, it applies only to latent defects.[376] This characteristic of the warranty makes it somewhat within the control of the seller, since disclosing the defect means the warranty does not apply.[377] But if there are defects of which the seller is not aware, and thus cannot disclose, the seller does not entirely control the creation of the warranty. The warranty created in that scenario fits neither the dictionary definition of warranty nor the analysis posited herein.[378]

The question then becomes, are these true borderland situations? Or are they exceptions to the definition of warranty? Either characterization has some appeal, but the real issue in these situations is terminology. Because they are similar to contractual warranties, it is both convenient and descriptive to call them warranties, even though they are not warranties in the usual sense. The terminology is "borrowed" from warranty law because it communicates the concept of the liability created under the law. This use of borrowed terminology exists in other areas of the law. For example, a quasi-contract is not really a contract.[379] Neither is a constructive trust a true trust.[380] Each designation is descriptive, but it does not accurately indicate the body of law under which the claim is made. Both quasi-contract and constructive trust are restitution claims.[381]

[of habitability] requires the builder to provide a house that is safe, sanitary, and otherwise fit for human habitation.").

375. *Centex Homes*, 95 S.W.3d at 273 ("[T]his implied warranty only protects new home buyers from conditions that are so defective that the property is unsuitable for its intended use as a home.").

376. *Id.* at 275.

377. *Id.* at 274 ("We agree with the Missouri Supreme Court that the warranty of habitability can be waived only to the extent that defects are adequately disclosed. Thus only in unique circumstances, such as when a purchaser buys a problem house with express and full knowledge of the defects that affect its habitability, should a waiver of this warranty be recognized.").

378. *See supra* Parts I, II.A.

379. *See* RESTATEMENT (SECOND) OF CONTS. § 4 cmt. b (AM. L. INST. 1981) ("Quasi-contracts have often been called implied contracts or contracts implied in law; but, *unlike true contracts*, quasi-contracts are not based on the apparent intention of the parties[,] . . . nor are they promises. They are obligations created by law for reasons of justice.") (emphasis added).

380. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 cmt. b (AM. L. INST. 2011) ("It is commonly repeated that a constructive trust is 'not a real trust' . . . . One might go further and explain that the term 'constructive trust,' used correctly to designate a remedy for unjust enrichment, is only a manner of speaking.").

381. *See* DOBBS & ROBERTS, *supra* note 204, at 399 ("Both quasi-contract and constructive trust aim at restitution of something that in good conscience belongs to plaintiff.").

Likewise, use of the term warranty in the context of a so-called warranty that cannot be disclaimed is so commonplace that it is unlikely it will end. Further, there seems to be little reason to quibble with this usage as long as the true nature of the claim is understood and respected. And because these nominal warranties are created in the law, either by a court or legislature, they will be defined by the terms of their creation. To the extent the opinions or statutes creating such "warranties" leave questions about remedies, statutes of limitations, and other issues, the resulting confusion further underscores the need to clarify the classification of the claim. If the so-called warranty is statutory, most of these questions will be answered by examining the overall statutory scheme.[382] For claims developed by a court as a matter of law, keeping the focus on discerning the true nature of the claim will increase the likelihood that the court will provide the tools to classify the claim when it is created.[383]

VI. CONCLUSION

Nothing could be more clearly contractual than a promise made in exchange for another's promise.[384] In many situations, such a promise creates a warranty.[385] Not all promises create warranties, but, with limited exceptions, all warranties are contractual by their very nature.[386] Warranties generally have three identifiable characteristics. The first two—that a warranty is part of a voluntary exchange and that a breach of warranty results in liability without a requirement of fault or intent—are features of contracts generally.[387] The third—the special undertaking, or warranty promise—distinguishes a warranty from other contractual undertakings but does not change its contractual nature.[388]

Suggestions that warranty and contract are mutually exclusive do not survive scrutiny. Suggestions that breach of warranty occupies a borderland between contract and tort, while understandable, create unnecessary confusion in the law.[389]

382. For example, the statute of limitations for a breach of warranty under Article 2 of the UCC would be determined under U.C.C. § 2-725 (AM. L. INST. & UNIF. L.COMM'N 2022). The statute of limitations in a consumer law context would be determined by the relevant state consumer law statute.

383. The Supreme Court of Texas noted the importance of maintaining a clear distinction between tort and contract law in *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003).

384. *See* RESTATEMENT (SECOND) OF CONTS. § 1 (AM. L. INST. 1981) ("A contract is a promise or a set of promises . . . .").

385. *See supra* note 22–25 and accompanying text.

386. *See supra* notes 22–31 and accompanying text.

387. *See supra* notes 22–31 and accompanying text.

388. *See supra* Part II.A.

389. *See supra* Part II.A.

The somewhat parallel developments of products liability in tort and *extensions* of warranties to third parties in contract have contributed to a view of warranty as residing in a borderland between contract and tort.[390] However, each body of law is conceptually separate and protects different interests.[391]

Conceding that exceptions based on terminology might exist, and that some of the line-drawing must be precise, does not detract from the importance of drawing the line. The contract character of the true breach of warranty claim gives definition to the claim that must be preserved. Likewise, recognizing the strength of a products liability regime that is robust and independent of contract restraints allows more policy-conscious development in tort. Moving away as much as feasible from the term "warranty" for claims that sound in tort would go a long way toward preserving the distinctions.[392] With due deference to the exceptions discussed herein, predictability and clarity in the law is enhanced when the line between contract and tort remains bright.

390. *See supra* Part III.B. *See generally* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §1 cmt. a (AM. L. INST. 1998) (recognizing that strict products liability "is not fully congruent with classical tort or contract law" and noting the "confusion spawned by existing doctrinal categories.").

391. *See supra* Part III.B

392. Despite the mention of warranty in the Restatement (Third) of Torts: Products Liability, the Restatement generally uses terms such as "products liability," "strict liability," and the like, not warranty. *See supra* Part IV.B.1.