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Establishing A Warranty That Explicitly Extends to Future Performance—Nebraska's Application Of U.C.C. § 2-725(2)


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I. INTRODUCTION

The past decade has been marked by an increase in lawsuits against retailers\(^1\) and manufacturers\(^2\) of defective products. While

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there are several theories on which to base a products liability action, not all of them may be available to the plaintiff due to the nature of the injury or damage sustained, the particular party being sued, or the applicable statute of limitations.

When the plaintiff has suffered personal injury or property damage due to a defective product, he may bring an action under the tort theories of strict liability or negligence, or for breach of


5. Some states have limited the parties who may be sued under the theory of strict liability. See Neb. Rev. Stat. § 25-21,181 (1979) (no product liability action based on the doctrine of strict liability shall be commenced or maintained against a person other than the manufacturer); S.D. Codified Laws Ann. § 20-9-9 (1979) (distributor, wholesaler or retailer cannot be sued under the doctrine of strict liability, unless also the manufacturer of the product or knew of the defective condition of the product); Wash. Rev. Code Ann. § 7.72.040 (Supp. 1983-84) (a seller other than the manufacturer is liable only for negligence, breach of warranty or intentional misrepresentation, with a few delineated exceptions). Other states have not exempted nonmanufacturers from strict tort liability in product liability actions. In such states, the courts have held that a distributor, wholesaler, or retailer may be sued under the doctrine of strict liability. See, e.g., Marko v. Stop & Shop, 169 Conn. 550, 364 A.2d 217 (1975); Sipari v. Villa Olivia Country Club, 63 Ill. App. 3d 380 N.E.2d 819 (1978); Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980).

6. A plaintiff's cause of action may accrue at different times, depending upon the theory on which the plaintiff bases his claim. Likewise, the time period in which suit must be brought after the action accrues may vary from one theory to the next. As a result, the plaintiff may be barred from bringing a breach of warranty action, but still be able to bring a suit for negligence or strict liability. See J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 11-9, at 415-20 (1980).

7. Restatement (Second) of Torts § 402A (1965). It states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject
warranty under the Uniform Commercial Code. But where the plaintiff has suffered solely an economic loss, the remedy lies exclusively under the Uniform Commercial Code for breach of warranty. An action against a seller for breach of warranty must be commenced within the time period prescribed in section 2-725. Ordinarily, a plaintiff must commence his action within four years after the goods were tendered for delivery, whether or not he knows the goods are defective. However, the second sentence of

8. See supra note 3. Nebraska passed the Uniform Commercial Code in its entirety in 1963. 1963 Neb. Laws 49. With respect to the sections pertinent to this Article, the Nebraska Legislature incorporated the Code in the Nebraska statutes without altering the language or section numbers. Therefore, as a matter of convenience, this Article will cite specific Code sections to the Uniform Commercial Code rather than to the Nebraska statutes.

9. “Economic loss” has been defined as “damages for inadequate value, costs of repair and replacement of the defective product . . . without any claim of personal injury or damage to the other property.” Note, Economic Loss in Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 918 (1966). Ordinarily, economic loss is “the difference between the actual value of the goods accepted and the value they would have had if they had been as warranted.” J. White & R. Summers, supra note 6, § 11-5, at 406 (1980). Generally, economic loss is measured “by the purchaser’s cost of replacement of cost of repair.” Id.


11. U.C.C. § 2-725 (1978). It provides, inter alia:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the agreed party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

12. Id. The last sentence of subsection (1) allows the parties to the agreement to reduce the limitation period to less than four years. See, e.g., Standard Alli-
section 2-725(2) provides that if a warranty "explicitly extends to future performance" of the product, the plaintiff has four years from the time the defect is discovered to commence his action. This exception to the general rule has posed interpretive difficulties for the courts in determining when a warranty "explicitly extends to future performance."

In Moore v. Puget Sound Plywood, Inc., the Nebraska Supreme Court was asked to decide whether the plaintiffs' action for breach of warranty was timely commenced under section 2-725. In rendering its decision, the court had to deal with the perplexing language of section 2-725(2) and determine whether the warranty "explicitly extended to future performance." This Article will examine Moore in light of the construction previously given to section 2-725(2) by other jurisdictions and the Nebraska Supreme Court. First, it will present the facts and holding in Moore. It will then closely examine the language of section 2-725 and the interpretation given it by other jurisdictions and the Nebraska Supreme Court. The Moore decision itself will be examined within this framework. Finally, this Article will discuss the possible impact of Moore on future product liability suits in Nebraska.

II. THE MOORE DECISION

A. The Facts

Sometime during the construction of their house in 1970 and 1971, Dennis and Lois Moore purchased lauan siding which was manufactured by the defendant, Puget Sound Plywood, Inc. In October, 1977, the Moores noticed that the siding was beginning to deteriorate. By 1979, the problem had become so severe that the Moores began to investigate ways to remedy the situation. Almost ten years after purchasing the siding, the Moores filed suit in the
Omaha Municipal Court on April 24, 1981, against the manufacturer.\textsuperscript{18}

In their complaint,\textsuperscript{19} the plaintiffs alleged that the defendant breached implied warranties of merchantability,\textsuperscript{20} and of fitness for a particular purpose.\textsuperscript{21} Subsequently, the plaintiffs filed an amended petition, alleging that the defendant had expressly warranted in writing that the siding was merchantable and reasonably fit for the purpose for which it was to be used.\textsuperscript{22} In response, de-

\begin{itemize}
\item \textsuperscript{18} Id. at 16, 332 N.W.2d at 214.
\item \textsuperscript{19} Transcript at 75 (Plaintiffs' Original Complaint), Moore v. Puget Sound Plywood, Inc., 214 Neb. 14, 332 N.W.2d 212 (1983).
\item \textsuperscript{20} U.C.C. § 2-314 (1978) provides:
\begin{enumerate}
\item Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section, the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
\item Goods to be merchantable must be at least such as \begin{enumerate}
\item Pass without objection in the trade under the contract description; and
\item In the case of fungible goods, are of fair average quality within the description; and
\item Are fit for the ordinary purpose for which such goods are used; and
\item Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
\item Are adequately contained, packaged and labeled as the agreement may require; and
\item Conform to the promises or affirmations of fact made on the container or label if any.
\end{enumerate}
\item Unless excluded or modified (section 2-316), other implied warranties may arise from course of dealing or usage of trade.
\end{enumerate}
\item \textsuperscript{21} U.C.C. § 2-315 (1978) provides:
Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.
\item \textsuperscript{22} Transcript at 64 (Plaintiffs' Amended Petition), Moore v. Puget Sound Plywood, Inc., 214 Neb. 14, 332 N.W.2d 212 (1983).
\end{itemize}
fendant submitted an affidavit of the treasurer of Puget Sound Plywood, Inc., which stated that Puget Sound had never published written warranties of any kind in reference to its siding. The defendant specifically denied that any express warranties were given in connection with the siding, and affirmatively pleaded that the plaintiffs' action for breach of implied warranties was barred by the U.C.C. statute of limitations, section 2-725. The plaintiffs then abandoned their express warranty claim, and proceeded to trial on the theory that the defendant breached implied warranties of merchantability and fitness for a particular purpose. In addition, the plaintiffs argued that the implied warranty claims were not barred by the statute of limitations.

The parties agreed that the trial court could take judicial notice that siding is ordinarily supposed to "last the life of the house." The trial court held that the plaintiffs' action was barred by the statute of limitations. The district court affirmed. On appeal to the Nebraska Supreme Court, the plaintiffs argued that "where a seller impliedly warrants the future performance of a product, the statute of limitations is extended until the breach is or should have been discovered." The defendant responded that an implied warranty by its very nature cannot fall within the "discovery" exception of section 2-725(2).

B. The Nebraska Supreme Court Holding

The Nebraska Supreme Court found it unnecessary to decide the case on the basis of a breach of implied warranties. Instead, the court found that the defendant had given an express oral warranty under U.C.C. section 2-313 when it represented to the plaintiffs that the product was "siding." Recognizing that the parties had stipulated that siding is expected to last the life of a house, the court held that the description of the goods as "siding" created an express warranty that explicitly extended to the future perform-

26. Id.
28. Id. at 15, 332 N.W.2d at 214.
29. Id.
30. Id. at 16, 332 N.W.2d at 214.
31. Id.
32. Id.
33. Id. at 17, 332 N.W.2d at 214-15.
ance of the siding. In light of the expectations of the parties, the warranty explicitly extended to future performance and the plaintiffs' action did not accrue until the breach was discovered. Having filed suit within four years of discovery, the court concluded that the plaintiffs' action was timely commenced under section 2-725.

III. ANALYSIS

A. The Code Analysis

Generally, section 2-725 requires that a plaintiff bring an action for breach of warranty within four years after the cause of action accrues. Therefore, the essence of section 2-725 is determining when the plaintiff's cause of action accrued. Section 2-725(2) provides that a cause of action accrues when the breach of warranty occurs, which, in turn, is dependent upon the type of warranty given. The breach occurs either when the goods are tendered for delivery, or when the plaintiff discovers, or should have discovered, the defect in the goods.

Normally, a breach of warranty occurs when tender of delivery is made, even though the purchaser does not know the goods are defective. It is only where the seller gives a warranty which "explicitly extends to future performance," and where "discovery of the breach must await the time of such performance," that the breach occurs at the time the defect is, or should have been, discovered. While it may seem that all warranties extend to future

34. Id.
35. Id.
37. See supra note 11 for the text of § 2-725.
39. Generally, "[t]ender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery." U.C.C. § 2-503 (1978) (emphasis added). It has, however, been held that, "for the purposes of § 2-725, tender of delivery refers to an offer of goods under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation." Standard Alliance, Indus. v. Black Clawson Co., 587 F.2d 813, 819 (6th Cir. 1978). To hold that tender of delivery does not occur until the goods are proved nondefective would extend the statute of limitations indefinitely into the future: "A defect at the time of delivery would prevent 'due tender' from taking place until [the defect] was correct." Id. It should also be noted that where installation of the goods is required, tender of delivery occurs not when the goods are physically brought to the site, but when the installation is complete. Id. at 819. See also Jandreau v. Sheesley Plumbing & Heating Co., 324 N.W.2d 266, 270 (S.D. 1982).
performance, the language of section 2-725(2) has been narrowly
construed and assigned a specific meaning by the courts.42 Not all
warranties explicitly extend to future performance of the goods.

In summary, before a court can determine whether a cause of
action is barred by the statute of limitations, it must first discern
the type of warranty given by the seller. It is the plaintiff who has
the burden of proving the warranty given by the seller.43 If the
plaintiff does not want his action to have accrued upon tender of
delivery, but rather upon discovery of the defect, he must prove
that the seller gave a warranty that explicitly extended to the fu-
ture performance of the product, and that any defects in the prod-
uct were not discoverable until such future performance had
occurred.44

B. The Existing Case Law

When does a warranty explicitly extend to future performance
of a product? The courts have consistently held that only an ex-
press warranty can explicitly extend to future performance.45 The
"explicit" requirement of section 2-725(2) requires that the war-
tanty be express. An implied warranty "by its very nature cannot
explicitly extend to future performance."46 The term "explicit"
means that which is distinctly and clearly stated in plain language,
and not merely implied or conveyed by implication.47 A pur-
chaser's mere expectation, no matter how reasonable, that the
product will last "a long time" is not enough to constitute a war-
tanty that explicitly extends to future performance.48

In addition, the language of the express warranty must be spe-

42. See infra notes 45-67 and accompanying text.
45. See, e.g., Clark v. Dehavel Separator Corp., 639 F.2d 1230, 1325 (5th Cir. 1981);
1971); Beckmire v. Ristikrat Clay Prods. Co., 36 Ill. App. 3d 411, 413, 343 N.E.2d
530, 532 (1976); Wilson v. Massey-Ferguson, Inc., 21 Ill. App. 3d 867, 871, 315
559, 568, 279 N.W.2d 603, 609 (1979).
46. Clark v. Dehavel Separator Corp., 639 F.2d 1320, 1325 (5th Cir. 1981). This
court cites numerous cases in support of this proposition.
48. See, e.g., Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 94, 335 N.E.2d
443, 454 (1975); Beckmire v. Ristikrat Clay Prods. Co., 36 Ill. App. 3d 411, 413,
343 N.E.2d 530, 532 (1976); Wilson v. Massey-Ferguson, Inc., 21 Ill. App. 3d 867,
42 A.D. 2d 573, 574, 344 N.Y.S.2d 101, 103 (1973) (suggesting that a purchaser's
specific and explicitly refer to a future time of performance. A warranty can be express without being explicit: "Even where a warranty is express, courts are reluctant to infer from its language terms of prospective operation or conditions which are not clearly stated." Where nothing is said regarding how long the warranty is to last, the statute of limitations begins to run upon tender of delivery. The warranty must clearly state that the product will perform properly and for a specified period of time. It is not enough that the warranty states that the product "will perform," is "designed to give long and reliable service," or that the product will perform in a certain manner under certain conditions. Likewise, it has been held that a warranty promising to replace or repair the product for a period of time does not explicitly extend to future performance. On the other hand, an express warranty that explicitly guaranties the product for a lifetime, for a specific term of years, or states that the product "will give satisfactory service at all times," will extend to future performance.

Prior to Moore, the Nebraska Supreme Court aligned itself with the other jurisdictions that held that the "discovery" exception of section 2-725(2) requires an express warranty that expressly and explicitly refers to future performance. In Grand Island School

52. Id. at 819-20.
District v. Celotex Corporation, the plaintiff brought an action alleging that a manufacturer of roofing materials breached its implied warranty that the roofing system was fit for the purpose intended. The court recognized that unless the "discovery" exception of section 2-725(2) applied, i.e., unless the defendant gave a warranty which explicitly extended to future performance, the plaintiff's action would be barred by the statute of limitations. The defendant had given a guaranty bond under which it promised to repair leaks in the roof caused by ordinary wear and tear for a period of twenty years. In holding that the bond did not constitute a warranty guarantying the future performance of the goods, the court stated that the "discovery" exception to section 2-725(2) "applies only where the seller explicitly states . . . that the product will [for example] 'last for ten years.'"

In addition to requiring that the express warranty explicitly refer to future performance, section 2-725(2) also requires that discovery of the defect must await future performance. The statute must be read in the conjunctive: it requires that the warranty explicitly extend to future performance, and discovery of any defects must await such performance.

There is practically no case law construing the requirement that discovery of the defect must await future performance. While courts have been accused of overlooking this requirement, the truth is that few courts have needed to address the requirement because the warranty in question failed to be express or explicitly refer to a future time.

At first glance, the requirement that discovery must await future performance appears to add little, if anything, to section 2-725(2). At what other time is the purchaser to discover defects but after tender of delivery? Defects generally are not discovered until the purchaser has the product in his possession. However, it is possible that this requirement does not refer to the time the defect is actually discovered, but rather the discoverability of the defect. The statute requires that discovery of the defect must await future performance. If the defect existed at the time of delivery and could have been discovered prior to, or at that time, it fails to meet

59. 203 Neb. 559, 279 N.W.2d 603 (1979).
60. Id. at 567, 279 N.W.2d at 609.
61. Id. at 568, 279 N.W.2d at 609.
62. Id. at 568, 279 N.W.2d at 609 (emphasis in original).
65. See Note, supra note 13, at 791.
this prong of the "discovery" exception.\textsuperscript{66} While the Voth court did not expressly characterize the defect, it seems obvious that it must be considered patent. The "discovery" exception, however, seems to require that the product be \textit{latently} defective.\textsuperscript{67}

Succinctly, the "discovery" exception of section 2-725(2) has been interpreted by the courts to require: 1) an express warranty; 2) language that specifically and explicitly refers to future time; and 3) a defect that is not discoverable prior to, or at the time of, delivery.\textsuperscript{68}

\subsection*{C. The Warranty in Moore}

The significance of the Moore decision lies in the recognition that the Moores' remedy was limited to that provided by the Uniform Commercial Code. Because the Moores suffered only economic loss,\textsuperscript{69} their cause of action lay exclusively under the warranty provisions of the Uniform Commercial Code.\textsuperscript{70} If the Moores' breach of warranty action was barred by the statute of limitations, they would be left without recourse against the manufacturer. Therefore, it was essential that the Moores' cause of ac-

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{66} E.g., Voth v. Chrysler Motor Corp., 218 Kan. 644, 649, 545 P.2d 371, 376 (1976).
\item\textsuperscript{68} \textit{See supra} notes 45-67 and accompanying text.
\item\textsuperscript{69} \textit{See supra} note 9.
\item\textsuperscript{70} The U.C.C. governs the rights between the parties to a sales transaction that results in solely an economic loss. \textit{See supra} notes 4 & 10. The tort theories of strict liability and negligence were not available to the plaintiffs because the defective siding caused no physical harm to the plaintiffs or their property. In the absence of physical harm to persons or property other than the product itself, the purchaser of a product pursuant to contract cannot recover economic losses from the manufacturer on claims based on negligent manufacture or strict liability. \textit{See}, e.g., National Crane Corp. v. Ohio Steele Tube Co., 213 Neb. 782, 786-87, 332 N.W.2d 39, 43-44 (1983). \textit{See also}, Jones & Laughlin Steel v. Johns-Manville Sales, 626 F.2d 280, 286-88 (3d Cir. 1980); Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 85-88, 435 N.E.2d 443, 450-52 (1982). However, some courts have allowed a purchaser to sue the manufacturer for solely economic loss, where the damage to the product itself occurred as the result of a sudden, violent event, and not as a result of an inherent defect that gradually reduced the product's value. \textit{See} Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982). In addition, the tort theory of misrepresentation was not available to the plaintiffs in Moore because the defendant neither intentionally nor negligently made false representations concerning the performance of the siding. \textit{See} Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 95-99, 435 N.E.2d 443, 452-53 (1982).
\end{itemize}
\end{footnotesize}
tion be timely commenced under the applicable statute of limitations, i.e., section 2-725.

In order to hold that the Moores' suit was timely commenced, the Nebraska Supreme Court had to cross an initial hurdle and find that an express warranty had been given. The complaint alleged that the defendant impliedly warranted that the siding was merchantable and reasonably fit for the purpose for which it was to be used by the Moores. On appeal before the Nebraska Supreme Court, the Moores argued that, "where a seller impliedly warrants the future performance of a product, the statute of limitations is extended until the breach is or should have been discovered."

In deeming it unnecessary to address the plaintiffs' implied warranty argument, the court held that it was not bound to the issue as framed by the parties. Though the plaintiffs pleaded and argued their case on implied warranty theories, the court found that the defendant had in fact given an express warranty in rep-

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73. Transcript at 75 (Plaintiffs' Original Complaint), Moore v. Puget Sound Plywood, Inc., 214 Neb. 14, 332 N.W.2d 212 (1983). The plaintiffs also filed an amended complaint alleging that the defendant expressly warranted that the siding would be merchantable and reasonably fit for the purpose for which it was to be used. See supra note 22 and accompanying text. The defendant specifically denied the existence of any express warranties. See supra notes 23-24 and accompanying text. Subsequently, the plaintiffs abandoned their express warranty claim and proceeded to trial under the implied warranty claim. See supra notes 25-26 and accompanying text.
74. The parties waived oral argument before the Nebraska Supreme Court and had the court render a decision on the basis of the briefs submitted and the record. See Report of Prehearing Conference Officer, Supreme Court of Nebraska, Dec. 10, 1982, Moore v. Puget Sound Plywood, Inc., 214 Neb. 14, 332 N.W.2d 212 (1983).
76. Id.
77. Id. at 18, 332 N.W.2d at 215.
78. Express warranties are governed by U.C.C. § 2-313 (1978), which provides:

1. Express warranties by the seller are created as follows:
   a. Any affirmation of fact or promises made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promises.
   b. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
   c. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

2. It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee"
resenting the product as "siding." The description of the product as "siding" became a part of the basis of the bargain and created an express warranty.

There is no question that an express warranty under section 2-313 was given in the description of the goods as "siding." However, it is questionable whether the court should have relied on the express warranty in rendering its opinion. The existence of an express warranty may not have been sufficiently pleaded by the plaintiffs. If this was the case, the defendant was misled in preparing its defense, and was prejudiced by the court's reliance on the express warranty in making its decision.

It is true, as the court stated, that under Nebraska's code pleading "it is the facts well pleaded, not the theory of recovery or the legal conclusions, which state a cause of action." But it is equally evident that the "court must assume the facts as alleged and cannot assume the existence of any facts not alleged, nor facts in aid of the pleading ..." In addition, the pleadings must advise the adversary as to what he is called upon to contest, and the adversary has a right to insist that all facts essential to a cause of action be stated in the complaint. In Moore, the Nebraska court held that the facts, as pleaded, put the defendant on notice that it may be called upon to meet an express warranty claim; the defendant was in no way misled by the plaintiff's use of the word "implied." The court's conclusion seems to ignore the fact that there is a substantial difference between the creation of an implied warranty and the creation of an express warranty.

An implied warranty of merchantability under section 2-314

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80. Id. at 17, 332 N.W.2d at 215.
87. See supra note 20 for the text of § 2-314.
arises in all sales of goods where the seller is a merchant with respect to goods of that kind.\textsuperscript{88} The warranty arises merely from the seller's status as a merchant, independent of any representations, conduct, samples, or models.\textsuperscript{89} With respect to pleading, the plaintiff need only plead that there was a sale of goods, the seller was a merchant, and the goods were unmerchantable. Under section 2-315,\textsuperscript{90} an implied warranty of fitness for a particular purpose arises where the seller has reason to know the particular purpose for which the goods are being bought and the purchaser is relying on the seller's judgment to furnish suitable goods.\textsuperscript{91} Succinctly, implied warranties reflect the reasonable expectations of the purchaser and are not necessarily based on an affirmative act of the seller.\textsuperscript{92} An implied warranty arises by implication and can exist in the absence of an express warranty.

In contrast, the creation of an express warranty is dependent upon some affirmative act which becomes the basis of the bargain.\textsuperscript{93} An express warranty is created either by an affirmation of fact or promise by the seller to the buyer, or by a description, sample, or model of the goods provided by either party.\textsuperscript{94} It is not enough that the seller is a merchant or that the seller knows the purpose for which the product will be used by the purchaser. Consequently, facts alleging the breach of implied warranties may not actually give one notice of the creation and breach of an express warranty.

In Moore, the defendant may have been further mislead by the fact that the plaintiffs argued solely implied warranties in the trial court.\textsuperscript{95} Furthermore, the report of the prehearing conference officer, filed prior to the supreme court arguments, stated that there was no evidence of an express warranty.\textsuperscript{96} In light of the possible prejudicial effect to the defendant, it is questionable whether the Moore court should have relied upon the express warranty in rendering its decision.

However, the fact that an express warranty was given in

\textsuperscript{88} See supra note 20 for the text of § 2-314. See also U.C.C. § 2-314 comments 2-4 (1978).
\textsuperscript{90} See supra note 21 for the text of § 2-315.
\textsuperscript{91} U.C.C. § 2-315, comment 1 (1978).
\textsuperscript{92} See supra note 9, at 923.
\textsuperscript{93} U.C.C. § 2-313 (1978). See supra note 78 for the text of § 2-313.
\textsuperscript{94} U.C.C. § 2-313 (1978). See supra note 78 for the text of § 2-313.
\textsuperscript{95} Transcript at 10 (Plaintiffs' Trial Brief), Moore v. Puget Sound Plywood, Inc., 214 Neb. 14, 332 N.W.2d 212 (1983).
Moore—that the goods were described as “siding”—does not alone trigger the “discovery” exception of section 2-725(2). In light of the Nebraska Supreme Court's Grand Island School District decision, and accepting as authority the case law of other jurisdictions, a court must look to the language of the warranty and determine whether it explicitly refers to a future time of performance. In Moore, the language consisted of the single word “siding.” As to whether there was a reference to performance at a future date, the Nebraska Supreme Court noted that the parties stipulated at trial that “siding... is supposed to... last the life of the house.” Therefore, “the description of the goods as ‘siding' carried with it the representation that it would last the lifetime of the house.” That is, at the time of sale, there was “created in the minds of the parties the expectation that the siding would last the lifetime of the house.” As a result, the warranty “necessarily extended explicitly to future performance.”

In Moore, the Nebraska Supreme Court did what other courts have refused to do—allow the buyers’ expectations to trigger the “discovery” exception of section 2-725(2) in the absence of clear, distinct, and explicit terms referring to the future performance of the product. The parties’ stipulation adds little support to the court’s reasoning. It is unclear as to what the parties stipulated. In their trial brief, the plaintiffs stated the stipulation to be that “the buyer of exterior siding expected it to last the lifetime of the house.” This is nothing more than a stipulation to expectations; it is not the same as saying the siding would in fact last a lifetime. The mere expectation, however reasonable, that, due to the nature of the product, it will last a long time, is not sufficient to make the statute of limitations commence upon the discovery of the defect rather than at tender of delivery.

The Nebraska Supreme Court interpreted the stipulation to imply that the “siding... [was] supposed to last the lifetime of the
Even under this interpretation, it is questionable whether the language distinctly and explicitly refers to future performance. Is "supposed to" the equivalent of a guaranty that the siding will in fact "last a lifetime"? In any event, no explicit terms were ever articulated or clearly communicated at the time of sale. The nature and extent of the warranty was not explicitly stated. Rather, it existed by implication in the mind of the purchaser. In effect, the court read the "explicit" requirement out of section 2-725(2). Satisfied with its finding of an express warranty that explicitly extended to future performance, the Moore court never addressed the issue of whether discovery of the defect had to await such future performance.

In light of its prior decision in Grand Island School District, and the case law of other jurisdictions, the Nebraska Supreme Court's decision in Moore is an aberration. It is possible to fault the Moore court for its anomalous decision. At the same time, it should be recognized that Moore is a case in which a court tried to escape the effect of a poorly drafted statute that ignores reality and is contrary to an underlying policy of contract law and the U.C.C. Nevertheless, the arguments which may be advanced in support of Moore all fall short in justifying the court's decision.

It is well established in contract law that a major objective of contractual remedies is to protect a party's reasonable expectations. Arguably, the construction and application of section 2-725 does not serve this objective. As applied to goods that normally have a useful life much greater than four years, for example, siding, bricks, roofing materials, and large pieces of equipment, section 2-725 is unjust and ignores reality.

For example, a farmer might purchase a new milking machine, which is normally expected to have a useful life of fifteen years.

108. See supra notes 49-62 and accompanying text.
109. For a discussion of how § 2-725 ignores reality and is contrary to the underlying policy of the U.C.C., see Note, supra note 13, at 787-90.
111. See Note, supra note 13, at 787-90.
112. Id.
113. Assume that during the course of dealings the seller gave no express warranties, but the sales contract which the farmer received upon purchase described the equipment as a new "Acme Milking Machine." Although the contract is silent as to the future performance of the machine, the farmer knows from the experience of other farmers that Acme Milking Machines are generally good for at least fifteen years. Furthermore, while the description of the product as an "Acme Milking Machine" does not explicitly refer to the future performance of the machine, it does establish the standard against
The seller gives no express warranties, but because of his status as a merchant, an implied warranty of merchantability attaches to the milking machine.\footnote{114} Six years after the date of delivery, a latent defect renders the machine totally useless. The farmer’s reasonable expectation was that the machine would be fit for its ordinary purpose and that it would perform satisfactorily for fifteen years. However, because the seller did not give an express warranty explicitly extending to future performance, the statute of limitations expired four years after the date of delivery and two years before the defect became apparent. If the farmer’s remedy lay solely under the U.C.C., he is left without any recourse against the seller, despite the machine’s unusually short life.\footnote{115}

However, the fact that section 2-725 may seem unjust in light of a purchaser’s reasonable expectations as to the normal useful life of the product does not authorize a court to ignore the statute’s plain language, nor excuse the court from failing to give the statute effect. Courts cannot refuse to give a statute of limitation effect merely because it operates harshly in a case involving a meritorious claim.\footnote{116}

In enacting statutes of limitations, legislatures have attempted to balance the interests of the purchaser with the interests of the manufacturer. Manufacturers have an interest in being protected from stale claims.\footnote{117} It would be unfair to a manufacturer to allow a party to bring a claim after a certain period of time has passed and the facts have become obscure from the lapse of time.\footnote{118} Manufacturers also have an interest in being protected from infinite and endless litigation.\footnote{119} After a particular product has been sold and is in the possession of the purchaser for a period of time, the manufacturer should no longer have to be concerned about claims being filed with respect to the product. In order to protect manufacturers from infinite litigation and to prevent unreasonable delay in the filing of claims, legislatures enacted statutes of limitations fixing a reasonable time in which claims must be filed.\footnote{120}
The drafters of the Code considered four years to be a reasonable time in which to file an action for breach of warranty.\(^{121}\) Even though the four-year limitation period may be arbitrary and based on convenience rather than logic,\(^{122}\) manufacturers have a right to rely on the expectation that the statute will be enforced. Giving effect to a purchaser's reasonable expectations with respect to the useful life of a product thwarts the policies underlying the statute of limitations. A statute of limitations dependent upon a purchaser's reasonable expectations would result in a different period of limitation for each and every product sold.\(^{123}\) Consequently, manufacturers would be forever liable for a breach of warranty on any goods they sold.

A second argument that could be advanced in support of Moore is that the courts have consistently misread the term "explicit" in the statute.\(^{124}\) Section 2-725(2) states, \textit{inter alia}, that a breach of warranty occurs when tender of delivery is made, "except . . . where a warranty explicitly extends to future performance . . . ."\(^{125}\) Courts have construed this phrase as requiring an express warranty.\(^{126}\) However, the term "explicitly" is used as an adverb modifying "extends to future performance," not as an adjective modifying "warranty." The "discovery" exception does not mandate an "explicit" warranty. Rather, it requires the warranty, be it expressed or implied, to be explicitly directed toward future performance.\(^{127}\)

However, this argument only renders the need for an express warranty unnecessary; the court need not find that the seller gave an express warranty. It does not change the requirement that the warranty explicitly extend to future performance. Even an implied warranty must explicitly refer to a future time of performance. A description of the goods as a "new Acme Milking Machine" or "siding," whether the description be express or in the

\(^{121}\) See, \textit{e.g.}, Standard Alliance, Indus. v. Black Clawson Co., 587 F.2d 813, 820 (6th Cir. 1978). Even though the drafters of the Code considered four years to be a reasonable period of time, states, when adopting the U.C.C., were free to increase the period of limitations. \textit{See} OKLA. \textit{STAT. ANN. tit. 12A, § 2-725} (West 1963) (increases the U.C.C. period of limitation to five years); Wis. \textit{STAT. ANN. § 402.725} (West 1964) (U.C.C. period of limitation is six years).

\(^{122}\) Generally, the period of limitation determined by the legislature is arbitrary and based on the need to have a point in which where the seller can be certain that claims arising from products sold in the past will no longer be filed. \textit{See} 51 AM. \textit{JUR. 2D, supra} note 116.


\(^{124}\) See Note, \textit{supra} note 13, at 791.


\(^{126}\) \textit{See} \textit{supra} notes 45-48 and accompanying text.

\(^{127}\) \textit{See} \textit{supra} note 11. \textit{See also} Note, \textit{supra} note 13, at 791.
contract of sale,\textsuperscript{128} merely states what the product is and the standard against which merchantability is to be determined.\textsuperscript{129} The "explicit" requirement of section 2-725(2) requires more than just a description of what the product is; it requires a specific and explicit reference to future performance. Under section 2-725(2), a seller cannot warrant that a product will last "twenty years" or "a lifetime" without explicitly doing so in the sales contract or in the course of dealing. Expectations of the product's future performance that arise from circumstances outside the contract description or the course of dealing, that is, from the purchaser's knowledge of other milking machines or siding products, do not satisfy the explicit requirement of section 2-725(2). While the goods in \textit{Moore} may have been described as "siding," the purchasers' expectations as to future performance arose from circumstances outside of the contract or the course of dealing with the seller. Consequently, the "explicit" requirement of section 2-725 remained unsatisfied.

\section*{IV. RAMIFICATIONS}

In states other than Nebraska, one can argue that \textit{Moore} is an anomalous result that establishes no precedent and deserves little, if any, attention. But, in spite of the fact that the tenuous analysis of \textit{Moore} may be out-of-sync with the decisions of other jurisdictions, \textit{Moore} is authority in Nebraska. However, the precedent \textit{Moore} established in Nebraska is uncertain. The decision reached in \textit{Moore} falls short of the court's requirement in \textit{Grand Island School District} that the warranty be express and that its language specifically and explicitly refer to a future time of performance. Arguably, the Nebraska Supreme Court has \textit{in effect} redefined the requirements of the "discovery" exception of section 2-725(2) so as to not require an \textit{explicit} reference to future time of performance. Under \textit{Moore}, a stipulation subsequent to the time of sale that the purchaser expected the goods to last a period of time satisfies the "explicit" requirement of the "discovery" exception. Consequently, in future breach of warranty cases, defense counsel should not stipulate as to the extent of the warranty or the purchaser's expectations. In addition, defense counsel should always read between the lines of the complaint, irrespective of the labels

\textsuperscript{128} A description of the goods in the sales contract states what the goods are and impliedly warrants that the goods will perform as described, \textit{i.e.}, as a "New Acme Milking Machine." That is, the description establishes the standard for merchantability. However, this is different than the "explicit" requirement of § 2-725, where the seller must \textit{explicitly} refer to the future performance of the product.

\textsuperscript{129} See supra notes 20 & 128 and accompanying text.
the plaintiff places on his cause of action and allegations. Even if the plaintiff pleads only implied warranty theories, the defendant should make full discovery and be prepared to meet an express warranty analysis by the court.

V. CONCLUSION

While Moore may be seen as a victory in the field of consumer protection, it may be of questionable value because of the court's tenuous analysis in fitting the facts under the language of section 2-725(2). Moore can be viewed as a court's attempt to escape the harsh effect that a statute of limitations has on what may be a meritorious claim. The problem in Moore was not the law itself, but the application of the law to the specific facts presented. The court recognized the well established requirements that the warranty be express and that the warranty explicitly refer to future time of performance. However, since the facts of the plaintiffs' case did not readily fall within the "discovery" exception, the court had to actively massage the facts if it was to hold the complaint timely filed and not barred by the statute of limitations. In doing so, the court departed from other jurisdictions and its own decision in Grand Island School District, giving effect to the purchaser's reasonable expectations with respect to the nature of the product. Whether this departure was intentional or inadvertent, the court essentially ignored the "explicit" requirement of the statute. On the one hand, Moore may be viewed as an aberration; on the other, it may be viewed as a judicial forerunner of what is to come.

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130. It is clear from the court's analysis that it knew there must be an express warranty given, and that it explicitly refer to future performance. Otherwise, the court's analysis would not have followed the step-by-step progression it did. See Moore v. Puget Sound Plywood, Inc., 214 Neb. 14, 16-17, 332 N.W.2d 212, 214-15 (1983). The court also was aware of these requirements in its prior decision in Grand Island School Dist. v. Celotex Corp., 203 Neb. 559, 568, 279 N.W.2d 603, 609 (1979).