RECONCEIVING DONOR CONCEPTION: HOW SALES LAW CAN PROVIDE AN INTERIM REMEDY IN ABSENCE OF COMPREHENSIVE REGULATION

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I. INTRODUCTION

When Wendy and Janet Norman decided it was time to expand their family and bring a child into their home, they turned to Xytex Corporation to find a sperm donor.[1] Despite Xytex's renowned reputation, neither woman knew what trouble this decision would bring.[2] Couples experiencing infertility, same-sex couples, and single people who wish to have children face a similar choice in how they will expand their families.[3]

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1. Norman v. Xytex Corp., 848 S.E.2d 835, 837 (Ga. 2020).

2. Xytex is one of the four major cryobanks in the United States, the others being Fairfax Cryobank, California Cryobank, and Seattle Sperm Bank. *See* Franziska Moeckel, *Top US Cryobanks & Donor Eligibility*, LINKEDIN (Jan. 30, 2020), https://www.linkedin.com/pulse/top-us-cryobanks-donor-eligibility-franziska-moeckel-mba. Throughout this Article, Xytex, Fairfax Cryobank, and California Cryobank will be used as examples of industry norms and practices. Seattle Sperm Bank is not included as it is the newest and only offers open-identity donors, unlike the other cryobanks. *See Open ID Donors, a Choice for All Futures What is an Open ID Donor?*, SEATTLE SPERM BANK, https://www.seattlespermbank.com/open-id-donors/ (last visited July 27, 2024).

3. The discussions occurring in this Article revolve around biological reproduction, and consequently, man and woman or male and female will often be used to describe a cisgender man and cisgender woman, respectfully. Unless otherwise noted, a couple is the relationship between a cisgender man and a cisgender woman. The unique challenges and experiences of transgender parents are outside the scope of this Article.

Some infertile couples turn to adoption to build their families,[4] while others turn to assisted reproductive technology ("ART") or other fertility techniques.[5] For many, adoption is a last resort, only seen as a viable path *after* attempting unsuccessfully to conceive a child genetically related to one or both parents.[6] Same-sex couples face a similar choice, in deciding whether to use fertility techniques or pursue adoption. While "[s]ame-sex couples are four times more likely [to adopt] than opposite-sex couples,"[7] many same-sex couples face additional challenges in adopting a child.[8] Whether they ran into such challenges, or simply prefer to have a child genetically related to one parent, many same-sex couples use artificial insemination or in vitro fertilization, with or without a surrogate, to create their families.[9]

Those couples who choose to use a donor when expanding their family put their trust in sperm and egg banks[10] to provide them

4. *See* OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., ASPE RSCH. BRIEF, CHILDREN ADOPTED FROM FOSTER CARE: CHILD AND FAMILY CHARACTERISTICS, ADOPTION MOTIVATION, AND WELL-BEING 11 (2011) https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//43596/rb.pdf (finding approximately 39% of parents' reason for adopting from foster care was due to infertility).

5. *See* Rachel Arocho et al., *Estimates of Donated Sperm Use in the United States: National Survey of Family Growth 1995-2017*, 112 FERTILITY & STERILITY 718, 719, 721 (2019), https://www.fertstert.org/action/showPdf?pii=S0015-0282%2819%2930492-3 (estimating over 250,000 heterosexual women using sperm donors between 2015 and 2017). For definitions of ART and fertility techniques as used in this Article, see, for example, FLA. STAT. § 742.13 (2023) (defining ART as "procedures which involve the laboratory handling of human eggs or preembryos") and FLA. STAT. § 63.213 (2023) (providing a definition of fertility technique to include artificial insemination, in vitro fertilization, among other artificial conception procedures).

6. *See* Leslie Reed, *Study Finds Couples Who Want Children View Adoption as a Last Resort*, UNIV. OF NEB.: NEB. TODAY (Oct. 22, 2013), https://news.unl.edu/newsrooms/today/article/study-finds-couples-who-want-children-view-adoption-as-a-last-resort/ (citing Nicholas K. Park & Patricia Wonch Hill, *Is Adoption an Option? The Role of Importance of Motherhood and Fertility Help-Seeking in Considering Adoption*, 35 J. FAM. ISSUES 601 (2014)).

7. Danielle Taylor, *Fifteen Percent of Same-Sex Couples Have Children in Their Household*, U.S. CENSUS BUREAU (Sept. 17, 2020), https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html.

8. Fourteen states "permit[] state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBTQ people and same sex couples, if doing so conflicts with their religious beliefs," and eighteen states (plus four territories) do not explicitly protect "against discrimination in adoption based on sexual orientation." *Child Welfare Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws/adoption (last visited June 22, 2024).

9. *See* Arocho et al., *supra* note 5, at 721 (finding nearly 190,000 gay or bisexual women using sperm donors between 2015 and 2017).

10. These gamete banks are often referred to as cryobanks, both by the entities themselves and the medical professionals who work adjacent to them, in reference to the freezing procedures used by the reproductive cell banks. *See generally* Willem Ombelet & J.

with a wide variety of options for the donor reproductive cell or cells (gametes) that the parents decide to utilize. If the gametes that recipient-parents decide to utilize are not as the cryobank has described them, parents are often left without any form of compensation for the damages they have experienced. In absence of a comprehensive regulatory scheme, sales law can provide a meaningful remedy to donor-conceived people and their recipient-parents.

Part II of this Article will explore the current regulatory landscape of fertility techniques, focusing specifically on cryobanks. Part III will first argue that donor gamete cells should be classified as goods, as defined under Article 2 of the Uniform Commercial Code ("Article 2 goods") and then will argue that the warranties and remedies provided by Article 2 allow for recovery in cases where tort actions have been unsuccessful. Finally, Part IV will propose that in absence of a comprehensive regulatory scheme, a statute limiting the terms of a contract for donor gamete cells would protect the ability for donor-conceived people and their recipient-parents to recover under breach of warranty theory.

II. THE GREAT DEBATE: CURRENT REGULATION OF ART

The idea of the Wild West is pervasive through American culture, often being invoked when new technology expands faster than governments can develop regulations to protect their citizens.[11] As new technology seeps into more industries, each sector of modern life is faced with its own microcosm of the Wild West. In the fertility industry, that microcosm is fertility techniques.[12]

Van Robays, *Artificial Insemination History: Hurdles and Milestones*, 7 FACTS VIEWS & VISION OBGYN 137, 142 (2015); *Sperm Banking History*, CAL. CRYOBANK, https://www.cryobank.com/learning-center/sperm-banking-101/sperm-banking-history/ (last visited June 22, 2024). Throughout this Article, the term "cryobank" will be used to describe either a sperm or egg bank, without regard for any specific procedures the bank uses or for any tissue bank that uses cryogenic procedures for non-reproductive cells.

11. *See, e.g.*, Riddhi Setty & Isaiah Poritz, '*Wild West' of Generative AI Poses Novel Copyright Questions (1)*, BLOOMBERG L. (Nov. 18, 2022, 11:00 AM), https://news.bloomberglaw.com/ip-law/wild-west-of-generative-ai-raises-novel-copyright-questions; Valerie Strauss, *Why California's Charter School Sector is Called 'the Wild West'*, WASH. POST (Sept. 28, 2016, 12:06 PM), https://www.washingtonpost.com/news/answer-sheet/wp/2016/09/28/why-californias-charter-school-sector-is-called-the-wild-west/.

12. *See* Caroline Hackley et al., *The Regulation of Assisted Reproduction*, THE REGUL. REV. (Aug. 13, 2022), https://www.theregreview.org/2022/08/13/saturday-seminar-the-

Opponents of greater regulation—including the American Society for Reproductive Medicine ("ASRM")[13]—argue that ART and fertility techniques are *already* heavily regulated.[14] With the Centers for Disease Control and Prevention ("CDC"), the Centers for Medicare and Medicaid Services ("CMS"), and the Food and Drug Administration ("FDA") playing a role in regulation, there are multiple layers of federal regulation, plus, any regulation that a state may decide to impose. [15] On the contrary, proponents for greater regulation argue that when it comes to ART and fertility techniques, "cash is king and informed consent is optional."[16] Regardless of opinion on the sufficiency of regulations currently in place, the fact of the matter is that donor-conceived children are becoming adults and voicing concerns that the regulatory scheme and industry as they exist today have, and continue to, cause harm.[17]

A. Federal Regulation of Fertility Techniques: Alphabet Soup and a Lost Bill

Administrative regulations are the only sources of regulation or law related to fertility techniques; although, there has been a recent attempt to change this.[18] At the federal administrative level, the CDC, CMS, and FDA each play a role in regulating

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regulation-of-assisted-reproduction/ (explaining that ART is "[s]ometimes referred to as the 'Wild West' of fertility treatments").

13. The American Society for Reproductive Medicine ("ASRM") is an organization made up of physicians and other medical professionals that serves the medical profession, maintaining a similar role as different bar associations that serve the legal profession. *See ASRM 2023 Annual Report*, AM. SOC'Y FOR REPROD. MED., https://www.asrm.org/globalassets/_asrm/about-us/annual-report/2023annualreport.pdf (last visited June 22, 2024). The ASRM puts together continuing medical education programs; publishes the academic journal, *Fertility and Sterility*; advocates for policy change; and funds research. *See generally id.*

14. *See Oversight of Assisted Reproductive Technology* 5, AM. SOC'Y FOR REPROD. MED (2021), https://www.asrm.org/globalassets/_asrm/advocacy-and-policy/oversiteofart.pdf.

15. *See id.*; *infra* pt. II.

16. Steve P. Calandrillo & Chryssa V. Deliganis, *In Vitro Fertilization and the Law: How Legal and Regulatory Neglect Compromised a Medical Breakthrough*, 57 ARIZ. L. REV. 311, 311 (2015); *see also* Madeline Verniero, *The Wild West of Fertility Clinics*, THE REGUL. REV. (Aug. 10, 2021), https://www.theregreview.org/2021/08/10/verniero-wild-west-fertility-clinics/.

17. *See generally* Katie Tobin, *Sperm Donor Children Are Calling Out the Fertility Industry*, HUCK MAG (Jan. 18, 2023), https://www.huckmag.com/article/the-children-of-sperm-donors-are-calling-out-the-fertility-industry; *About USDCC*, U.S. DONOR CONCEIVED COUNCIL, https://www.usdcc.org/about/ (last visited June 22, 2024).

18. *See* H.R. 8307, 117th Cong. (2022).

fertility techniques.[19] The CDC and the CMS both relate to the Clinical Laboratory Improvement Amendments;[20] whereas the FDA focuses on the donor.[21]

The CMS implements the provisions of the Clinical Laboratory Improvement Amendments;[22] whereas the CDC collects and publishes data.[23] Under the Clinical Laboratory Improvement Amendments, any facility that examines "materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of . . . human beings"[24] must be certified by the Secretary of Health and Human Services and must maintain certain performance standards.[25] This means that laboratories that test reproductive cells and tissues to diagnose infertility, or laboratories that complete the fertilization process, must be certified and are held to CMS standards; however, facilities that simply collect, store, and sell gametes are *not* required to be certified, nor are they held to CMS standards.[26]

Where the CMS ensures laboratory facilities sustain a standardized level of performance, the CDC promotes transparency in the fertility industry. Each year, the CDC publishes a report containing data related to ART.[27] The CDC defines ART as procedures "in which either eggs or embryos are handled outside of a woman's body," and consequently, the CDC does not collect data related to other fertility techniques or

19. *See Oversight of Assisted Reproductive Technology*, *supra* note 14, at 5.

20. *See* 42 U.S.C. § 263a–1; *Quality, Safety & Oversight - Certification & Compliance*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/medicare/provider-enrollment-and-certification/certificationandcomplianc (last visited June 22, 2024).

21. *See* 21 C.F.R. § 1271.1 (2023).

22. *See Quality, Safety & Oversight - Certification & Compliance*, *supra* note 20; *see also Oversight of Assisted Reproductive Technology*, *supra* note 14, at 6–7.

23. § 263a–1.

24. *Id.* § 263a.

25. *Id.* Certified laboratories must "maintain a quality assurance and quality control program . . . appropriate for the validity and reliability of the laboratory examinations[;] . . . maintain records . . . necessary for the proper and effective operation of the laboratory"; employ only qualified personnel, as established by the Secretary of Health and Human Services; and "meet [any] . . . other requirements as the Secretary [of Health and Human Services] determines necessary to assure consistent performance." *Id.*

26. *See How to Apply for a CLIA Certificate, Including International Laboratories*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/regulations-and-guidance/legislation/clia/how_to_apply_for_a_clia_certificate_international_laboratories (last visited June 22, 2024) (providing that specimen collection facilities are not required to have a CLIA certificate).

27. § 263a–1.

cryobanks as a whole.[28] Included in the data collected are the number of assisted reproductive technology clinics; the number and outcomes of ART procedures performed; and the proportion of infants born via ART.[29] This data is further broken down by state.[30] This information allows individuals and couples to understand the chances of conception when deciding whether to incur the high costs of ART.[31]

Currently, the FDA is the only federal agency that regulates gametes, having established eligibility criteria for donors of human cells and tissues.[32] The FDA's definition of "[h]uman cells, tissues, or cellular or tissue-based products" ("HCT/Ps") explicitly includes semen, which brings sperm donation into the scope of the FDA's regulatory authority.[33] The FDA imposes requirements for facilities dealing in human cells and tissues to screen donors for risk factors and to test donors for "relevant communicable disease agents and diseases."[34] While a start in the right direction, the standards for donor eligibility are relatively low, imposing only a

28. *Commonly Asked Questions*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/reports/2021/questions.html (last visited June 22, 2024). The CDC's data collection parameters exclude artificial insemination, a common procedure in the fertility industry when a male factor is solely responsible and among single women, as well as lesbian and bisexual women in same-sex relationships. *See Artificial Insemination: All Your Questions Answered*, RODEO DRIVE WOMEN'S HEALTH CTR., https://www.rdwhc.com/blog/artificial-insemination-all-your-questions-answered (last visited June 22, 2024).

29. *See State-Specific Assisted Reproductive Technology Surveillance, United States: 2021 Data Brief*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/state-specific-surveillance/2021/figures.html (last visited June 22, 2024).

30. *Id.*

31. IVF procedures typically costs parents tens of thousands of dollars and are rarely covered by insurance. *See* Marissa Conrad, *How Much Does IVF Cost?*, FORBES: HEALTH, https://www.forbes.com/health/womens-health/how-much-does-ivf-cost/ (Aug. 14, 2023, 7:04 AM) ("[O]ften, the total bill will fall somewhere between $15,000 and $20,000 [for a single IVF cycle].").

32. 21 C.F.R. § 1271.1 (2023).

33. *Id.* § 1271.3. The definition does not explicitly include eggs; however, the definition does not limit HCT/Ps to the examples included, and eggs are likely to be analogous to semen. *Id.* There is no specific regulatory history that would indicate why semen was explicitly included and eggs were not. Semen was not included in the original 1997 rule but was added in 2004. *See* Current Good Tissue Practice for Human Cell, Tissue, and Cellular and Tissue-Based Product Establishments; Inspection and Enforcement, 69 Fed. Reg. 68612, 68680 (Nov. 24, 2004) (to be codified at 21 C.F.R. pt. 1271). The simple answer may just be that sperm donation has existed for longer and was more common at the time of amendment. *Compare* Ombelet & Van Robays, *supra* note 10, at 138, 140 (detailing the first uses of artificial insemination in animals in the 1700s and 1800s and the first reports on human artificial insemination in the 1940s), *with History*, MONASH IVF, https://monashivf.com/why-monash-ivf/history/ (last visited June 22, 2024) (reporting the first IVF pregnancy in 1973).

34. § 1271.45.

"responsible person" standard and failing to look beyond certain communicable diseases.[35] Screening is effectively an interview with the donor that indicates that they are "free from risk factors . . . and . . . communicable disease risks associated with" transplantation of live cells into a human recipient.[36] Donor testing includes testing for "relevant communicable disease agents,"[37] but the scope of that definition is limited, explicitly including some viruses (human immunodeficiency virus, hepatis B for all donors, and chlamydia and gonorrhea for reproductive tissue donors), but leaving the status of others to the interpretation of three factors (a risk of transmission of the disease by the donor tissue; the disease could be fatal, life-threatening, or result in permanent damage; and appropriate screening measures for the donor tissue exist).[38] Each of these criteria look strictly at diseases spread through the exchange of bodily fluid, rather than through genetic material.[39]

While screening for disease that can transmit through the exchange of bodily fluids is incredibly important—and likely sufficient in the case of other HCT/Ps, e.g., skin, heart valves, and corneas—the regulations fall short of screening for any diseases or conditions that may be passed through a donor's genes. Despite the claim that the fertility industry is "one of [the] most highly regulated of all medical practices in the United States,"[40] the ASRM provides additional recommendations, including that anonymous sperm donors have a psychoeducational and genetic screening, whereas known sperm donors have psychological and genetic screening done.[41] Despite the ASRM's recommendation,

35. *Id.* § 1271.50. The federal regulations on HCT/Ps define donor medical history interview broadly, but do not require one be done and only require medical history be reviewed for communicable disease. *See id.* §§ 1271.3, 1271.47.

36. *Id.* § 1271.50.

37. *Id.*

38. *Id.*; *id.* § 1271.3(r).

39. *See, e.g.*, *Hepatitis B: General Information*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (June 2016), https://www.cdc.gov/hepatitis/hbv/pdfs/hepbgeneralfactsheet.pdf ("Hepatitis B . . . is spread when . . . body fluids from an infected person enters the body of someone who is not infected."); *About Gonorrhea*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 15, 2024), https://www.cdc.gov/gonorrhea/about/ (indicating that gonorrhea can be spread by having sex with someone that is infected with it, or "a pregnant person with gonorrhea can give the infection to their baby during childbirth").

40. *Oversight of Assisted Reproductive Technology*, *supra* note 14, at 11.

41. *See* Prac. Comm. of the Am. Soc'y for Reprod. Med. & Prac. Comm. for the Soc'y for Reprod. Tech., *Guidance Regarding Gamete and Embryo Donation*, 115 FERTILITY & STERILITY 1395, 1397 tbl. 1 (2021) [hereinafter *Guidance on Gamete Donation*].

there is no enforcement mechanism to ensure these screenings are completed.[42]

On its face, the donor conception industry appears highly regulated at the federal level. After all, the CDC, CMS, and FDA all regulate some part of the process. Each agency's role is vital and unique in regulation; however, even with all three agencies involved, there are still massive gaps in regulatory coverage which permit bad actors to take advantage of unknowing recipient-parents.

In 2022, Representative Chris Jacobs from New York introduced House Resolution 8307, a bill that would have "require[d] reproductive tissue banks to collect, verify, and disclose certain information about a donor's medical history," and required that "tissue bank[s] must provide, at no cost, the donor's medical information to the recipient of the donor tissue [or an otherwise appropriate person]."[43] H.R. 8307 was referred to the House Committee on Energy and Commerce[44] on the same day it was introduced in the House, but the bill died in committee after no further action was taken.[45]

B. State Regulation of ART: The Tale of Three States

In absence of federal laws and regulations that protect Americans, states may choose to legislate to fill those gaps and provide meaningful protection to their citizens.[46] Currently, seven

42. In a recent survey of 36 sperm banks, 31 self-reported that they conducted some sort of genetic screening, and 26 self-reported they conducted some sort of psychological evaluation, but prospective parents, medical professionals, or governmental agencies have no way to verify that these screenings and evaluations actually occurred. *See 2022 Sperm Bank Data Survey*, U.S. DONOR CONCEIVED COUNCIL 13–14 (Apr. 25, 2023), https://www.usdcc.org/wp-content/uploads/2023/04/Sperm-Bank-Survey_2022.pdf.

43. Cong. Rsch. Serv., *H.R.8307 – Steven's Law*, CONG.GOV, https://www.congress.gov/bill/117th-congress/house-bill/8307?s=1&r=18 (last visited June 22, 2024); *see* H.R. 8307, 117th Cong. (2022).

44. The House Committee on Energy & Commerce is responsible for all matters related to food and drug safety. *About*, ENERGY & COM., https://energycommerce.house.gov/about (last visited June 22, 2024). As discussed *supra* pt. II.A., federal regulation of gamete banks is largely done by the U.S. Food and Drug Administration.

45. *See* Cong. Rsch. Serv., *supra* note 43.

46. *See generally* U.S. CONST. amend. X ("[P]owers not delegated to the [federal government] by the Constitution, nor prohibited by it to the States, are reserved to the States. . . ."); Kellen Norwood, *Federal Preemption of State and Local Law in* MUNICIPAL LAW DESKBOOK 1, 6–15 (William J. Scheiderich ed., 2015) (discussing the Supremacy Clause, Dormant Commerce Clause, preemption, and when states can regulate in absence of federal regulation).

states have an additional regulatory scheme in place for cryobanks.[47] Most of these states require licensure for cryobanks or specific testing requirements.[48] Out of those seven, three—Colorado, California, and New York—go beyond licensure and testing in their enacted regulatory schemes.[49] Bills introducing additional regulation are currently pending in the New York, Minnesota, and Vermont state legislatures.[50]

Of the three states with enacted legislation beyond some form of licensure and/or additional testing requirements, only Colorado has enacted comprehensive regulation of the cryobank industry.[51] On May 31, 2022, Colorado Governor Jared Polis signed into law Senate Bill 22-224, better known as the Protection for Donor-Conceived Persons and Families Act.[52] Colorado was lauded for the novelty and breadth of this bill,[53] but the novelty and breadth also

47. *See Gamete Industry Regulation*, U.S. DONOR CONCEIVED COUNCIL, https://www.usdcc.org/gamete-industry-regulation/ (last visited July 27, 2024).

48. *See generally id.* Delaware, Illinois, and Maryland require tissue banks, including cryobanks, to either obtain a permit or license to operate within the state or to register with the state and require some sort of additional testing for HIV and/or additional sexually transmitted diseases. *See* DEL. CODE ANN. tit. 16, § 2801 (2024) (requiring sperm banks to register and requiring HIV testing for tissue donations prior to injection, transfusion, or transplant into the recipient); 20 ILL. COMP. STAT. 2310/330 (2024) (same); MD. CODE ANN., HEALTH–GEN. § 17-305 (West 2024) (requiring tissue banks, including cryobanks, to obtain a permit to operate); MD. CODE REGS. 10.50.01.11 (2023) (requiring testing similar to that required under federal regulations for all donors, and additional similar testing for gamete donors). Oregon requires only that tissue banks register with a state agency prior to operation within the state. *See* OR. REV. STAT. § 441.082 (2023).

49. *See Gamete Industry Regulation*, *supra* note 47. This is not to discount the importance of licensure or specific testing requirements; however, these regulations provide minimal protection or remedy for consumers. Rather, they marginally expand on what the CMS and the FDA require and add a state-specific penalty for non-compliance. *See* sources cited *supra* note 48.

50. *See generally Gamete Industry Regulation*, *supra* note 47; S.B. S2122, 2023–24 Leg., Reg. Sess. (N.Y. 2023) (requiring cryobanks to verify medical history provided by donor and make that history available to prospective parents prior to purchase of gamete cells); S.B. S7749, 2023–24 Leg., Reg. Sess. (N.Y. 2023) (creating a comprehensive regulatory scheme, similar to, and in some ways stronger than, Colorado's recent legislation); S.B. S5107C, 2023–24 Leg., Reg. Sess. (N.Y. 2023) (outlining requirements for surrogacy agreements); H. File 3567, 93rd Leg., Reg. Sess. (Minn. 2024) (requiring cryobanks to provide donor-conceived children access to nonidentifying medical history when the child reaches the age of majority, among other provisions); H.B. 777, 2023–24 Gen. Assemb., Reg. Sess. (Vt. 2024) (creating a comprehensive regulatory scheme similar to Colorado's recent legislation)

51. *See generally Gamete Industry Regulation*, *supra* note 47.

52. *See SB22-224 Protections for Donor-Conceived Persons and Families*, COLO. GEN. ASSEMB., https://leg.colorado.gov/bills/sb22-224 (last visited July 21, 2024).

53. *See, e.g.*, Sam Tabachnik, *Colorado Becomes First State to Ban Anonymous Sperm and Egg Donations*, THE DENV. POST (June 1, 2022, 3:58 PM), https://www.denverpost.com/2022/06/01/colorado-donor-conceived-persons-protection-act/; *Making History: Colorado SB 22-224*, U.S. DONOR CONCEIVED COUNCIL (May 13, 2022), https://www.usdcc.org/2022/05/13/making-history-colorado-sb224/; *LGBTQ Advocates Praise Balanced Approach*

led to uncertainty.[54] SB 22-224's provisions will take effect on January 1, 2025, and only apply to gamete cells collected on or after that date.[55]

Under the new law, anonymous donor conception is prohibited—if a donor-conceived person above the age of eighteen (or a legally emancipated minor) requests identifying information on their donor, the cryobank *must* provide it.[56] Donors cannot opt-out of their information being shared upon the child reaching adulthood, and these anonymity requirements extend to any reproductive cell bank providing donor gamete cells to recipient-parents located in or residents of Colorado, even if the reproductive cell bank is located outside of Colorado.[57]

Further, SB 22-224 requires cryobanks to collect the medical history of a donor and "make a good faith effort to maintain current contact information and updates on the medical history of the donor by requesting updates from the donor at least once every three years"[58] and sets the minimum age for donation at twenty-one.[59] Additionally, the law provides a cap of twenty-five families per donor,[60] as recommended by the ASRM.[61] While this provision has been one of the most widely approved, it also spurred widespread concerns over compliance.[62] The law provides that cryobanks must make a good-faith effort to keep track of how many parents are successful in having at least one living child born from each donor by "requiring recipients, as a condition of receiving donor gametes, to provide information on live births . . . requesting

in Colorado Bill Allowing People Conceived via Assisted Reproduction Access to Limited Donor Information, GLAD (May 11, 2022), https://www.glad.org/advocates-praise-colorado-bill-allowing-donor-conceived-people-access-to-limited-donor-info/.

54. *See* Ellen Trachman, *Colorado Is Poised to Pass a Groundbreaking Donor-Conceived Person Protection Act*, ABOVE THE L. (May 4, 2022, 1:23 PM), https://abovethelaw.com/2022/05/colorado-is-poised-to-pass-a-groundbreaking-donor-conceived-person-protection-act/ (expressing concerns that the bill will decrease access to ART and increase cost associated with ART, that the bill may be impossible to comply with, and that the bill might trigger constitutional and privacy related questions).

55. *See, e.g.*, COLO. REV. STAT. §§ 25-57-104 to -106 (2023).

56. *Id.* § 25-57-106.

57. *Id.* §§ 25-57-105 to -106.

58. *Id.* § 25-57-104.

59. *Id.* § 25-57-109.

60. *Id.*

61. *See Guidance on Gamete Donation*, *supra* note 41.

62. *See* Trachman, *supra* note 54.

information from recipients on live births, and using industry best practices."[63]

Any cryobank that violates any provision of the new law may be subject to a civil penalty, not more than $20,000, as assessed by the Colorado Board of Health.[64] There is still quite a bit of uncertainty around the implementation of this bill,[65] and there are still holes in the regulatory scheme,[66] but Colorado is looking to lead the charge of state regulation of fertility techniques in the coming years.

Contrasting Colorado's robust regulatory scheme, California has enacted additional provisions on informed consent requirements for tissue banks but did not expand beyond this additional requirement.[67]

Although the New York Legislature continues to push to expand the state's regulation of the donor conception industry and cryobanks, currently, state regulations impose additional donor qualifications,[68] requirements for informed consent,[69] and requirements for record retention.[70] While the additional donor qualifications largely do not disqualify donors with an individual or family history of certain genetic concerns, they do require cryobanks to note any indications of these genetic concerns and communicate the risks associated with the genetic concerns to any

63. § 25-57-109. Industry best practices include using different calculations to determine how many live births were *not* reported, despite requiring that information and asking for that information, and taking those live births into consideration in calculating the cap. *Id.*

64. *Id.* § 25-57-110.

65. The bill provides that rules necessary for implementation shall be promulgated by January 1, 2024. *Id.* § 25-57-111. Draft rules have been published for feedback and will be presented to the Colorado Board of Health for approval on September 18, 2024. *See Gamete Bank and Fertility Clinic Program*, COLO. DEP'T OF PUB. HEALTH & ENV'T, https://cdphe.colorado.gov/gamete-bank-fertility-clinic-program (last visited July 22, 2024); Draft Rules Implementing the Protection for Donor-Conceived Persons and Families Act, COLO. DEP'T OF PUB. HEALTH & ENV'T, https://drive.google.com/file/d/11WMr8JpHYw82azWotBEc32vXDfG_jus6/view (last visited July 27, 2024).

66. This bill does not require any psychological evaluations, nor does it require banks to verify self-disclosed medical information. *See SB22-224 Protections for Donor-Conceived Persons and Families*, *supra* note 52. Because the bill is limited to donor cells collected after January 1, 2025, it does not protect those conceiving or conceived prior to that date. *Id.* Additionally, there is no mechanism for donor-conceived families to seek remedy. *See id.*

67. *See* CAL. BUS. & PROF. CODE § 2260 (West 2024) (outlining informed consent necessary for gamete donation).

68. *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 52-8.5 (2024).

69. *See id.* tit. 10, § 52-8.8.

70. *See id.* tit. 10, § 52-8.9 (requiring retention of donor family history, donor and recipient-parent informed consent, outcome of procedures, and director approval of acceptability of donor).

recipient-parents.[71] Notably, the regulations list "autosomal dominate or X-linked [genetic] disorders for which the age of onset extends beyond the age of the donor" and autosomal recessive disorders, as well as a "known history of alcohol abuse" as concerns which would trigger this increased scrutiny and communication of risk factors to recipient-parents.[72] While not a comprehensive regulatory scheme, New York's additional donor qualifications, informed consent requirements, and record retention requirements are meaningful steps in the right direction.[73]

While Colorado's bill is a long way from being understood and replicated in other states, and bills in New York and Vermont face uphill battles in being enacted, this legislation reflects increased scrutiny of the fertility industry and a shift in attitude towards regulation of fertility techniques.

III. AN UNEXPECTED ROUTE TO REMEDY

In 2002, Wendy Norman gave birth to her son, A.A., with the help of Xytex Donor 9623. Throughout the donation process, Xytex "represented that it carefully screened the personal health, criminal history, and family history of all donors; that donors were put through rigorous physical exams and interviews to confirm the accuracy of the information donors provided; and that . . . fewer than five percent of candidates became donors."[74] In actuality, Xytex never asked Donor 9623 to "verify his answers, supply his medical records, or sign a [medical records] release," and a Xytex employee actually encouraged him to exaggerate his IQ and education.[75]

Ultimately, A.A. was diagnosed with ADHD and an inheritable blood disorder, of which Wendy Norman was not a

71. tit. 10, § 52-8.5.

72. *Id.*

73. These recommendations are in line with the ASRM recommendations discussed *infra* pt. III.B.2 that many of these donors be screened out, and that donors with ADHD permitted on a case-by-case basis where recipient-parents are warned of the strong genetic correlation of ADHD. *Guidance on Gamete Donation*, *supra* note 41, at 1405. Alcohol dependency has a similar genetic correlation to ADHD. *See* Erica Slaughter, *Genetics and Alcoholism: Is Alcoholism Genetic or Hereditary*, AM. ADDICTION CTRS., https://americanaddictioncenters.org/alcohol/hereditary-genetic (Mar. 8, 2024); Devon Jackson, *Study Reveals Genetic Risk Factors Associated with ADHD*, ADDITUDE (Apr. 11, 2022), https://www.additudemag.com/genetic-risk-factors-adhd-study/.

74. Norman v. Xytex, 848 S.E.2d 835, 837 (Ga. 2020).

75. *Id.*

carrier, and "regularly has suicidal and homicidal ideations."[76] In 2017, A.A. discovered that his donor had been previously diagnosed with schizophrenia, narcissistic personality disorder, and delusions.[77] Subsequently, the Normans brought suit against Xytex.[78] On appeal of a summary judgment dismissal, the Georgia Supreme Court allowed claims *related* to the birth of the child and held claims that are barred because they derive from a person's life (*i.e.*, wrongful birth) "do not create blanket immunity for reproductive service providers."[79] However, this result is uncommon,[80] and prior to trial, the Normans filed a dismissal with prejudice.[81] Often, recipient-parents and children are left without tort remedy, but sales law may provide an unexpected route to remedy.[82]

A. When the "Goods" Are a Good: Donor Gametes as Article 2 Goods

Every state other than Louisiana has adopted some variance of Article 2 of the Uniform Commercial Code ("UCC").[83] Meaning,

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76. *Id.* at 838.

77. *Id.*

78. *Id.* at 837.

79. *Id.* at 842.

80. *See* Final Order Granting Defendants' Motion to Dismiss at 1–3, Collins v. Xytex Corp., No. 2015CV259033, 2015 WL 6387328 (Ga. Super. Ct. Oct. 20, 2015) [hereinafter Final Order] (dismissing comparable claims arising out of a similar transaction); *see also* Opinion and Order on Defendants' Motion to Dismiss, Doe v. Xytex Corp., No. 1:16-CV-1729, 2017 WL 1036485 (N.D. Ga. Mar. 17, 2017) (same); Zelt v. Xytex, 766 F. App'x 735, 741 (11th Cir. 2019) (affirming dismissal of claims arising out of a similar transaction).

81. Dismissal with Prejudice, Norman v. Xytex Corp., No. 2017CV298536 (Ga. Super. Ct. Oct. 6, 2023).

82. This Article focuses on sales law as it relates to the UCC and Article 2 goods. The characterization of donor gametes as consumer goods, such that the Magnuson-Moss Act would extend additional protections, is outside the scope of this Article; however, the Magnuson-Moss Act exhibits a federal policy against disclaimer of warranties when dealing with consumers. *See Businessperson's Guide to Federal Warranty Law*, FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/resources/businesspersons-guide-federal-warranty-law (last visited Oct. 5, 2024); *cf.* 15 U.S.C. § 2308(a) (limiting disclaimer of implied warranties). If gametes were classified as consumer goods under Magnuson-Moss, the Act would dictate that prevailing party attorney's fees and increased privity in breach of warranty litigation be available to litigants. *See* §§ 2310(d)(2) (providing a statutory basis for a prevailing consumers' attorneys' fees), 2310(5) ("The term 'warrantor' means any supplier or other person who gives or offers to give a written warranty or who may be obligated under an implied warranty."); *see also 12 Reasons to Love the Magnuson-Moss Warranty Act*, 11 J. TEX. CONSUMER L. 127, 128, http://www.jtexconsumerlaw.com/V11N3/JCCL_Magnuson.pdf.

83. *See Litigation, Comparison Table – Uniform Commercial Code Articles by State*, BLOOMBERG L., https://www.bloomberglaw.com/document/X5RPB9SS000000 (last visited

in forty-nine states, the sale of goods is governed by some form of Article 2 of the UCC.[84] At first glance, the contract between a cryobank and recipient-parents might not appear to be a contract for goods. The recipient-parents are doing business with the donor reproductive bank with the intention and goal of having a child; however, it is important to highlight how the UCC defines "goods" under Article 2 and focus on the details of the transaction that occurs.

In the context of donor conception, the purchase of donor gametes occur *after* the cells have been collected and put into storage of some sort.[85] At this point, the donor gametes have been collected, tagged with identifying information, and stored—they are movable at the time of identification to the contract (the purchase). They do not resemble any of the categories that are explicitly excluded from Article 2's definition of goods: money to be paid, investment securities, or things inaction.[86] Additionally, there is no service provided by the bank, beyond packing and shipping the vials, and those incidental services do not defeat UCC applicability.[87]

In 2022, the Uniform Law Commission approved amendments to the UCC to address and "accommodate emerging

July 27, 2024); *What Is the Uniform Commercial Code?*, LA. SEC'Y OF STATE, https://www.sos.la.gov/BusinessServices/UniformCommercialCode/WhatIsUniformCommercialCode/Pages/default.aspx (last visited July 27, 2024).

84. U.C.C. § 2-102 (AM. L. INST. & UNIF. L. COMM'N 2022) ("[T]his Article applies to transactions in goods. . . ."); *see also, e.g.*, Allied Shelving & Equip., Inc. v. Nat'l Deli, LLC, 154 So. 3d 482, 483 (Fla. 3d Dist. Ct. App. 2015) ("[T]he UCC applies only to transactions in goods . . . .").

85. *See, e.g.*, *Sperm Donor Search*, XYTEX CORP., https://www.xytex.com/search-donors (last visited July 27, 2024) (color-coordinating the amount of vials still in the bank's possession); *Specimen Information*, FAIRFAX CRYOBANK, https://fairfaxcryobank.com/specimen-information (last visited July 27, 2024) (listing the types of vials offered and the number of motile cells per milliliter); *Choosing Your Donor*, CAL. CRYOBANK, https://www.cryobank.com/how-it-works/choosing-your-donor/ (last visited July 27, 2024) (listing how the donor process works).

86. § 2-105.

87. *Cf.* Propulsion Techs., Inc. v. Attwood Corp., 369 F.3d 896, 902 (5th Cir. 2004) ("[J]urisprudence has considered contracts for production and delivery to be transactions predominately in 'goods.'"). As of May 13, 2024, twenty-nine states had introduced the amendments and of those states, twenty-one had enacted them, but this pattern is not uncommon. *See UCC, 2022 Amendments to*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=1457c422-ddb7-40b0-8c76-39a1991651ac (last visited July 27, 2024); *see, e.g.*, *UCC Article 9, Secured Transactions, Amendments to*, UINF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=16acd023-5df6-4857-be45-46fc988cdb18 (click "Bill List") (last visited July 27, 2024) (detailing enactment across all 50 states over a five-year period following promulgation of amendments to Article 9).

technologies."[88] These amendments created an official definition for "hybrid transaction," that is a transaction including both the sale of goods and some other common law governed transaction (usually services).[89] Prior to the amendments, most courts applied a "predominant purpose" test to determine whether common law or the UCC would apply to the transaction, whereby the UCC applied if the parties' main goal for the transaction was to buy/sell the goods, and the services were incidental; however, common law applied if the parties' main goal for the transaction was for the services rendered, and the goods were incidental.[90] Under the new test, Article 2 applies to the parts of the transaction that involve the sale of goods.[91] Regardless, under either test, the conclusion remains the same: the UCC would govern the sale transaction for donor gametes.

When asked to give an example of what is a "good," one might easily list books, shoes, or even a laptop. In fact, when looking up "goods" in the dictionary, one will inevitably come across the word "thing," strengthening the idea that goods are commercially made and sold items of personal property that are freely exchanged in commerce.[92] Even so, the definition of goods under Article 2 is expansive.[93] "Generally, under the UCC, 'goods' has a very extensive meaning and embraces every species of property which

88. U.C.C. Prefatory Note at 3 (AM. L. INST. & UNIF. L. COMM'N 2022).

89. *Compare* U.C.C. § 2-106 (AM. L. INST. & UNIF. L COMM'N 2018) (amended 2022) ("Definitions: 'Contract'; 'Agreement'; 'Contract for Sale'; 'Sale'; 'Present Sale'; 'Conforming' to Contract; 'Termination'; 'Cancelation'."), *with* U.C.C. § 2-106 (AM. L. INST. & UNIF. L COMM'N 2022) ("Definitions: 'Contract'; 'Agreement'; 'Contract for Sale'; 'Sale'; 'Present Sale'; 'Conforming' to Contract; 'Termination'; 'Cancelation'; 'Hybrid Transaction'.").

90. *See, e.g.*, BMC Indus., Inc. v. Barth Indus., Inc., 160 F.3d 1322, 1329 (11th Cir. 1998). In amending the UCC, the Uniform Law Commission adopted a two-tier approach, incorporating both the predominate purpose test and the bifurcation approach. *See* U.C.C. § 2-102 cmt. 2 (AM. L. INST. & UNIF. L. COMM'N 2022).

91. *See* § 2-102.

92. *See* Definition 3 of *Goods* (noun), MERRIAM-WEBSTER: DICTIONARY, https://www.merriam-webster.com/dictionary/goods#dictionary-entry-2 (last visited July 27, 2024) (providing multiple definitions of "good" including "something that has economic utility or satisfies an economic want . . . [goods, plural]: personal property having intrinsic value but usually excluding money, security, and negotiable instruments . . . [goods, plural]: something manufactured or produced for sale . . . ."); *Goods*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/goods ("[T]hings for sale, or things that you own . . . .") (last visited July 27, 2023).

93. *See generally* Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 580 (7th Cir. 1976) ("We find ample support . . . that the scope of coverage of 'goods' is not to be given a narrow construction but instead should be viewed as being broad in scope . . . ."); Propulsion Techs., Inc. v. Attwood Corp., 369 F.3d 896, 900 (5th Cir. 2004) ("This definition [of goods] is broad.").

is not real estate, choses in action, or investment securities or the like."[94] In fact, donor gametes are often treated like personal property under the law.[95] The UCC itself specifically includes "unborn young of animals and growing crops," like fruit and hay.[96] Additionally, courts are liberal in interpreting the definition of goods, finding everything from airplanes, boats, and gasoline, to intangibles such as electricity, to qualify as goods under the UCC.[97]

While seemingly obsolete in today's age of cloud computing, the question of whether computer software was an Article 2 good vexed courts for the last quarter of the twentieth century.[98] In a notable 1991 case, the Third Circuit articulated an analogy to support its conclusion that computer software[99] was an Article 2 good: something that is produced in a way in which it would not be

94. Duffee v. Judson, 380 A.2d 843, 846 (Pa. Super. Ct. 1977).

95. *See* Am. Fertility Soc'y, *Ethical Statement on in Vitro Fertilization*, 46 FERTILITY & STERILITY app. at 89S (Supp. 1 1986) ("It is understood that the [reproductive cells] and [embryos] are the property of the donors."); Kurshner v. State Farm Fire & Cas. Co., 858 So. 2d 1220, 1221 (Fla. 3d Dist. Ct. App. 2003) ("Florida Statutes that govern the donation and disposition of sperm recognize that sperm removed from the body becomes property."); Hecht v. Superior Ct., 20 Cal. Rptr. 2d 275, 281–83 (2d Dist. Ct. App. 1993) (finding donor cells to be property within the meaning of the California Probate Code).

96. U.C.C. § 2-105 (AM. L. INST. & UNIF. L. COMM'N 2022); *id.* cmt. 1; *see, e.g.*, Mogan v. Cargill, Inc., 856 P.2d 973, 975 (Mont. 1993) ("Contracts for the sale of wheat come within the definition of "goods" and are governed by the provisions of the Uniform Commercial Code for sales . . . ."); Bornstein v. Somerson, 341 So. 2d 1043, 1044 (Fla. 2d Dist. Ct. App. 1977) (applying Article 2 to the sale of citrus crops); *see also, e.g.*, Two Rivers Co. v. Curtiss Breeding Servs., 624 F.2d 1242, 1243 (5th Cir. 1980) (applying UCC law to a breach of warranty claim for bull semen); Frank T. Becker, *Non-Uniform Statutes Governing the Sale of Horses*, 8 KY. J. EQUINE AGRIC. & NAT'L RES. 1, 2 (2015) (noting that Article 2 applicability to contracts involving bull sperm "seems to depend on whether the sperm will ever be transported separately from an animal," for example during artificial insemination).

97. *See, e.g.*, McCollum Aviation, Inc. v. CIM Assocs., 446 F. Supp. 511, 513 (S.D. Fla. 1978) (finding the sale of an airplane was a sale of goods, governed by Article 2); Puamier v. Barge BT 1793, 395 F. Supp. 1019, 1029 (E.D. Va. 1974) (acknowledging precedent that ships are Article 2 goods); Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433, 440 (W. Va. 1976) ("[I]t is clear that what is involved is a transaction in goods (petroleum products) which is governed by the Uniform Commercial Code . . . ."); Helvey v. Wabash Cnty. REMC, 278 N.E.2d 608, 610 (Ind. 1st Dist. Ct. App. 1972) (finding electricity was a good under Article 2); *see also* Dakota Pork Indus. v. City of Huron, 638 N.W.2d 884, 886 (S.D. 2002) (finding that water is an Article 2 good); *Propulsion Techs., Inc.*, 369 F.3d at 902–03 (5th Cir. 2004) (finding unfinished products "plainly encompass[ed]" in the Article 2 definition of goods).

98. *See generally* Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 676 (3d Cir. 1991); David A. Owen, *The Application of Article 2 of the Uniform Commercial Code to Computer Contracts*, 14 N. KY. L. REV. 277 (1987); Andrew Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply*, 35 EMORY L.J. 853 (1986).

99. The court defined software as "the medium that stores input and output data, as well as computer programs," and explicitly included "hard disks, floppy disks, and magnetic tapes." *Advent Sys. Ltd.*, 925 F.2d at 674.

a good can readily become a good.[100] In the Third Circuit's context, computer programs were abstract and created by an intellectual process, and thus appeared not to be goods; however, once the program was loaded onto a floppy disc (or for those in the 21st century, a flash drive), the program readily becomes an Article 2 good.[101] In the context of donor reproduction, donor gametes are not ordinarily goods—they are created through biological and physiological processes and typically only exist within biological and physiological contexts—however, when they are donated and stored at a gamete bank, they are being loaded onto the metaphorical floppy disk, and become Article 2 goods.

Despite this, a court may still hold that Article 2 does not apply because donor gametes are of a unique kind,[102] especially given the recent legislative and jurisprudential trends toward expanding the legal definition of when human life begins.[103] In examining this argument, legislation, regulation, and policies surrounding blood transfusion provide insight. Some courts have held that the transaction between hospitals and blood banks is governed by the UCC as a sale of goods.[104] However, most

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100. *See id.* at 675. For example:

> Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.

Id.

101. *Id.*

102. *See* Moore v. Regents of Univ. of Cal., 793 P.2d 479, 489 (Cal. 1990) (en banc) (opining that "the laws governing such things as human tissues . . . deal with human biological materials as objects sui generis"); *cf.* Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 596 (2013) (finding that genes were not patentable because of their intrinsic natural properties). *But see* Diamond v. Chakrabarty, 447 U.S. 303, 318 (1998) (finding that a bacterium unlike anything found in nature was patentable).

103. *See, e.g.*, OKLA. STAT. tit. 63, § 1-730 (2023) (including embryos and zygotes in the definition of "unborn child"); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022) (recognizing that states have a legitimate interest in the "preservation of prenatal life at all stages of development"). Following *Dobbs*, many states passed similar legislation to Oklahoma, which led to concerns about the future of ART and other fertility treatments. *See* Erin Heidt-Forsythe et al., Roe *Is Gone. How Will State Abortion Restrictions Affect IVF and More?*, WASH. POST (June 25, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/06/25/dodds-roe-ivf-infertility-embryos-egg-donation/; Shery F. Colb, *In Vitro Fertilization and* Dobbs, DORF ON L. (May 19, 2022), https://www.dorfonlaw.org/2022/05/in-vitro-fertilization-and-dobbs.html.

104. *See, e.g.*, Jackson v. Muhlenberg Hosp., 232 A.2d 879, 884 (N.J. Super. Ct. Law. Div. 1967), *rev'd on other grounds*, 249 A.2d 65 (N.J. 1968); Hoder v. Sayet, 196 So. 2d 205, 208

jurisdictions have blood shield statutes in place.[105] These statutes make the transfer of blood from one entity to another entity a per se service, despite any consideration exchanged.[106] For many states, these statutes exist within the state's UCC and are not reflective of the fact that blood is a human biological product, nor that blood is essential to human life.

As an example, in Florida, characterizing the sale of blood a per se service serves to "eliminat[e] actions for strict liability against blood banks."[107] Florida's blood shield statute is found in Section 672.316 of the Florida Uniform Commercial Code, labeled "Exclusion or modification of warranties,"[108] rather than Section 672.102, "Scope; certain security and other transactions excluded from this chapter,"[109] or Section 672.105, "definitions: transferability; "goods"; "future goods"; "lot"; "commercial unit."[110] If blood was characterized as a good because it was a human biological product of its own kind, one might expect to see it excluded from the scope of the chapter on sales. If blood was characterized as a service because the Florida legislature truly intended for selling blood to be a service, one might expect the provision articulating that idea to appear in the goods definition section, wherein other things that might otherwise be characterized as goods are excluded.[111] In fact, the Florida Supreme Court has opined that "[t]here is no evidence to suggest that the legislature intended . . . [the] legal fiction . . . that selling

(Fla. 3d Dist. Ct. App. 1967) (holding that "a blood bank which supplied blood to a patient for a consideration *has* made a 'sale'").

105. *See* Daniel Brettler, *Blood Shield Statutes: Origins, Applications and Emerging Implications*, CONNOR STRONG & BUCKELEW (May 22, 2023), https://www.connerstrong.com/wp-content/uploads/2022/04/1718CSB-Blood-Shield-Whitepaper-2022_3.pdf; FLA. STAT. § 672.316(6) (2023). By the mid-80s, only New Jersey, the District of Columbia, Rhode Island, and Vermont did not have blood shield statutes on the books. *See* INST. OF MED., DIV. OF HEALTH PROMOTION AND DISEASE PREVENTION, COMM. TO STUDY HIV TRANSMISSION THROUGH BLOOD AND BLOOD PRODUCTS, HIV AND THE BLOOD SUPPLY: AN ANALYSIS OF CRISIS DECISION MAKING 2, 48 (Lauren B. Leveton et al. eds. 1995) [hereinafter HIV AND THE BLOOD SUPPLY].

106. *See* sources cited *supra* note 105.

107. Silva v. Sw. Fla. Blood Bank, Inc., 601 So. 2d 1184, 1188 (Fla. 1992); *see also* Walls v. Armour Pharm. Co., 832 F. Supp. 1467, 1473 (M.D. Fla. 1993) ("The Florida legislature undoubtably had specific public policy reasons for taking these actions to protect blood banks that were supplying blood at a time when they presumably had no way of knowing whether the blood contained a defect.").

108. FLA. STAT. § 672.316 (2023).

109. *Id.* § 672.102.

110. *Id.* § 672.105.

111. *Id.* (excluding "money in which the price is to be paid, investment securities . . . and things in action" in the definition of "goods").

blood is a 'service' rather than a 'sale'" in any context, other than for the purposes of eliminating liability on an implied warranty theory.[112] Notably, blood shields do not prevent blood from being a good in other contexts, such as tax law, because these shields are in place only to further their specific policy goals, not to set blood apart as a unique human biological product in a class of its own.[113]

The policies supporting blood shield statutes often do not apply to donor gametes. To make this determination, it is important to note *when* and *why* blood shield statutes were originally passed.[114] Florida, for example, originally passed its blood shield statute in 1969, following a 1967 Florida Supreme Court case, *Community Blood Bank v. Russell*.[115] There, the Supreme Court of Florida found that the District Court of Appeals was "eminently correct in" holding that the plaintiff had a cause of action for breach of the implied warranty of merchantability against a blood bank for supplying diseased blood.[116]

The Florida legislature found that blood transfusions were a "desirable and necessary medical service," but transfusions involved "a known but reasonable risk."[117] Given the important nature of blood transfusions in life saving procedures, the Florida legislature stressed that the continued "operation of community and private blood banks provide[d] . . . a service which might otherwise have to be provided by the State."[118] Further, the

112. *Silva*, 601 So. 2d at 1188.

113. *See* Parkridge Hosp., Inc. v. Woods, 561 S.W.2d 754, 755 (Tenn. 1978) (finding that Tennessee's blood shield statute did not exclude human blood from sales tax); Green v. Comm'r, 74 T.C. 1229, 1234 (T.C. 1980) (classifying blood as property for purposes of the tax code and finding payment for blood donations to be a sale of a product (petitioner's blood) subject to income tax because "[a] tangible product changed hands at a price"); *see also* United States v. Garber, 607 F.2d 92, 100 (5th Cir. 1979) (Hill, J., concurring) ("I conclude that the [payment for blood donations] under investigation . . . [were taxable] . . . [and] I should have preferred that the court say so in positive terms."). *See generally* Bridget J. Crawford, *Our Bodies, Our (Tax) Selves*, 31 VA. TAX REV. 695, 710–717 (2012) (surveying the law regarding taxation of gametes).

114. For a discussion of how and when blood shield statutes evolved throughout the states, see generally Kristin Garcia, *A Brief History of Blood Transfusion Through the Years*, STAN. BLOOD CTR. (Mar. 10, 2016, 5:11 PM), https://stanfordbloodcenter.org/a-brief-history-of-blood-transfusion-through-the-years/.

115. *See* 1969 Fla. Laws 717–19 (implementing Senate Bill 63).

116. Cmty. Blood Bank v. Russell, 196 So. 2d 115, 117 (Fla. 1967); *see also* 1969 Fla. Laws 718 ("[T]he Supreme Court of Florida has reasoned and held that the law of sales may apply to certain aspects of the rendering of [blood transfusions].").

117. 1969 Fla. Laws 717–18.

118. *Id.* at 718; *see also* HIV AND THE BLOOD SUPPLY, *supra* note 105, at 223 ("Blood-product-related injuries have . . . been removed from the scope of strict liability law by blood shield laws . . . which protect society's interests in having an adequate blood supply.").

legislature found that blood transfusions are "more often than not done under circumstances [where] persons involved do not have the capacity or opportunity to contract."[119] In other words, the Florida legislature wanted to protect a vital resource that was instrumental in saving lives in emergencies, as well as in treatments for certain conditions, like hemophilia.[120] The emergence of the AIDS epidemic in the 1980s and 1990s instilled fear around the blood supply, strengthening the need for protective legislation.[121]

Today, most states provide a shield for both blood and "human tissue and organs for human transplant by an institution qualified for such purposes."[122] In providing the specific examples of both blood and transplant tissue, legislatures send a clear message that medical shield statutes are designed to protect those human products that are transplanted or transfused into a recipient patient in order to save that recipient patient's life.[123] In sum, these blood shields are in place to further specific policy goals, not to set blood apart as a unique human biological product in a class of its own.

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119. 1969 Fla. Laws 718.

120. HIV AND THE BLOOD SUPPLY, *supra* note 105, at 48–49.

121. *See id.* at 2; Harvey J. Alter & Harvey G. Klein, *The Hazards of Blood Transfusion in Historical Perspective*, 112 BLOOD 2617, 2620 (2008). The fears specifically around the blood supply are evident in the regulations surrounding HCT/P donation and blood donation. *Compare supra* pt. II.A, *and* 21 C.F.R. § 1271.50 (2022) (providing less than half of a page on the requirements for HCT/P donors), *with id.* §§ 630.10, 630.15 (providing a total of seven pages on the general requirements for blood donors, in addition to more specific requirements for blood donors of whole blood, red blood cells, and plasma collected by apheresis).

122. FLA. STAT. § 672.316 (2023); *see also, e.g.*, GA. CODE ANN. § 11-2-316(5) (2023); VA. CODE ANN. § 32.1-97 (2024).

123. When interpreting statutes, courts will not add terms; terms are given their ordinary meaning; and the inclusion of one thing implies the exclusion of others. *See* LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 18 (2014). Florida amended its blood shield statute to include organs in 1984. 1984 Fla. Laws 1224. The Florida legislature amended the statute again in 1997 and in 2003, *see* 1997 Fla. Laws 267; 2003 Fla. Laws 1. By the mid-1980s, sperm banks had been in existence for a decade and artificial insemination was becoming increasingly more common. *See* Susan Dominus, *Sperm Donors Can't Stay Secret Anymore. Here's What That Means.*, THE N.Y. TIMES MAG. (June 26, 2019), https://www.nytimes.com/2019/06/26/magazine/sperm-donor-questions.html. In the 1990s, the AIDS epidemic had skyrocketed the marketability of donor sperm. *Id.* When amending the statute to include organs or in the subsequent amendments, the Florida legislature could have expanded the statutes to include all medical procedures or not included the provision on organs; however, it chose not to, indicating that the only tissue and human byproducts covered by the shield are those similar to blood and organs that are necessary to maintain or save human life.

In the context of donor conception, these policies are inapplicable. Society as a whole does not have an interest in having an adequate supply of reproductive cells; and if providers were disincentivized from providing donor gametes, there would not be an existential threat to human life. There would be no burden on the state to step in and provide that service. Unlike the emergent or lifesaving situations where blood transfusions occur, parties looking to transact for donor gametes have both the capacity and the ability to contract. Further, gamete cells are not explicitly included under Florida's blood shield statute. The conclusion that donor gamete cells should not be Article 2 goods is legal fiction.

B. Mean What You Say and Say What You Mean: Warranty Liability Under the UCC

Under common law, no implied warranties for the item or service being provided as consideration are typically provided.[124] The UCC, however, outlines how one creates an express warranty[125] and provides an implied warranty of merchantability[126] and an implied warranty of fitness of a particular purpose.[127] In order to disclaim certain warranties under the UCC, there are specific requirements that must be met.[128] One cannot simply say whatever they please and then maintain that no warranties are provided.[129]

1. Express Warranties Provided

Under the UCC, express warranties can be created in the absence of words such as "warrant" and "guarantee."[130] While

124. *Every* contract, whether governed by the UCC or by common law, includes an implied covenant of good faith and fair dealing. *See* 23 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 63:22 (4th ed. 2002); U.C.C. § 1-304 (AM. L. INST. & UNIF. L. COMM'N 2022). Contracts under common law also carry an implied promise to perform within reasonable time, an implied duty of reasonable care, and an implied promise not to interfere with the other party's performance. WILLISTON & LORD, *supra* § 63:24–:26.

125. § 2-313.

126. *Id.* § 2-314.

127. *Id.* § 2-315.

128. *Id.* § 2-316.

129. *Id.*; *see, e.g.*, Golden v. Den-Mat Corp., 276 P.3d 773, 795 (Kan. Ct. App. 2012) ("An express warranty once created generally cannot then be limited because, by definition it has become part of the agreed-upon contract or bargain."); Shutter Shop, Inc. v. Amersham Corp., 114 F. Supp. 2d 1218, 1231 (M.D. Ala. 2000) ("Express warranties cannot be disclaimed.").

130. *See* § 2-313; FLA. STAT. § 672.313 (2023).

parties are free to contract to the terms in which they please, a seller cannot create an express warranty and then disclaim it effectively.[131] While a "seller's opinion or commendation of the goods does not create a warranty," any affirmatively stated facts, promises, or description of the goods that then become a basis of the bargain do create an express warranty.[132] The commentary of the UCC reiterates that unless "good reason is shown to the contrary," statements by the seller that can "fairly be viewed as entering into the bargain" become part of the basis of the bargain.[133]

Most banks are similar in that they make some type of representations regarding their screening processes. Taking Xytex as an example, at the bank level, Xytex represents that it "evaluate[s] all donors for hereditary conditions using an extensive medical history questionnaire and carrier testing for 569 genetic conditions."[134] Xytex further represents that donors have testing and physical examination done to assess the donors overall health and undergo background checks and psychological evaluations.[135] On a donor level, Xytex represents physical characteristics from eye color to hair texture to body build.[136] Xytex even invites many of these qualifications—that it purports not to provide a warranty for—to become a basis of the bargain by allowing prospective parents to search by hair color, eye color, height, weight, and degree.[137] In doing so, Xytex describes the goods for sale and thus "cannot reduce [its] obligation with respect to such description."[138] Xytex is not alone in these practices, most—if not all—cryobanks purport to evaluate their donors in some way,[139] describe donors in

131. *See* § 2-313 cmt. 4 ("[A] contract is normally a contract for a sale of something describable and described. A clause generally disclaiming 'all warranties, express or implied' cannot reduce the seller's obligation with respect to such description and therefore cannot be [effective] under Section 2-316."); *infra* pt. III.B.4.

132. § 2-313.

133. *Id.* cmt. 8.

134. *Frequently Asked Questions: Our Qualifications*, XYTEX CORP., https://www.xytex.com/patient-information/frequently-asked-questions/ (last visited July 27, 2024) (click "Why choose Xytex?" under "Our Qualifications").

135. *See id.*; *2022 Sperm Bank Data Survey*, *supra* note 42, at 14–15.

136. *See, e.g.*, *Donor Profile: Donor 50070*, XYTEX CORP., https://www.xytex.com/donor/50070?rq=3 (last visited July 27, 2024) (describing the donor's brown eyes and wavy red hair and representing that the donor is seeking his bachelor's degree in finance).

137. *See Sperm Donor Search*, *supra* note 85.

138. *See* § 2-313 cmt. 4.

139. *See, e.g.*, *Donor Qualifications*, CAL. CRYOBANK, https://www.cryobank.com/how-it-works/donor-qualification (last visited July 27, 2024) (describing a lengthy donor screening process where "good isn't good enough," including a genetic screening, psychological

some way,[140] and invite recipient parents to rely on the information provided to make their decision in selecting a donor.[141]

One might argue that these statements simply amount to sales puffery, statements that constitute the seller's opinion or approval of the goods, which does not create an express warranty.[142] In determining whether a statement is sales puffery, such that no express warranty is created, courts will look at "whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on a matter of which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment."[143] Perhaps if cryobanks did not permit recipient-parents to search by certain characteristics or opined conspicuously that the bank *believed* these things to be true, it would amount to sales puffery; however, that is not the case.[144] Many banks *do* engage in sales

assessment, and criminal background check for each donor); *Donor Screening*, FAIRFAX CRYOBANK, https://www.fairfaxcryobank.com/donor-screening (last visited July 27, 2024) (claiming that less than 1% of applicants are accepted after the screening process, which includes a physical exam, a health questionnaire, medical and genetic testing, educational degree verification, a psychological evaluation, a criminal background check, and ongoing testing).

140. *See, e.g.*, *Donor Profile: Donor Number: 6726*, FAIRFAX CRYOBANK, https://www.fairfaxcryobank.com/search/donorprofile.aspx?number=6726&s=1 (last visited July 27, 2024) (describing the donor's blue eyes and straight brown hair and representing that the donor has an entry level IT degree and works as a support engineer); *Donor 18088*, CAL. CRYOBANK, https://www.cryobank.com/donor/18088/?position=5 (last visited July 27, 2024) (describing the donor's brown eyes and wavy black hair and representing that the donor has a master's degree in translation).

141. *See, e.g.*, *Donor Search*, FAIRFAX CRYOBANK, https://www.fairfaxcryobank.com/search (last visited July 27, 2024) (including height, ancestry, eye and hair color, education, and genetic screening amongst search categories and providing a "face match" search tool that will use facial recognition software to find donors whose photos match the searcher's facial features); *Donor Search*, CAL. CRYOBANK, https://www.cryobank.com/search (last visited July 27, 2024) (including height, hair and eye color, genetic testing, education level, ancestry, Jewish ancestry, religion, amongst search categories and providing a self-reported caveat *only* for ancestry and Jewish ancestry).

142. § 2-313(2); *see also* 3 DAVID FRISCH, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-313:135 (3d ed. 2013) ("[T]he mere expression by the seller of an opinion as to the character or quality of the goods sold does not necessarily amount to a warranty . . . .").

143. Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1100 (11th Cir. 1983) (quoting Royal Bus. Machs., Inc. v. Lorraine Corp., 633 F.2d 34, 41 (7th Cir. 1980)); *see also* FRISCH, *supra* note 142, § 2-313:138 (listing "the circumstances surrounding the sale, the reasonableness of the buyer believing the seller, the reliance placed on the seller's statement by the buyer, and whether the seller assumes to assert facts of which the buyer is ignorant, or" simply states an opinion or judgment about the product as relevant considerations).

144. A two-line paragraph in the middle of the terms of use in the sole location where Fairfax Cyrobank discloses family history is discussed, despite divulging the donor's medical history at length in other contexts. *See Donor Informational Products*, FAIRFAX

puffery: articulating in donor biographies that the donor is "a pretty well-rounded guy"[145] or that the donor is "a high school football hero (defensive MVP and all-star conference player)."[146] However, recipient-parents have no way to have an opinion or exercise judgment on donor genetic material, without the descriptions provided. The descriptions of the genetic material that the recipient-parents are buying are statements that "affect[] the true essence of the bargain," and thus constitute express warranties made by the gamete banks.[147]

For families like the Normans, when they read that a gamete bank completes comprehensive testing and screening of prospective donors, they believe the bank. When families read about a donor's physical appearance, health history, and advanced degrees, they rely on that information in their donor selection process,[148] hoping to have a child that resembles them and to give their child the best chance at success in life. Whether it is intended or not, cryobanks consistently create express warranties.

2. Implied Warranty of Merchantability

Among the unique characteristics and benefits of the UCC are the implied warranties available to buyers. One such warranty is the implied warranty of merchantability. This warranty provides that where the "seller is a merchant with respect to goods of that kind," the goods sold must be merchantable, meaning that they

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CRYOBANK, https://fairfaxcryobank.com/donor-information (last visited July 27, 2024); *Donor Profile: Donor Number: 6726*, *supra* note 140; *Terms of Use*, FAIRFAX CRYOBANK, at 3, https://fairfaxcryobank.com/wp-content/uploads/SM-003-F.002-Terms-of-Use_WEB_DS-3.pdf (Jan. 1, 2024). Xytex opines that a donor's medical history is self-reported in both a FAQ webpage and the Donor Sperm Services Agreement, but creates ambiguity on donor profiles, where it represents that the donor's family medical history (immediate, paternal, and maternal) is self-reported, but it *does not* include the same disclaimer for the donor's own medical history. *See Frequently Asked Questions*, *supra* note 134 (click "How does a man qualify to be a sperm donor for Xytex" under "Our Quality Standards"); *Donor Sperm Services Agreement*, XYTEX CORP. 3, https://www.xytex.com/wp-content/uploads/2023/05/9003.8-Rev-12.pdf (Dec. 14, 2022); *Donor Profile: Donor 40159*, XYTEX CORP., https://www.xytex.com/donor/40159?rq=0 (last visited July 27, 2024) (click "Immediate Family Medical History," "Paternal Family Medical History," "Maternal Family Medical History," and "Health Information").

145. *Donor Profile: Donor 40159*, *supra* note 144.

146. *Donor 17576*, CAL. CRYOBANK, https://www.cryobank.com/donor/17576/?position=9 (last visited July 27, 2024).

147. *See* U.C.C. § 2-313 cmt. 6 (AM. L. INST. & UNIF. L. COMM'N 2022).

148. Cyros Int'l Sperm Bank, *The Ultimate Guide to Choosing a Sperm Donor*, CYROS (Feb. 6, 2024), https://www.cryosinternational.com/en-gb/dk-shop/private/blog/choosing-a-sperm-donor/.

"pass without objection in the trade under the contract description . . . [and] are fit for the ordinary purpose for which such goods are used."[149] To be a merchant with respect to goods of that kind, the seller must regularly sell the kinds of goods that are the basis of the warranty at issue.[150]

There is little question that cryobanks are merchants with respect to donor gamete cells. While some cryobanks provide adjacent services, the predominate purpose these banks serve is to sell donor gametes to recipient-parents.[151] At first glance, the implied warranty of merchantability appears to provide a relatively low standard, requiring the goods to be no worse than average, but it is important to note the context that delineates this standard: the line of trade.[152]

Within the fertility industry, as in any medical profession, the standard of what is acceptable in the trade is not simply determined by what *has* been done or is *being* done, but rather, it is determined with an intersectional approach, considering binding laws and regulations, apprenticeship, and persuasive scholarship from national organizations.[153] In the fertility industry, the ASRM is an impactful national organization, and thus its standards and recommendations are an incredibly insightful source of persuasive scholarship.[154] Consequently, the recommendations and standards set by the ASRM should, at the

149. § 2-314.

150. *See id.* cmt. 3 ("A person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply."); Brandt v. Boston Sci. Corp., 792 N.E.2d 296, 300 (Ill. 2003) ("[A] merchant [requires] professional status as to a particular kind of goods.").

151. *See generally* Homepage, FAIRFAX CRYOBANK, https://fairfaxcryobank.com/ (last visited July 27, 2024) (focusing on sperm donor advertisement, although Fairfax also provides storage services); Homepage, CAL. CRYOBANK, https://www.cryobank.com/ (last visited July 27, 2024) (same).

152. § 2-314 cmt. 7. In fact, it is possible for the "no worse than average" standard to be raised if that is what the trade requires. *See id.* cmt. 6.

153. *See generally* Margje W.J. van de Wiel et al., *Exploring Deliberate Practice in Medicine: How Do Physicians Learn in the Workplace?*, 16 ADVANCES IN HEALTH SCIS. EDUC. 81, 84 (2011) (discussing how residents and physicians fill gaps in knowledge and skill); Scott H. Podolsky et al., *The Evolving Roles of the Medical Journal*, 366 NEW ENG. J. MED. 1457, 1457 (2012) ("[Medical journals] . . . define the scope of medical concerns and articulate norms for physicians' professional and social roles.").

154. See *supra* note 13 for a more detailed description of the ASRM. Recommendations and standards from national organizations, like the ASRM, function similarly to the Restatements in law. Doctors and nurses often give significant deference to the organization's recommendation in deciding how best to provide care, just like attorneys and judges often give significant deference to the Restatements when deciding how to craft their arguments or opinions.

very least, be highly persuasive in determining what constitutes no worse than average in the trade. The ASRM's most recent guidance suggests that donors should be at least 21, have genetic testing completed, and all screenings should conform to the "established standards of professional and ethical practice."[155] Donors with autosomal dominant or X-linked genetic conditions (those where a child only needs one copy of the gene to have the disease) or donors whose family history suggests undiagnosed autosomal dominate or X-linked diseases should be excluded, as should donors with other genetically linked diseases or disorders.[156]

Thus, if recipient-parents, like the Normans, found that their donor passed down an autosomal dominant condition to their donor-conceived child and the cryobank did not screen for that condition, the donor gametes would not pass without objection in the trade and would be a breach of the implied warranty of merchantability. The implied warranty of merchantability can provide a remedy where the cryobank had provided donor gametes that should have been excluded from use under ASRM guidelines.

3. Implied Warranty of Fitness for a Particular Purpose

Where the implied warranty of merchantability applies for goods' ordinary purpose, the implied warranty of fitness for a particular purpose applies for goods' extraordinary purposes.[157] This warranty provides that "[w]here the seller at the time of

155. *See Guidance on Gamete Donation*, *supra* note 41, at 1397, 1402. The ASRM's recommendations of screening include screening for cystic fibrosis, spinal muscular atrophy, and hemoglobinopathy carrier status, at minimum, and recommends expanded carrier screening using panethnic screening and "if carrier screening is performed using different panels . . . a professional should review the results to evaluate and disclose the reproductive risk." *Id.* at 1403. The genetic screening should be done by a "certified genetic counselor or a professional boarded by" the American Board of Medical Genetics and Genomics or the American Board of Genetic Counseling. *Id.* at 1404.

156. *Id.* at 1404–05. The most notable example of an undiagnosed autosomal dominant condition is the BRCA gene and a family history of breast cancer. *Id.* at 1405. Donors with serious functional or cosmetic handicaps (e.g., cleft lip), autism (or first degree relative with autism), serious mental illness or substance abuse (or first degree relative with such conditions); and any chromosomal condition should be excluded. *Id.* Donors with ADHD are *only* permitted on a case-by-case basis and recipient-parents *must* be warned of the strong genetic correlation of ADHD. *Id.*

157. *Compare* U.C.C. § 2-314 cmt. 8 (AM. L. INST. & UNIF. L. COMM'N 2022) ("Fitness for the ordinary purposes for which goods of the types are used is a fundamental concept of the [implied warranty of merchantability] . . . ."), *with id.* § 2-315 cmt. 2 ("A 'particular purpose' differs from the ordinary purpose for which the goods are used . . . .").

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 . . . the goods shall be fit for such purpose."[158] While the seller does not need to have *actual* knowledge of the buyer's purpose, the seller must at least "ha[ve] reason to realize the purpose intended or that the reliance exists."[159]

A claim for breach of the implied warranty of fitness for a particular purpose may arise when a couple turns to donor gametes because one of them is a carrier of a debilitating genetic disorder.[160] If the couple works with the cryobank, either to notify them of this concern or to find a donor that is not a genetic carrier, and the donor matched to the recipient-parents *was* a carrier of the genetic disorder, then the bank would likely have breached the implied warranty of fitness for a particular purpose. However, outside of this specific scenario, the implied warranty of fitness for a particular purpose is unlikely to provide an avenue for relief, as it requires the distinction in the recipient-parents' purpose between having a child, in general, and having a child with certain characteristics. This argument entails making legally and ethically dubious claims, given there is no guarantee that a child will not be born with certain characteristics, even if the child's genetics should say otherwise. Consequently, this theory of liability is neither likely to be brought nor be successful.

4. Modification and Disclaimer of Warranties

It is common in commercial transactions for sellers to waive any and all warranties, including the implied warranties of merchantability and fitness for a particular purpose. The UCC mandates that these disclaimers must take certain forms to be effective. When a seller creates an express warranty, "negation or limitation [of that warranty] is inoperative to the extent that such construction is unreasonable."[161] This means that "[a] clause generally disclaiming 'all warranties, express or implied'" is

158. *Id.* § 2-315.
159. *Id.* cmt. 1.
160. *See* Jacqueline Mroz, *In Choosing a Sperm Donor, a Roll of the Genetic Dice*, N.Y. TIMES (May 14, 2012), https://www.nytimes.com/2012/05/15/health/in-sperm-banks-a-matrix-of-untested-genetic-diseases.html.
161. § 2-316.

ineffective to disclaim warranty liability for a description provided.[162] However, expressions like "as-is" and "with all faults" are common and acceptable means of eliminating implied warranties.[163] For this language to be effective to disclaim the implied warranty of merchantability, the disclaimer *must* mention merchantability.[164] If the disclaimer is in writing, disclaimer of the implied warranty of merchantability or the implied warranty of fitness for a particular purpose must be conspicuous.[165]

Indeed, the three largest gamete banks in the United States insert as-is language, amongst other disclaimers, within their terms of use, in an effort to eliminate warranty liability.[166] Xytex Corp.'s agreement, a prior version of which the Normans would have had to sign, in relevant part states:

> All Xytex products and services are provided "AS IS" with no representations or warranties of any kind, either express or implied, including without limitation, implied warranties of merchantability or fitness for a particular purpose. Further . . . Xytex does not make any representations or warranties

162. *Id.* § 2-313 cmt. 4.

163. *Id.*

164. *Id.* § 2-316 cmt. 3. No similar specific language is needed to disclaim the implied warranty of fitness for a particular purpose. *Id.* cmt. 4.

165. *Id.* § 2-316 cmt. 3–4. Conspicuous is among the defined terms whose language was updated in the 2022 amendments. *Compare* U.C.C. § 1-201(10) (AM. L. INST. & UNIF. L. COMM'N 2018) (explicitly including text in "contrasting type, font, or color to the surrounding text or the same or less size" and text "set off from surrounding text of the same size by symbols or other marks that call attention to the language" as conspicuous terms), *with* U.C.C. § 1-201(10) (AM. L. INST. & UNIF. L. COMM'N 2022) (noting that something is conspicuous if the court determines "based on the totality of the circumstances a reasonable person against which it is to operate ought to have noticed it.").

166. *See, e.g.*, *Donor Sperm Services Agreement*, *supra* note 144, at 3; *Terms of Use*, *supra* note 144, at 5, ("Vials are provided 'as is,' with no warranties of any kind, express or implied, including without limitation the implied warranties of merchantability and fitness for a particular purpose."); *Donor Semen Services Agreement*, CAL. CRYOBANK 3, https://d3hwulnyp980el.cloudfront.net/files/cryobankcom/_forms/pdf/documents/a3.pdf (last visited July 27, 2024) ("[A]ll cryobank products . . . are provided 'as is' with no representations or warranties of any kind, either express or implied, including (but not limited to) the implied warranties of merchantability [and] fitness for a particular purpose . . . cryobank does not make any representations or warranties regarding the correctness . . . of . . . the . . . qualifications, characteristics or descriptions of any donor."). The disclaimers in each of these agreements meets the criteria set forth in the pre-2022 UCC and will likely continue to meet the criteria in the amended UCC, but it is no longer as clear. The updated definition was intended, in part, to be "more protective of consumers;" however, the official commentary opines that factors, such as differing text type, font, color, or size are indicative of a finding of conspicuousness. *See* U.C.C. § 1-201(10) cmt.10 (AM. L. INST. & UNIF. L. COMM'N 2022).

> regarding the correctness, accuracy, reliability, timeliness or suitability of information provided . . . .[167]

Xytex borrows at length from the statutory text of Section 2-316, as any prudent company does; however, it makes a fatal mistake in attempting to disclaim express warranties. Xytex relies on the "all warranties, express or implied" language that the UCC disavows as insufficient in the commentary.[168] Not only is this language ineffective at disclaiming all warranties because it is inconsistent with the express warranties provided, but it is also unreasonable to say that the fine-print disclaimer clauses buried in a terms of use contract are consistent with large-print assertions of guarantee.[169]

The "as-is" language is typically effective at disclaiming all implied warranties, and the clause makes specific references to the two implied warranties for which the UCC expressly provides.[170] Consequently, Xytex would likely prevail in arguing that it did not owe a warranty of merchantability; however, in doing so, it strengthens the argument that donor gametes should be Article 2 goods, and thus the provisions on warranty liability would prohibit the cryobank from disclaiming the express warranties provided through description of the goods.

C. The Trouble with Contract Remedies

The fact that warranties can be—and often are—disclaimed poses a challenge to recovery under a breach of contract claim,[171] but the biggest concern in characterizing donor gametes as goods under Article 2 is actually the exact thing that this Article argues is the reason they should be characterized as such: remedies. In contract law, and under the UCC, the goal is to put "the injured party in the same position in which it would have been had the breach not occurred."[172] Here, one might assume an argument for

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167. *Donor Sperm Services Agreement*, *supra* note 144, at 3; *Donor Semen Services Agreement*, *supra* note 166, at 3.

168. *See* § 2-313 cmt. 4.

169. *See id.* § 2-314 cmt. 4.

170. *See id.* § 2-316(3)(a).

171. *See Donor Sperm Services Agreement*, *supra* note 144, at 3; *Donor Semen Services Agreement*, *supra* note 166.

172. Tucker v. John Galt Ins. Agency Corp., 743 So. 2d 108, 111 (Fla. 4th Dist. Ct. App. 1999); *see* § 2-714(2) ("The measure of damages for breach of warranty is the difference . . .

breach requires the argument that the child themselves is the damage or that the child is defective somehow. Indeed, this is the problem that defeated many of the Normans' claims[173] and defeated all of Angela Collins' claims following her use of the same donor.[174] Not only is this argument morally dubious at best, but it is also disfavored in law.[175] Even so, there is a path to remedy for donor-conceived people and their recipient-parents without having to make such an argument.

1. A Remedy Without Deterrence

One drawback of contract law as a remedy is that remedies under the UCC are aimed at putting the non-breaching party in the same position they were in before they entered the contract with the breaching party—there are no punitive damages.[176] This means that in order to recover at all, donor-conceived people or their recipient-parents must put a number on their damages—what monetary amount would put them in the same position prior to the donor-conceived child's conception?

That number, and any subsequent recovery, would be limited to incidental and consequential damages.[177] Incidental damages include those expenses that the buyer incurs in taking steps to deal with the non-conforming goods and mitigate the consequential damages experienced,[178] whereas consequential damages include any expense that result from the seller's breach, including injury

between the value of the goods accepted and the value they would have had if they had been as warranted . . . .").

173. Norman v. Xytex Corp., 848 S.E.2d 835, 837 (Ga. 2020).

174. *See* Final Order, *supra* note 80, at 2, 6.

175. *See* RESTATEMENT (THIRD) OF TORTS § 27 cmt. e (AM. L. INST., Tentative Draft No. 2, 2023) ("No appellate court has been willing to say that it is better never to be born than to be born with disabilities."); Final Order, *supra* note 80, at 3 (finding Georgia law, which covers all Xytex contracts, does not recognize a wrongful birth tort); Kush v. Lloyd, 616 So. 2d 415, 422–23 (Fla. 1992) (opining that Florida law does recognize a tort for wrongful birth, but not a tort for wrongful life).

176. *See, e.g.*, §§ 2-711 to -716; *see also, e.g.*, Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1106 (11th Cir. 1983) ("Florida law does not allow punitive damage awards for breach of warranty claims under the Uniform Commercial Code."). To recover punitive damages, the "acts of the contractual breach [must] also amount to a separate and independent tort which was willfully and wantonly committed or attended by abuse, malice, or gross negligence" and that "willful tort [must have] caused damages separate and distinct from damages attributable to warranty claims." *Royal Typewriter Co.*, 719 F.2d at 1106.

177. *See* § 2-715 (defining consequential and incidental damages).

178. *Id.* cmt. 1.

to a person.[179] Ultimately, to collect consequential damages, the seller must have known, or had reason to know, that such a loss would occur if non-conforming goods were tendered.[180]

In the context of donor conception, incidental damages may be genetic testing, either for early intervention to avoid increased medical expense (in the case of a breach of warranty related to genetic testing) or prior to entering into a sexual relationship to avoid the medical costs associated with a child born from incest (in the case of breach of warranty related to family size). Consequential damages might include the cost of mental health professionals, or any other medical expenses incurred because of the gamete bank's breach of warranty.

Subsequently, the donor-conceived person or recipient-parents bringing suit will need to show that "the seller at the time of contracting had reason to know" of the requirements or needs of the buyer; however, this should not be a difficult burden to meet.[181] While the cost of genetic tests or mental health counseling seems like a small price when a gamete bank breaches the warranties owed to its consumers for its own financial benefit, the warranties provided can bridge the remedy gap in absence of meaningful regulation.

2. Who Owed Whom a Warranty?

Another challenge in bringing suit for breach of warranty regarding terms related to reproductive cell donor characteristics is determining against whom to bring the lawsuit. Donor-conceived people and recipient-parents would prefer to bring the lawsuit against the cryobank, which undoubtedly has deeper pockets than the individual donor, whose identity may not even be readily ascertainable; however, cryobanks do their best to pass the liability on to donors.[182] While seemingly simple when cryobanks

179. *See id.* cmt. 2.

180. *Id.* § 2-715(2). The UCC modifies the traditional common law rule that stipulated sellers must have actual knowledge to include both actual knowledge or constructive knowledge. *Compare id.*, *with* Hadley v. Baxendale 156 Eng. Rep. 145 (Ct. of Exchequer 1854) (opining the common law rule, requiring a seller to know of the consequences to be liable for the associated consequential damages).

181. § 2-715(2)(a).

182. *See 2022 Sperm Bank Data Survey*, *supra* note 42, at 12 (finding zero banks confirming "that they verified self-reported personal and family medical history" and that "[m]any banks cited that [doing so] . . . would constitute a HIPAA violation"); *Donor Sperm Services Agreement*, *supra* note 144, at 3 ("[D]onor information is obtained directly from

create express warranties, this analysis can become more complex with the notion of a cryobank making an express warranty regarding variable or donor-reported traits.[183]

There are two instances where privity may act as a bar to recovery in a breach of warranty action based on a contract for donor gametes. First, given that cryobanks do their best to offload responsibility for the representations made surrounding donor characteristics to the donors themselves, donor-conceived people and possibly their recipient-parents may be found to be third party beneficiaries to the warranty that the donor makes to the cryobank. Second, if the cryobank has been found to be the maker of the warranty, the donor-conceived child may be found to be a third-party beneficiary to the warranty that the cryobank made to their recipient-parents.[184]

There are two types of privity in a contract: vertical and horizontal.[185] Vertical privity relates to the commercial distribution chain, whereas horizontal privity relates to any further relationship once the initial buyer has the item.[186] The

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[the] Donor during qualification and screening. Xytex does not make any representations or warranties regarding the correctness, accuracy, reliability, timeliness or suitability of information provided by any Donor . . . ."); *Terms of Use*, *supra* note 144, at 3 ("Donors self-report the family medical history, health and behavioral history information in their profiles. Cryobank does not independently verify their answers."); *Donor Semen Services Agreement*, *supra* note 166, at 3 ("Cryobank relies on information provided by its donors during the screening process . . . Although Cryobank takes reasonable efforts . . . to confirm the accuracy of . . . donor information, Cryobank does not make any representations or warranties regarding the correctness, accuracy, reliability, timeliness, or suitability of such information . . . .").

183. See *supra* pt. III.B.1 and pt. III.B.4 for a discussion regarding how cryobanks make these express warranties and why the disclaimers in different agreements are inoperative to disclaim these express warranties.

184. *See* Mesa v. BMW of N. Am., 904 So. 2d 450, 458 (Fla. 3d Dist. Ct. App. 2005) ("Under Florida law, a plaintiff cannot recover economic losses for breach of implied warranty in the absence of privity.").

185. Jeremiah Hegarty, Recent Decisions, *Sales: Uniform Commercial Code: Section 2-318 and Its Effect on the Requirement of Privity*, 48 MARQ. L. REV. 273, 274 (1964).

186. *Id.*

UCC recognizes three alternatives to horizontal privity,[187] and leaves the requirements of vertical privity to case law.[188]

Much to a cryobank's chagrin, for recipient-parents, this is likely to be a question of vertical privity.[189] Vertical privity is at issue where the defendant was not a party to the underlying contract and exists where "the provisions of the contract primarily and directly benefit the third party or a class of persons of which the third party is a member."[190] Even if it were to be held—and it should not be—that the donors, rather than the cryobanks, make the warranties regarding the donor gametes, recipient-parents would not face hurdles related to vertical privity. Warranties made by donors are primarily intended for consumers of the donated gamete cells, donors permit cryobanks to resell their donated gamete cells, and recipient-parents purchase these cells. As such recipient-parents should be held to have vertical privity with the donors, such that the warranty should carry from the donor to the cryobank and then from the cryobank to the recipient-parents.[191]

A donor-conceived child may face the additional hurdle of horizontal privity. Horizontal privity is at issue where the harmed plaintiff was not a party to the underlying contract.[192] Under the strictest alternative to horizontal privity, recovery is limited to those who are in the household of the buyer, those who are guests

187. *See* U.C.C. § 2-318 (AM. L. INST. & UNIF. L. COMM'N 2022). It is up to each state to adopt the alternative that it deems appropriate. In each alternative, personal injury is *required* to pursue the claim of breach of warranty. *Id.* Florida employs the strictest alternative to horizonal privity, limiting recovery to those who are in the household of the buyer, those who are guests in the buyer's home, or an employee or agent of the buyer, in this case, the cryobank. FLA. STAT. § 672.318 (2023). If this were to be a question of horizontal privity, the limited definition would likely act as a bar to litigation, if it were held that the donor makes the warranty, rather than the cryobank.

188. § 2-318 cmt. 3 ("Beyond [horizontal privity] 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.").

189. Even though they are referred to as "donors," both sperm and egg donors are compensated for providing the cells that the bank ultimately sells to recipient-parents. *See* Tamar Lewin, *10 Things to Know About Being a Sperm Donor*, N.Y. TIMES (Nov. 3, 2016), https://www.nytimes.com/2016/11/08/health/sperm-donor-facts.html (finding that active sperm donors can make up to $1,500 a month); *Frequently Asked Egg Donor Questions and Answers*, FAIRFAX EGG BANK, https://www.fairfaxeggbank.com/donor-learning-center/egg-donor-faqs/ (last visited June 18, 2024) (click "How much are reimbursements?") ("Reimbursement for completing a cycle is several thousand dollars."). This payment for services rendered to create a product is not substantially different from a distributor purchasing materials from a manufacturer and selling them to consumers.

190. Greenacre Props., Inc. v. Rao, 933 So. 2d 19, 23 (Fla. 2d Dist. Ct. App. 2006).

191. *Cf.* Weiss v. Gen. Motors LLC, 418 F. Supp. 3d 1173, 1183 (S.D. Fla. 2019).

192. *See generally* § 2-318.

in the buyer's home, or an employee or agent of the buyer.[193] Despite the fact that the donor-conceived child is clearly in the household of the buyer, the child faces an even more delicate line of argument in pleading and proving injury caused by the breach. While not a perfect solution, contracts provide a meaningful opportunity for recovery in light of limited tort success.[194]

IV. LEGISLATING A SOLUTION

It is no wonder why advocates for changes in the donor conception industry often focus on regulatory changes and tort legislation to provide a remedy to those harmed by the fertility industry.[195] Increased regulations could work proactively to ensure that no child or parents ever find themselves in the Normans' situation; lied to and deceived, fighting for the smallest chance of remedy. Tort legislation could work to deter reproductive cell banks from misleading recipient-parents and provide families financial remedy when a reproductive bank has been negligent or fraudulent.

There is immense benefit to these paths to recovery, but as bill sponsors in Colorado, New York, and the U.S. House of Representatives have seen, bills of this kind face numerous hurdles.[196] Even when these bills pass their respective legislative process, implementation takes years, and regulations often do not benefit families retroactively.[197] Advocates and state legislators

193. *Id.*

194. Many tort actions brought against sperm banks have argued on theories of negligent misrepresentation or wrongful *conception*, but most courts find that these plaintiffs misstate their cause of action and are actually suing on a wrongful birth or wrongful life theory, which are unrecognized by most states. *See, e.g.*, Zelt v. Xytex Corp., 766 F. App'x 735, 741–42 (11th Cir. 2019) (finding that the plaintiff's claim boiled down to a wrongful birth claim and thus the court was bound to dismiss for failure to state a claim); D.D. v. Idant Lab'ys, 374 F. App'x 319, 324 (3d Cir. 2013) (unpublished) (dismissing a claim, brought on behalf of a minor child with disabilities, against the sperm bank for misrepresentations regarding donor characteristics because the claim amounted to wrongful life, a tort not recognized under New York law); *see also* Barbara Pfeffer Billauer, Sperm Bank Liability: Do Damages Accrue for Defective Deposits? The Impact of *Colins v. Xytex Corp.* 1 (Feb. 21, 2017) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920969).

195. *See generally* Tiffany D. Gardner, *Forgotten Parties: Shifting the Focus of Donor Conception to Donor-Conceived Persons Through Reasonable Regulation*, 74 MERCER L. REV. 503, 505 (2023); Yaniv Heled et al., *Righting a Reproductive Wrong: A Statutory Tort Solution to Misrepresentation by Reproductive Tissue Providers*, 60 HOUS. L. REV. 1 (2022).

196. *See supra* pt. II.

197. *See supra* pt. II.B.

may see these gaps as an unfortunate but unavoidable part of the process, but this is not the case.

In the absence of, and to bridge the gaps during the drafting and passage of, comprehensive regulations and tort legislation, states should pass a bill restricting the terms that can be in a contract for donor gamete cells.[198] The idea of placing restrictions on contracts is not new in many legislatures, which place restrictions on a variety of types of contracts, including surrogacy agreements and restrictive covenants.[199] At minimum, such a bill should include the characterization of donor gametes as Article 2 goods, restrictions on warranty disclaimers, and explicit examples of remedies available. A more robust bill should also include restrictions on enforcement of choice of law clauses in contracts for the sale of donor gametes and specific statute of limitations parameters. In creating these restrictions, state legislatures should amend current statutes and create a new statute.[200]

A. Protection Through Amendment

First and foremost, the restrictions should include a provision explicitly categorizing donor gametes as goods, subject to Article 2. Using Florida as an example, this provision should appear in an

198. If dealing with the three biggest sperm banks in the U.S., recipient-parents and donor-conceived children will likely encounter choice-of-law issues. Contracts with Xytex include a Georgia governing law clause; contracts with Fairfax Cryobank include a Virginia governing law clause; and contracts with California Cryobank include a California governing law clause. *See Donor Sperm Services Agreement*, *supra* note 144, at 3; *Donor Semen Services Agreement*, *supra* note 166, at 5. While a full choice of law and jurisdictional analysis is out of the scope of this Article, it is worth noting that the 11th Circuit, for example, will not enforce a choice of law provision if the clause would effectively deny the plaintiff "its day in court because of . . . unfairness of the chosen forum . . . the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or . . . enforcement . . . would contravene . . . public policy." Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1292 (11th Cir. 1998); *see* Vanderham v. Brookfield Asset Mgmt., Inc., 102 F. Supp. 3d 1315, 1319 (S.D. Fla. 2015). Florida state courts will not enforce a choice of law that contravenes Florida public policy. *See* Briceño v. Sprint Spectrum, L.P., 911 So. 2d 176, 179 (Fla. 3d Dist. Ct. App. 2005); *see also* Internet Escrow Servs. v. Hendel, 317 So. 3d 1182, 1182 (Fla. 3d Dist. Ct. App. 2021) (mem.) (per curiam).

199. *See, e.g.*, FLA. STAT. §§ 63.213 (surrogacy agreements), 542.335 (restrictive covenants) (2023); GA. CODE ANN. § 13-8-56 (2023) (same). *See generally Covenants Not to Compete: A State-by-State Survey*, BLOOMBERG L., https://www.bloomberglaw.com/product/labor/bbna/chart/5/10160 (last visited June 22, 2024) (select "All" under "Jurisdictions" and "Is there a state statute governing covenants?" under "Topics"; click "Create"); *U.S. Surrogacy Laws by State*, WORLDWIDE SURROGACY SPECIALISTS LLC (Feb. 15, 2021), https://www.worldwidesurrogacy.org/blog/u-s-surrogacy-laws-by-state.

200. The following sections use Florida law as a model but can be modified and applied to any state's laws.

amendment to Section 672.105, the section of the Florida Uniform Commercial Code labeled "Definitions: transferability; 'goods'; 'future' goods; 'lot'; 'commercial unit.'" In amending Section 672.105, the legislature should simply amend subsection (1), changing the final sentence: "'Goods' also includes the unborn young of animals~~,~~; ~~and~~ growing crops and other things attached as realty as described in the section on goods to be severed from realty (s. 672.107)~~.~~; and donor gametes, as defined in s.685.202." Placement within this section would ensure that the categorization of gametes could not be misconstrued as serving a narrower or alternative purpose and ensure that courts and savvy lawyers could not circumvent legislative intent and consumer protection.

Next, the bill should include provisions clarifying that donor gametes are not analogous to blood or organs, such that the blood and organ shield against warranty liability should apply. This provision should appear in an amendment to Section 672.316 of the Florida Uniform Commercial Code, labeled "Exclusion or modification of warranties." In amending Section 672.316, the legislature should create a subsection (7) and state:

> The procurement, processing, storage, distribution, or sale of donor gametes for the purposes of artificial insemination, in vitro fertilization, or other alternative reproductive technology procedure or fertility technique constitutes the sale of goods to which implied warranties of merchantability and fitness for a particular purpose are applicable and is not analogous or comparable to the distribution or providing of blood, human tissue, or organs, as described in subsection (5) or (6) of this section.

In creating this amended subsection, the legislature would eliminate any argument that donor gametes should be analogized to blood or organs, thus barring warranty liability under Florida's blood and organ shield statutes.[201]

By inserting these provisions within the Florida Uniform Commercial Code, the Florida legislature would make it clear that the UCC applies to the sale of donor gametes without substantially deviating from the official UCC text, serving both the public policy

201. In states where the blood/organ shield statutes do not appear in the state's Uniform Commercial Code, this amended statute should appear as a subsection to the blood/shield statute, wherever it is found within the state's laws.

of consumer protection and the statutory intent of ensuring that commercial law across states is as uniform as possible.

Finally, the legislature should amend Section 95.031[202] to incorporate an additional exception to the general rule set forth in subsection (1). The newly created subsection (3) should read:

> (3)(a) An action founded upon s. 95.11(2)(b) or s. 95.11(3)(j) where the underlying contract is a contract for the sale of donor gametes accrues when the breach was discovered or should have been discovered with the exercise of due diligence.
>
> (b) If the breach of warranty is discovered when the donor-conceived child is a minor, the child's cause of action does not begin to accrue until which time he or she has reached the age of majority.
>
> (c) In any event, the action must be commenced within 20 years of the commission of the alleged breach, regardless of the date the breach was or should have been discovered.
>
> (d) Unless context dictates otherwise, there is a presumption against imputing knowledge of breach to a party that did not actually know. Prior misdeeds or trade practices are not grounds for finding that a party should have known about the breach.

By amending Section 95.031, the legislature would protect against any confusion or bar to liability that could be introduced by the unusual nature of contracts for donor gametes. Often, parties may not learn of the breach until years after the contract is executed, when their child is suffering from a genetic ailment of which the biological parent is not a carrier. By providing an accrual provision specific to these unusual circumstances, the legislature would ensure that the legislative intent behind the other amendments and statutes would be properly effectuated. Amending Section 672.105 is imperative in legislating a solution, and amending Sections 672.13, 95.031 should be included in a more robust bill, but amending statutes alone is insufficient to bring meaningful remedy to donor-conceived people and their recipient-parents.

202. Florida's statute outlining when a cause of action accrues for the purposes of determining the statute of limitations.

B. Supplementing and Expanding Through New Statutes

To provide the necessary protections without deviating from the well-established goal of the UCC as a uniform law, the Florida legislature should amend Chapter 685, the chapter outside of the Florida UCC, titled "Contract Enforcement; Choice of Law," to include two parts: (1) labeled as "Generally" and including the two statutes currently included in the chapter, Sections 685.101–.102; and (2) a new section labeled "Contracts for Donor Gametes." Within this new part, the legislature should include sections on the following: (1) scope; (2) definitions; (3) prohibited and unenforceable terms; (4) remedies; and (5) choice of law.[203]

To achieve these goals, the newly created Part II should include statutes that read similar to the following:

> 685.201. Scope.
>
> (1) This part applies to all contracts of the sale of donor gametes from a cryobank to intended parents who reside in Florida.
>
> (2) This part does not apply to any transactions including embryos, zygotes, surrogacy, or other cells or services that include the fertilization or implantation of an egg cell.
>
> (3) This part shall supplement and expand on the provisions of Chapter 672; nothing in this part shall be construed to supplant or contradict the terms in Chapter 672.
>
> 685.202. Definitions.
>
> (1) All applicable definitions provided in s. 742.13 are incorporated herein.
>
> (2) Unless context otherwise requires, as used in this section:
>
> (a) "Characteristic" means any term that describes the donor's physical, ethnic, genetic, or national background, including, but not limited to, eye and hair color, height, weight, number of children, marital status, blood type, allergies, and genetic history or carrier status.
>
> (b) "Achievement" means any term that describes the donor's academic, personal, or professional accomplishments, including, but not limited to, degrees, specialized training, job status, languages spoken, awards, or talents.

203. Where these provisions fit in amendment is a highly state-specific inquiry but should be included in a comparable section (related to commercial relations/contracts, but outside of the state's Uniform Commercial Code).

(c) "Cryobank" means any establishment registered with the United States Food and Drug Administration as distributing oocytes or semen.

(d) "Donor" means an individual who provides tissue or cells from his or her body.

(e) "Donor-conceived child" means the child or children conceived with the use of donor gametes.

(f) "Fertility technique" means the same as used in the statute on preplanned adoption agreements (s. 63.213).

(g) "Intended parent(s)" means the person or persons who, as evidenced by the contract for donor gametes, intends to assert the parental rights and responsibilities for a child conceived through a fertility technique regardless of whether the child is biologically related to the person.

(h) "Recipient-parent(s)" means the person or persons who have parental rights and responsibilities for a child conceived through a fertility technique regardless of whether the child is biologically related to the person.

(i) "Reproductive cell(s)" means any human "egg" or "sperm," as those terms are defined in s. 742.13.

685.203. Terms.

(1) In a contract for donor gametes, a cryobank may not disclaim express or implied warranties, including the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

(2) A cryobank that permits intended parents to search donors based on a donor characteristic or describes a donor characteristic makes an express warranty that the donor meets those criteria, unless the cryobank provides a clear and conspicuous statement within the search function or description that the characteristic is self-reported by the donor.

1. If a characteristic is readily ascertainable when the cryobank interacts with the donor, the cryobank must clearly and conspicuously stipulate within the donor profile whether such characteristic was verified when the cryobank interacted with the donor.

2. Immutable characters, such as height and skin tone cannot be disclaimed regardless of whether the cryobank clearly and conspicuously states that the characteristic is self-reported.

(3) A cryobank that permits intended parents to search based on a donor achievement or describes a donor achievement makes an express warranty that the cryobank has verified with

> the granting institution, company, organization, or similar entity, that the donor obtained that achievement, unless the cryobank provides a clear and conspicuous statement within the search function or description that the characteristic is self-reported.
>
> 685.204. Remedies.
>
> (1) Recipient-parents are entitled to incidental and consequential damages, as defined in s. 672.715. Incidental damages include, but are not limited to, the cost of genetic testing; whereas consequential damages include, but are not limited to, the cost of both physical and mental healthcare.
>
> (2) Limitation of consequential damages for a breach of warranty of donor gametes is prima facie unconscionable.
>
> 685.205. Choice of Law
>
> (1) Notwithstanding subsections (2) and (3), a choice of law provision in a contract for donor gametes is unlawful and shall not be enforced by a court.
>
> (2) Unless otherwise prohibited under s. 685.101, a court may enforce a choice of law provision if the jurisdiction selected provides a basis for recovery.
>
> (3) Unless otherwise prohibited under s. 685.101, a court must enforce a choice of law provision if the jurisdiction selected provides a basis for recovery that is as favorable, or more favorable, to the plaintiff as Florida.

By passing similar legislation, legislatures would ensure that donor-conceived people and their recipient-parents benefit from the classification of donor gametes as Article 2 goods and ensure that companies are unable to circumvent the legislative intent and policy of classifying donor gametes as Article 2 goods by crafty contract drafting.

V. CONCLUSION

Despite a multitude of federal agencies regulating fertility techniques, gamete banks remain largely unregulated, and are left to warrant terms freely to prospective recipient-parents without consequence if they breach those warranties. In the absence of a comprehensive regulatory scheme governing gamete banks, or even in the absence of statutory limitations on donor-conception contracts, characterizing donor gametes as Article 2 goods can

provide a much-needed remedy, available to all donor-conceived persons and their recipient-parents without delay.

To strengthen the cause of action and to ensure that reproductive cell banks are not able to disclaim each warranty or otherwise escape liability without cause, states should pass a bill to restrict the terms of a contract for donor gametes. In many states, the law *already* restricts the terms permitted in certain contracts related to gestational surrogacy, another fertility technique; consequently, legislating restriction on contracts for donor gametes should simply be an expansion on this idea. Legislating restrictions on the terms of contracts for donor gametes would ensure that families never find themselves facing the same devastating uphill legal battle as the Normans.

While it might seem to be an eccentric idea to characterize donor gametes as Article 2 goods, the UCC is an effective body of law, and it is one that already exists and is well understood. This characterization alone lends to a sorely needed path toward recovery for donor-conceived people and their recipient-parents. With the help of legislation, this remedy could become available to families who have been harmed by donor reproductive banks more interested in profits than the donor-conceived children they help bring into this world.