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The Implied Warranty of Merchantability and the Remote Manufacturer

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THE IMPLIED WARRANTY OF MERCHANTABILITY AND THE REMOTE MANUFACTURER

RALPH C. ANZIVINO*

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I. INTRODUCTION

It is well established that personal injury and property loss caused by a defective product can be recovered from a remote manufacturer without establishing privity.¹ Conversely, a hot topic in warranty law today is whether economic loss can be recovered from a remote manufacturer in the chain of

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1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM. LAW INST. 1998).

distribution.² The Uniform Commercial Code (UCC) mandates that every manufacturer gives the implied warranty of merchantability for every sale of its product, unless the manufacturer disclaims it.³ The implied warranty of merchantability means that every product must be fit for its ordinary use.⁴ The implied warranty is the minimum standard set for each product sold by a manufacturer.⁵ Its importance cannot be overstated. Currently, there is a significant split of authority among the states on whether a buyer must be in privity with the manufacturer of the product before that buyer can sue the manufacturer for breach of the implied warranty of merchantability.⁶

This Article identifies each state's position on whether that state requires privity before an aggrieved buyer can sue the remote manufacturer for breach of the implied warranty of merchantability. In addition, this Article identifies the primary arguments put forth on both sides of the issue. Currently, Wisconsin is in the distinct minority of states that do not permit the buyer to sue the remote manufacturer for breach of the implied warranty of merchantability unless the buyer can establish privity. Finally, the Article concludes with the Author's analysis of the conflicting arguments and a recommendation for the future.

II. THE IMPLIED WARRANTY OF MERCHANTABILITY—STATUTORY WARRANTY

The implied warranty of merchantability is given by every seller who is a merchant with respect to the goods it sells.⁷ A manufacturer obviously qualifies as a merchant, and therefore gives the implied warranty of merchantability every time it sells a good. The implied warranty of merchantability is understood to mean that the good being sold is fit for the ordinary purpose for which such good is normally used.⁸ Stated differently, the implied warranty of merchantability requires that a manufacturer's good will actually fulfill its understood purpose. In other words, shoe polish should actually polish your shoes, and if it doesn't, the implied warranty of merchantability has been breached. The importance of the implied warranty of merchantability is

2. 1 BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* § 10:20 (2010).

3. *Id.* § 5:1.

4. *Id.* § 5:3.

5. *See id.* § 5:1.

6. *Id.* § 10:20.

7. WIS. STAT. § 402.314(1) (2015–2016).

8. *Id.* § 402.314(2)(c).

underscored by the fact that it is required by law in every merchant transaction.⁹ It is a mandated, statutory warranty as opposed to an express warranty which the seller has the option to offer.¹⁰

A. Duration of the Implied Warranty of Merchantability

There is no fixed duration for the implied warranty of merchantability.¹¹ The merchantability warranty does not extend to future performance of a good like an express warranty.¹² Rather, the warranty is measured as of the time of delivery.¹³ An action, therefore, brought for breach of implied warranty of merchantability must be brought before the UCC statute of limitations expires¹⁴ or at an earlier agreed expiration date as provided in the parties' contract.¹⁵ If the parties do agree to a shorter statute of limitation, the minimum period cannot be less than one year.¹⁶

B. Disclaiming the Implied Warranty of Merchantability and Limitations of Remedy

Risk allocation is dealt with in entirely different ways depending upon whether an action is denominated as one in tort or contract. Tort law places the risk of loss onto the manufacturer to protect the public from personal injury and property damage.¹⁷ On the other hand, contract law, through the UCC, provides the structure for the parties to allocate any risk of economic loss¹⁸ between or amongst themselves through their contract.¹⁹ Interestingly, in Wisconsin, the tort and contract claims are mutually exclusive and cannot be brought in the same lawsuit.²⁰ Therefore, it's critical for an attorney to be able to properly classify the type of loss suffered by the client in order to properly plead a case.

9. CLARK & SMITH, *supra* note 2, § 5:1.

10. *Id.* § 4:1.

11. Johnson v. Ford Motor Co., No. 3:13-6529, 2015 U.S. Dist. LEXIS 172348, at *87 (S.D. W. Va. Nov. 24, 2015) (quoting Mexia v. Rinker Boat Co., 95 Cal. Rptr. 3d 285, 290 (Cal. Ct. App. 2009)).

12. *Id.*

13. *Id.*

14. WIS. STAT. § 402.725(1) (2015–2016).

15. *Id.*

16. *Id.*

17. Grams v. Milk Prods., Inc., 2005 WI 112, ¶ 18, 283 Wis. 2d 511, 699 N.W.2d 167 (quoting Ins. Co. of N. Am. v. Cease Elec., 2004 WI 139, ¶ 39, 276 Wis. 2d 361, 688 N.W.2d 462).

18. Ralph C. Anzivino, *The Economic Loss Doctrine: Distinguishing Economic Loss from Non-Economic Loss*, 91 MARQ. L. REV. 1081, 1082 (2008).

19. Grams, 2005 WI 112, ¶ 17 (citing Daanen & Janssen, Inc. v. Cedarapids Inc., 216 Wis. 2d 395, 407, 573 N.W.2d 842, 847–48 (1998)).

20. Austin v. Ford Motor Co., 86 Wis. 2d 628, 644, 273 N.W.2d 233, 240 (1979).

One way that manufacturers allocate the risk of loss in a sales transaction is through the use of disclaimers. Manufacturers are permitted to expressly modify or completely exclude the implied warranty of merchantability.²¹ To expressly exclude or modify the implied warranty of merchantability the manufacturer's disclaimer must mention the word "merchantability" and, if the disclaimer is in writing, it must be conspicuous.²² The implied warranty of merchantability can also be excluded by expressions such as "as is" or by the buyer's inspection of the goods prior to their purchase.²³ Finally, the implied warranty of merchantability can be modified or excluded by course of dealing, course of performance, or trade practice.²⁴

Another way for manufacturers to control risk of loss is by limiting the buyer's remedies in the event of a loss. The manufacturer may limit the buyer's remedy to an exclusive one²⁵ (e.g., repair or replacement) provided that remedy does not fail for its essential purpose.²⁶ Finally, the manufacturer may also exclude consequential damages, unless the exclusion is deemed unconscionable.²⁷

All of the foregoing methods are available to a manufacturer to control its exposure to economic loss. It's clear, however, that if a disclaimer or limitation of remedy is not disclosed to the buyer at the time that the buyer contracts to buy the product, the disclaimer or limitation of remedy is not effective.²⁸ As a general rule, it is the burden of the party seeking to invoke a warranty exclusion or limitation of remedy to plead and prove its effect.²⁹ Also, warranty exclusions and limitation of remedy clauses are strictly construed against the author.³⁰

The following case is instructive on the correct way for a manufacturer to effectively disclaim the implied warranty of merchantability and also limit the buyer's remedy. In *R & L Grain Co. v. Chicago E. Corp.*, the buyer purchased

21. WIS. STAT. § 402.316(2).

22. *Id.*

23. *Id.* §§ 402.316(3)(a)–(b).

24. *Id.* § 402.316(3)(d).

25. *Id.* §§ 402.719(1)(a)–(b).

26. *Id.* § 402.719(2).

27. *Id.* § 402.719(3).

28. *See* Spagnol Enters., Inc. v. Dig. Equip. Corp., 568 A.2d 948, 952 (Pa. Super. Ct. 1989); *see also* Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc., 604 P.2d 849, 850, 852–53 (Okla. 1979).

29. *DeCoria v. Red's Trailer Mart, Inc.*, 491 P.2d 241, 244 (Wash. Ct. App. 1971).

30. *Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc.*, 216 N.E.2d 282, 286 (Ill. App. Ct. 1965) (quoting *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 77–78 (N.J. 1960)).

a grain storage bin from the manufacturer's dealer.³¹ The terms of sale contained a manufacturer's express warranty that the product was free from defects in material and workmanship.³² Included within the language of the express warranty, was a disclaimer of the implied warranty of merchantability.³³ Also in the express warranty, the manufacturer limited its liability to repair and replacement for a period of twelve months after the date of delivery.³⁴ Upon the product's failure to perform as expected, the buyer sued the manufacturer for breach of the implied warranty of merchantability.³⁵ The buyer sought to nullify the effect of the implied warranty disclaimer and the limitation of remedy on the basis that neither the buyer nor the dealer were ever actually aware of the warranty exclusion or limitation of remedy.³⁶ The court concluded, however, that actual knowledge was not required but simply that the disclaimer and limitation of remedy be "reasonably noticeable."³⁷ In fact, the court found that the disclaimer and limitation of remedy were conspicuous as required by the UCC.³⁸

The simple solution to disclosing the implied warranty of merchantability disclaimer or limitation of remedy is to follow the lead of the *R & L Grain Co.* case and place the merchantability disclaimer or limitation of remedy in with the express warranty,³⁹ and require that the merchantability disclaimer or limitation of remedy be included in the selling dealer's forms or otherwise included as part of the sales transaction.⁴⁰ The essential legal requirement that must be satisfied is that the disclaimer or limitation of remedy be conspicuous in the sales contract.

III. HORIZONTAL PRIVITY OR VERTICAL PRIVITY

Privity is defined as "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter."⁴¹ Privity "implies a connection, mutuality of will, and interaction of parties."⁴² There

31. 531 F. Supp. 201, 203 (N.D. Ill. 1981).

32. *Id.* at 207.

33. *Id.*

34. *Id.*

35. *Id.* at 204.

36. *Id.* at 208.

37. *Id.* at 209.

38. *Id.*

39. *Great Am. Ins. Co. v. Paty's, Inc.*, 397 N.W.2d 853, 854 (Mich. Ct. App. 1986).

40. *Hunter v. Tex. Instruments, Inc.*, 798 F.2d 299, 303 (8th Cir. 1986).

41. *Privity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

42. *Wrenshall State Bank v. Shutt*, 202 Wis. 281, 232 N.W. 530, 530 (1930).

are two types of privity.⁴³ One is known as horizontal privity and the other is vertical privity.⁴⁴ The distinction between horizontal and vertical privity is significant. Horizontal privity is defined as “[t]he legal relationship between a party and a nonparty who is related to the party (such as a buyer and a member of the buyer’s family).”⁴⁵ Horizontal privity issues address the question of “whether persons other than the buyer of defective goods can recover from the buyer’s immediate seller on a warranty theory.”⁴⁶ Vertical privity is defined as “[t]he legal relationship between parties in a product’s chain of distribution (such as a manufacturer[, wholesaler, retailer, buyer] and a seller).”⁴⁷ Vertical privity issues ask “whether parties in the distributive chain prior to the immediate seller can be held liable to the ultimate purchaser for loss caused by the defective product.”⁴⁸ Official comment 3 to section 2-318 (Third Party Beneficiaries of Warranties Express or Implied) makes clear that the intent of the section was to deal with horizontal privity and not vertical privity.⁴⁹ In fact, the official comment makes clear that the section was “not intended to enlarge or restrict the developing case law on whether the seller’s warranties, given to [the] buyer who resells, extend to [any] other persons in the distributive chain.”⁵⁰ Therefore, the UCC has left vertical privity issues to be decided by each state independently.

A. *The Erosion of the Vertical Privity Requirement*

The requirement that one be in privity with the other party in the distributive chain before one is able to sue that party has been under attack for many years.⁵¹ The courts have developed a number of approaches to avoid the requirement of vertical privity when a buyer of a product wishes to assert a claim against a remote manufacturer in the distributive chain. There are at least four fairly identifiable approaches.

43. *See Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 287 (Alaska 1976).

44. *See id.*

45. *Horizontal Privity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

46. *Morrow*, 548 P.2d at 287.

47. *Vertical Privity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

48. *Morrow*, 548 P.2d at 287.

49. U.C.C. § 2-318 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM’N 1999).

50. *Id.*

51. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099, 1148 (1960) (quoting *Ultramares Corp. v. Touche* 174 N.E. 441, 445 (N.Y. 1931)).

1. Agency/Conduit Concepts

Some courts have used the idea that those selling the manufacturer's product are simply agents or conduits of the manufacturer.⁵² For example, in *Sanco, Inc. v. Ford Motor Co.*, the buyer purchased Ford trucks from the Ford dealer and not directly from Ford.⁵³ Nevertheless, the buyer sued Ford for defects in the trucks, and Ford raised the vertical privity defense.⁵⁴ The court rejected the vertical privity defense because the contractual arrangement between the manufacturer and the dealer created an agency relationship, particularly where it is shown that the manufacturer significantly participated in the sale through personal contact with the buyer and by means of advertising.⁵⁵

2. Third-Party Beneficiary

“The absence of privity will not bar an action upon an implied warranty [of merchantability] . . . when the circumstances attendant the sales transaction make the remote purchaser a third-party beneficiary of the contract.”⁵⁶ In *R & L Grain Co. v. Chicago E. Corp.*, R & L Grain Co. purchased a grain storage bin from a dealer of the defendant manufacturer.⁵⁷ When the bin proved to be unsatisfactory for Wisconsin winters, the plaintiff sued alleging various theories, including breach of implied warranty of merchantability.⁵⁸ The manufacturer responded by filing a motion to dismiss the implied warranty claim on the basis that there was no privity between the parties.⁵⁹ The court noted that although privity is generally a necessary element to maintain a claim for breach of the implied warranty of merchantability, the absence of privity is not a bar when the contract circumstances indicate that the remote purchaser was a third-party beneficiary of the primary contract.⁶⁰ Some courts require that in order for a buyer to qualify as a third-party beneficiary, the manufacturer

52. *State v. Mitchell Constr. Co.*, 699 P.2d 1349, 1352 (Idaho 1984); *see also Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41, 53 (Mo. 1963).

53. 579 F. Supp. 893, 899 (S.D. Ind. 1984), *aff'd*, 771 F.2d 1081 (7th Cir. 1985).

54. *See id.*

55. *Id.*

56. *R & L Grain Co. v. Chi. E. Corp.*, 531 F. Supp. 201, 208 (N.D. Ill. 1981) (citing *Frank's Maint. & Eng'g, Inc. v. C. A. Roberts Co.*, 408 N.E.2d 403, 412 (Ill. App. Ct. 1980)).

57. *Id.* at 203.

58. *Id.* at 204.

59. *Id.* at 204, 207–08.

60. *Id.* at 208; *see also Naef v. Masonite Corp.*, 923 F. Supp. 1504, 1508 (S.D. Ala. 1996) (quoting *Chandler v. Hunter*, 340 So. 2d 818, 822 (Ala. Civ. App. 1976)).

must know the identity, requirements, and purpose of the dealer's customer.⁶¹ "[M]erely alleging that the remote [manufacturer] knows that a dealer will resell the . . . product" is not sufficient to support the third-party beneficiary claim.⁶²

3. Strict Liability

A remote manufacturer "who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."⁶³ This principle is commonly known as strict liability.⁶⁴ "Strict liability . . . for defectively manufactured products merges the concept of implied warranty, in which negligence is not required, with the tort concept of negligence, in which contractual privity is not required."⁶⁵ No privity is required in a strict liability claim against a manufacturer.⁶⁶

4. Express Warranty

The fact that a product is sold with an express warranty from the manufacturer creates privity between the remote manufacturer and the ultimate buyer, notwithstanding that there is no contract between the two parties.⁶⁷ In *Paulson v. Olson Implement Co.*, the plaintiff purchased the manufacturer's product from the manufacturer's dealer.⁶⁸ Prior to the purchase, the manufacturer provided express warranties to the remote purchaser regarding the product's capabilities.⁶⁹ Upon the product's failure to live up to its warranted capabilities, the plaintiff sued the manufacturer for breach of the manufacturer's express warranties.⁷⁰ At the trial level, the plaintiff's action against the manufacturer was dismissed because there was no privity between the plaintiff-buyer and the remote manufacturer.⁷¹ On appeal, however, the Wisconsin Supreme Court concluded that there was privity between the remote manufacturer and the purchaser because of the manufacturer's actions and

61. *Chi. Heights Venture v. Dynamit Nobel of Am., Inc.*, 575 F. Supp. 214, 219 (N.D. Ill. 1983) (citing *Frank's Maint. & Eng'g, Inc. v. C. A. Roberts Co.*, 408 N.E.2d 403, 412 (Ill. App. Ct. 1980)).

62. *Id.* (citing *Slate Printing Co. v. Metro Envelope Co.*, 532 F. Supp. 431, 433 (N.D. Ill. 1982)).

63. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM. LAW INST. 1998).

64. *See id.* § 1 cmt. a.

65. *Id.*

66. *Id.*

67. *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 527, 319 N.W.2d 855, 863 (1982).

68. *Id.* at 513-14.

69. *Id.*

70. *Id.* at 515.

71. *Id.* at 516.

express representations made during the sales process.⁷² In essence, the court recognized that the manufacturer's statements had become part of the basis of the bargain and thereby an express warranty.⁷³ The grant of the express warranty creates a "contractual relationship" and, thereby legal privity, despite the fact that there is no contract between the buyer and the remote manufacturer.⁷⁴

B. Vertical Privity in the United States

There is a significant split of authority among the states on whether a remote buyer must be in privity with a manufacturer before the buyer is permitted to sue for breach of the implied warranty of merchantability. The majority of states do not require vertical privity and permit the remote buyer to sue the manufacturer directly for breach of the implied warranty of

72. *Id.* at 518–19.

73. *Id.* at 516, 527.

74. *McNeal v. Blue Bird Corp.*, No. 308763, 2014 Mich. App. LEXIS 1082, at *12 (June 12, 2014) (quoting *Great Am. Ins. Co. v. Paty's, Inc.*, 397 N.W.2d 853, 856 (Mich. Ct. App. 1986)).

merchantability.⁷⁵ A minority of states, however, do insist on privity between the remote manufacturer and the aggrieved buyer.⁷⁶

75. Thirty-one states do not require privity: (1) *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 289 (Alaska 1976); (2) *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 437 S.W.2d 459, 462 (Ark. 1969); (3) *Am. Safety Equip. Corp. v. Winkler*, 640 P.2d 216, 221 (Colo. 1982); (4) *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581, 583 (Del. 1976); (5) *Ontai v. Straub Clinic & Hosp. Inc.*, 659 P.2d 734, 743 (Haw. 1983) (applying the principle in a personal injury claim but seen as extending to economic loss in a federal case); (6) *Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 958–59 (Ind. 2005); (7) *Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc.*, 262 So. 2d 377, 381 (La. 1972) (citing *Marine Ins. Co. v. Strecker*, 100 So. 2d 493, 494 (La. 1957); *Le Blanc v. La. Coca Cola Bottling Co.*, 60 So. 2d 873, 875 (La. 1952)); (8) *Ouellette v. Sturm, Ruger & Co.*, 466 A.2d 478, 482 (Me. 1983) (stating rule generally, though in a personal injury case); (9) *Jacobs v. Yamaha Motor Corp., U.S.A.*, 649 N.E.2d 758, 763 (Mass. 1995); (10) *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 90 N.W.2d 873, 880 (Mich. 1958); (11) *Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 565 N.W.2d 16, 19 (Minn. 1997); (12) *Hargett v. Midas Int'l Corp.*, 508 So. 2d 663, 665 (Miss. 1987); (13) *Groppel Co. v. U.S. Gypsum Co.*, 616 S.W.2d 49, 58 (Mo. Ct. App. 1981); (14) *Whitaker v. Farmhand, Inc.*, 567 P.2d 916, 919–20 (Mont. 1977); (15) *Peterson v. N. Am. Plant Breeders*, 354 N.W.2d 625, 632 (Neb. 1984); (16) *Hiles Co. v. Johnston Pump Co. of Pasadena, Cal.*, 560 P.2d 154, 157 (Nev. 1977); (17) *Dalton v. Stanley Solar & Stove, Inc.*, 629 A.2d 794, 797 (N.H. 1993); (18) *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660, 663 (N.J. 1985); (19) *Perfetti v. McGhan Med.*, 1983-NMCA-032, ¶ 59, 99 N.M. 645, 662 P.2d 646, 655 (stating rule generally, though in a personal injury case); (20) *Lang v. Gen. Motors Corp.*, 136 N.W.2d 805, 810 (N.D. 1965); (21) *Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849, 851–52 (Okla. 1979); (22) *Kassab v. Cent. Soya*, 246 A.2d 848, 853–54 (Pa. 1968), *overruled on other grounds* by *AM/PM Franchise Ass'n v. Atl. Richfield Co.*, 584 A.2d 915 (Pa. 1990); (23) *Kelly v. Ford Motor Co.*, 290 A.2d 607, 610 (R.I. 1972); (24) *Gasque v. Eagle Mach. Co.*, 243 S.E.2d 831, 832 (S.C. 1978); (25) *Cundy v. Int'l Trencher Serv., Inc.*, 358 N.W.2d 233, 240 (S.D. 1984); (26) *Commercial Truck & Trailer Sales, Inc. v. McCampbell*, 580 S.W.2d 765, 772 (Tenn. 1979); (27) *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977); (28) *Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 17–18 (Utah 1990); (29) *Gasque v. Mooers Motor Car Co.*, 313 S.E.2d 384, 390 (Va. 1984); (30) *Dawson v. Canteen Corp.*, 212 S.E.2d 82, 84 (W. Va. 1975) (stating rule generally in a personal injury case, overruling all previous cases requiring privity); (31) *W. Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810 (Wyo. 1980).

76. Nineteen states require privity for a remote buyer to sue a manufacturer for economic loss. (1) *State Farm Fire & Cas. Co. v. J.B. Plastics, Inc.*, 505 So. 2d 1223, 1227 (Ala. 1987); (2) *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383, 388 (Ariz. 1981); (3) *Burr v. Sherwin Williams Co.*, 268 P.2d 1041, 1048–49 (Cal. 1954); (4) *Koellmer v. Chrysler Motors Corp.*, 276 A.2d 807, 812 (Conn. Cir. Ct. 1970); (5) *Mesa v. BMW of N. Am., L.L.C.*, 904 So. 2d 450, 458 (Fla. Dist. Ct. App. 2005); (6) *Chrysler Corp. v. Wilson Plumbing Co.*, 208 S.E.2d 321, 323 (Ga. Ct. App. 1974); (7) *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 544 P.2d 306, 312 (Idaho 1975); (8) *Mellander v. Kileen*, 407 N.E.2d 1137, 1138 (Ill. App. Ct. 1980); (9) *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 108 (Iowa 1995); (10) *Prof'l Lens Plan, Inc. v. Polaris Leasing Corp.*, 675 P.2d 887, 898–99 (Kan. 1984); (11) *Compex Int'l Co. v. Taylor*, 209 S.W.3d 462, 465 (Ky. 2006), *as modified on denial of reh'g* (Jan. 25, 2007); (12) *see Morris v. Osmose Wood Preserving*, 667 A.2d 624, 637–38 (Md. 1995) (requiring privity in the vertical chain and providing it by statute, *see* MD. CODE ANN., COM. LAW § 2-314(1)(a) (West 2017) (“In §§ 2-314 through 2-318 of this title, ‘seller’ includes the manufacturer, distributor, dealer, wholesaler, or other middleman or the retailer”)); (13) *Martin*

C. Vertical Privity in Wisconsin

The law of Wisconsin has historically required privity of contract in an action for breach of the implied warranty of merchantability.⁷⁷ The rule came from English common law.⁷⁸ The rationale for creation of the rule was to protect nascent manufacturers from the onslaught of potentially disastrous claims.⁷⁹ Fifty years ago, however, the Wisconsin Supreme Court indicated that the tender days of the Industrial Revolution had long past and the Court should be more concerned about the injured and hapless buyer of manufactured products.⁸⁰ The Court reasoned that the concepts of *laissez-faire* and *caveat emptor* should “give[] way to more humane considerations.”⁸¹ As a result, the Court adopted the doctrine of strict liability against a remote manufacturer for damage caused to an individual’s person or their property.⁸² Privity is no longer required in such an action.⁸³ The reasons offered for no longer requiring privity are that the manufacturer is in the best position to distribute the costs created by the defective product onto all buyers via increased prices; the manufacturer may protect itself by purchasing insurance or a form of self-insurance; the manufacturer in the first instance creates the risk by placing the defective product on the market; and the manufacturer has the greatest ability to avoid the risk created by its product through its quality control measures.⁸⁴

Albeit privity is no longer required for personal injury or property damage, Wisconsin is in the minority of states that requires privity to assert a claim

v. Julius Dierck Equip. Co., 374 N.E.2d 97, 100 (N.Y. 1978); (14) *Gregory v. Atrium Door & Window Co.*, 415 S.E.2d 574, 575 (N.C. Ct. App. 1992); (15) *Curl v. Volkswagen of Am., Inc.*, 114 Ohio St. 3d 266, 2007-Ohio-3609, 871 N.E.2d 1141, at ¶ 26; (16) *see State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 217–18 (Or. 1968); (17) *Tex Enters., Inc. v. Brockway Standard, Inc.*, 66 P.3d 625, 628 (Wash. 2003); (18) *City of La Crosse v. Schubert, Schroeder & Assocs., Inc.*, 72 Wis. 2d 38, 41, 240 N.W.2d 124, 125 (1976), *overruled on other grounds by Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 573 N.W.2d 842 (1998); (19) *Mainline Tractor & Equip. Co. v. Nutrite Corp.*, 937 F. Supp. 1095, 1107 (D. Vt. 1996), *aff’d*, 79 F.3d 272, 281 (2d Cir. 1996) (quoting *Vermont Plastics, Inc. v. Brine, Inc.*, 824 F. Supp. 444, 453 n.11 (D. Vt. 1993) (requiring privity according to a federal court’s interpretation of the Vermont Supreme Court’s dictum in *Gochey v. Bombardier, Inc.*, 572 A.2d 921 (1990)).

77. *Strahlendorf v. Walgreen Co.*, 16 Wis. 2d 421, 435, 114 N.W.2d 823, 831 (1962); *Kennedy-Ingalls Corp. v. Meissner*, 5 Wis. 2d 100, 109, 92 N.W.2d 247, 252 (1958); *Prinsen v. Russos*, 194 Wis. 142, 146, 215 N.W. 905, 906 (1927).

78. *Dippel v. Sciano*, 37 Wis. 2d 443, 450, 155 N.W.2d 55, 58 (1967).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 459.

83. *Id.*

84. *Id.* at 450–51.

against a remote manufacturer for economic loss caused by breach of the implied warranty of merchantability.⁸⁵ For many years, however, the Wisconsin Supreme Court has been contemplating whether to change its position.⁸⁶ The primary reason that caused courts to originally insist on privity as a prerequisite to an action for breach of the implied warranty of merchantability no longer exists.⁸⁷ The Uniform Sales Act was the controlling law in Wisconsin at the time of the adoption of the rule, and the Sales Act provided that implied warranties extended only between immediate parties to the sale.⁸⁸ Today, however, the Uniform Sales Act has been replaced by the Uniform Commercial Code, which is decidedly neutral on whether vertical privity is required between the manufacturer and remote buyer regarding the implied warranty of merchantability.⁸⁹ Therefore, the opportunity currently presents itself for Wisconsin to join the majority of states which have been persuaded to no longer require privity to maintain an action for breach of the implied warranty of merchantability against a remote manufacturer.

D. Arguments in Favor of Retaining the Vertical Privity Requirement

The reasons why a minority of states continue to require vertical privity before the buyer can sue the remote manufacturer for breach of the implied warranty of merchantability can be fairly catalogued.

The decision to bar vertical privity should be made by the legislature, not the courts. Lifting the vertical privity requirement is a matter of public policy, and policy decisions should be made by the legislature.⁹⁰ In light of the fact that the legislature has adopted the Uniform Commercial Code, courts should

85. *Id.* at 463.

86. *Strahlendorf v. Walgreen Co.*, 16 Wis. 2d 421, 435, 114 N.W.2d 823, 831 (citing *Smith v. Atco Co.*, 6 Wis. 2d 371, 383, 94 N.W.2d 697, 704 (1959)) (“When this court declared by footnote in *Smith v. Atco Co.*, that Wisconsin requires privity in breach-of-implied-warranty cases, it was merely stating the then present status of our law. This does not mean that this court will adhere to this rule forever, regardless of the persuasiveness of the arguments made, or authorities cited, in favor of changing it. However, we do not deem the instant case a proper one in which to give consideration to this question.” (internal citation omitted)).

87. *Dippel*, 37 Wis. 2d at 454 (“Dean Prosser’s reference to the Uniform Sales Act elucidates the most distressing problem with adopting the ‘implied warranty’ fiction in the present case. The Uniform Sales Act as enacted by Wisconsin is the controlling law. Sec. 15 of the Act [WIS. STAT. § 121.15 (1961)], specifically provides that there are no implied warranties of quality other than those set forth in the Act. These are the implied warranties between the ‘buyer’ and the ‘seller.’ By sec. 76 of the Act [WIS. STAT. § 121.76 (1961)], the term ‘buyer’ and ‘seller’ includes only the immediate parties to the sale.” (footnote omitted)).

88. *Id.* at 453; *see also* *Prinsen v. Russos*, 194 Wis. 142, 147, 215 N.W. 905, 907 (1927).

89. U.C.C. § 2-318 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM’N 1999).

90. *Ciociola v. Del. Coca-Cola Bottling Co.*, 172 A.2d 252, 257 (Del. 1961).

not lightly change the legislative scheme.⁹¹ Finally, it would be more appropriate for vertical privity's demise to be effectuated by legislative action because of its long existence as a part of the state's jurisprudence.⁹²

Lifting the vertical privity requirement would conflict with the scheme of the Uniform Commercial Code. The UCC permits the seller of a product to disclaim warranties,⁹³ limit remedies,⁹⁴ and require various notices that must be given by a complaining buyer to the seller.⁹⁵ A manufacturer of a product may have great difficulty disclaiming warranties or limiting remedies when the manufacturer has no contractual relationship with the ultimate buyer.⁹⁶ Similarly, in the absence of a contractual relationship, is it realistic to expect that a buyer would notify a remote manufacturer of a defect in its product as required by the UCC?⁹⁷ A buyer's failure to provide the requisite notice of defect to the manufacturer is an absolute bar to the buyer's claim of breach of implied warranty of merchantability.⁹⁸

A breach of the implied warranty of merchantability is a claim based on contract law, and therefore, the claim should be based on an actual contract. Economic loss damages stemming from an inferior product are better left to a claim between the buyer and the seller, since they negotiated the terms of the contract between them.⁹⁹ Since a contract claim normally only arises from an agreement between the two parties, vertical privity should be required for a claim based on breach of the implied warranty of merchantability.¹⁰⁰ All warranty claims are an element of contract law, and, therefore, privity should be required.¹⁰¹

Retaining the vertical privity requirement encourages a buyer to pick his seller with care. A buyer who carefully selects his seller will have adequate

91. *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 108 (Iowa 1995).

92. *Harnischfeger Corp. v. Harris*, 190 So. 2d 286, 290 (Ala. 1966).

93. WIS. STAT. § 402.316 (2015–2016).

94. *Id.* § 402.719.

95. *Id.* § 402.607(3)(a).

96. *Prof'l Lens Plan, Inc. v. Polaris Leasing Corp.*, 675 P.2d 887, 898 (Kan. 1984); *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 108 (Iowa 1995).

97. *Prof'l Lens Plan, Inc.*, 675 P.2d at 898.

98. WIS. STAT. § 402.607(3)(a).

99. *Steckmar Nat'l Realty & Inv. Corp. v. J I Case Co.*, 415 N.Y.S.2d 946, 949 (N.Y. Sup. Ct. 1979).

100. *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 544 P.2d 306, 312 (Idaho 1975).

101. *Wyatt v. N.C. Equip. Co.*, 117 S.E.2d 21, 24 (N.C. 1960).

remedies at law should a warranty be breached.¹⁰² Allowing a buyer whose seller proves to be irresponsible to sue the manufacturer ignores “the consensual elements of commerce.”¹⁰³

Finally, none of the three alternatives available for adoption by the states under section 2-318 of the Uniform Commercial Code (Third Party Beneficiaries of Warranties Express or Implied) eliminates the requirement of vertical privity.¹⁰⁴ Nothing in Georgia’s version of the UCC section 2-318, “which extends the sellers’ warranties to family members and guests in the buyer’s home . . . eliminates the requirement that the buyer and the [seller] be in privity.”¹⁰⁵ Similarly, Maryland’s version of section 2-318 lifts the requirement of privity only when personal injury is involved; thus, the requirement is still in place for economic loss actions.¹⁰⁶

E. Arguments in Favor of Eliminating the Vertical Privity Requirement

The reasons why a majority of states do not require vertical privity between the remote manufacturer and the buyer in order to validly assert an action based on breach of the implied warranty of merchantability can also be catalogued.

The vertical privity requirement has so many exceptions that its application creates unfair results. Some of the major exceptions to the vertical privity requirement created by the courts are products liability, express warranties, third-party beneficiaries, and the use of agency/conduit concepts.¹⁰⁷ In all of the foregoing circumstances, the courts have found persuasive reasons to circumvent the privity requirement in contract actions.¹⁰⁸ In fact, the privity requirement has been so weakened by the various exceptions that it is producing unfair results.¹⁰⁹ The general rule that privity is required with its “quilt of exceptions” creates legal confusion for courts and for plaintiffs who don’t know what cause of action is available to them.¹¹⁰

102. *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383, 389 (Ariz. 1981) (quoting *State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 217–18 (Or. 1968)).

103. *Campbell*, 442 P.2d at 217.

104. *See* U.C.C. § 2-318 (AM. LAW INST. & UNIF. LAW COMM’N. 1999).

105. *Thomaston v. Fort Wayne Pools, Inc.*, 352 S.E.2d 794, 796 (Ga. Ct. App. 1987).

106. *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 638 (Md. 1995).

107. *See supra* text accompanying notes 52–74.

108. *See id.*

109. *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 90 N.W.2d 873, 881 (Mich. 1958) (quoting *Carter v. Yardley & Co.*, 64 N.E.2d 693, 700 (Mass. 1946)).

110. *Kassab v. Cent. Soya*, 246 A.2d 848, 856 (Pa. 1968), *overruled on other grounds by* *AM/PM Franchise Ass’n v. Atl. Richfield Co.*, 584 A.2d 915 (Pa. 1990).

The requirement of vertical privity leads to numerous, expensive, and wasteful lawsuits in which each buyer has to sue only the party to which it has privity. Privity requirements lead to expensive and wasteful procedures whereby the buyer sues the retailer, who sues the distributor, who then sues the manufacturer.¹¹¹ The requirement of vertical privity “perpetuat[es] a needless chain of actions whereby each buyer must seek redress for breach of warranty from his own immediate seller until the actual manufacturer is eventually” held responsible.¹¹² Eliminating the vertical privity requirement promotes judicial efficiency.¹¹³

In many circumstances, the requirement of vertical privity leaves the aggrieved buyer without a remedy. The rule requiring vertical privity was created at the beginning of the Industrial Revolution in order to protect struggling and unstable manufacturers.¹¹⁴ Today, the concern has shifted from protecting the manufacturers to protecting the ultimate buyer.¹¹⁵ Various events can intervene to stifle a buyer’s claim against the remote manufacturer. For example, the remote manufacturer can be insulated by the insolvency of the dealer, lack of jurisdiction over the manufacturer, disclaimers by the dealer in the sales contract with the buyer, or statute of limitation issues.¹¹⁶ It has also been argued that retaining the vertical privity requirement could encourage manufacturers to use thinly capitalized corporations to sell commercially inferior products, and again leave the buyer without an effective remedy.¹¹⁷

The legislature’s adoption of the UCC section 2-318 abrogated the vertical privity requirement. Many courts have concluded that its state’s adoption of section 2-318 of the Uniform Commercial Code eliminated the requirement of vertical privity in commercial transactions.¹¹⁸ They reason that the plain

111. *Bernick v. Jurden*, 293 S.E.2d 405, 414 (N.C. 1982) (quoting *Kinlaw v. Long Mfg. N.C., Inc.*, 259 S.E.2d 552, 557 (N.C. 1979)).

112. *Kassab*, 246 A.2d at 856.

113. *Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849, 851–52 (Okla. 1979).

114. *Dippel v. Sciano*, 37 Wis. 2d 443, 450, 155 N.W.2d 55, 58 (1967).

115. *Id.*

116. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77, 83 (Tex. 1977) (quoting *Prosser*, *supra* note 51, at 1124).

117. *Id.* at 81–82.

118. *Jacobs v. Yamaha Motor Corp., U.S.A.*, 649 N.E.2d 758, 763 (Mass. 1995); *Dalton v. Stanley Solar & Stove, Inc.*, 629 A.2d 794, 797 (N.H. 1993); *Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 17–18 (Utah 1990); *Hargett v. Midas Int’l Corp.*, 508 So. 2d 663, 665 (Miss. 1987); *Cundy v. Int’l Trencher Serv., Inc.*, 358 N.W.2d 233, 240 (S.D. 1984); *Gasque v. Mooers Motor Car Co.*, 313 S.E.2d 384, 390 (Va. 1984); *Ouellette v. Sturm, Ruger & Co.*, 466 A.2d 478, 482 (Me. 1983); *W. Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 809 (Wyo. 1980).

language of the section lifts the privity requirement “as to any natural person who may be expected to use, consume or be affected by the product,” which those courts believe includes the ultimate buyer of the manufactured product.¹¹⁹ Since section 2-318 extends liability to third-party beneficiaries, those courts reason that this extension includes the ultimate buyer regardless of privity.¹²⁰

The same policy reason that caused courts to ignore the vertical privity requirement for express warranties applies equally to the implied warranty of merchantability. In Wisconsin,¹²¹ as in most other states,¹²² when a manufacturer provides an express warranty to a remote buyer, that express warranty creates a “contractual relationship” between the parties.¹²³ The reason for creating that “contractual relationship,” and ignoring the requirement of vertical privity, is that it would be unjust for a manufacturer to create a demand for its product by making representations, but yet not be ultimately responsible when the product fails to live up to its representations.¹²⁴ There seems little question that in the era of mass marketing the remote buyer is cultivated by the manufacturer.¹²⁵ The implied warranty of merchantability, which requires that a product be fit for its ordinary purpose,¹²⁶ is the most basic warranty provided by the UCC.¹²⁷ In fact, its importance is recognized by the fact that the UCC implies the implied warranty of merchantability into every transaction when a merchant sells its product.¹²⁸ It is unjust to permit a manufacturer to create a demand for its product by representing that it is selling a merchantable product, but then, because there is no privity of contract between the buyer and the remote manufacturer, the buyer is denied the right to recover damages from the manufacturer when the product proves itself un-merchantable.¹²⁹ Certainly, if

119. *Gasque v. Eagle Mach. Co.*, 243 S.E.2d 831, 832 (S.C. 1978); *see also W. Equip. Co.*, 605 P.2d at 809–10.

120. *Ontai v. Straub Clinic & Hosp. Inc.*, 659 P.2d 734, 743 (Haw. 1983).

121. *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 518–19, 319 N.W.2d 855, 859 (1982).

122. *See A. E. Korpela*, Annotation, *Privity of Contract as Essential in Action Against Remote Manufacturer or Distributor for Defects in Goods Not Causing Injury to Person or to Other Property*, 16 A.L.R.3d 683, § 5 (1967).

123. *McNeal v. Blue Bird Corp.*, No. 308763, 2014 Mich. App. LEXIS 1082, at *12 (June 12, 2014) (quoting *Great Am. Ins. Co. v. Paty's, Inc.*, 397 N.W.2d 853, 856 (Mich. Ct. App. 1986)).

124. *See Paulson*, 107 Wis. 2d at 518.

125. *See Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 80–81 (N.J. 1960).

126. WIS. STAT. § 402.314(2)(c) (2015–2016).

127. *See id.* § 402.314(2).

128. *Id.* § 402.314(1).

129. *Henningsen*, 161 A.2d at 81 (quoting *Baxter v. Ford Motor Co.*, 12 P.2d 409, 412 (Wash. 1932)).

an express warranty can be the basis for creating a contractual relationship, the implied warranty of merchantability should be accorded the same treatment.¹³⁰

The same policy reasons that caused courts to ignore the vertical privity requirement when they adopted strict liability applies equally to the implied warranty of merchantability. The doctrine of strict liability in tort evolved from contract warranty theories.¹³¹ The evolution of strict liability in tort is understood as a way of extending express and implied warranties to protect the remote purchaser.¹³² Some of the reasons why strict liability was imposed upon manufacturers of products includes the fact that the manufacturer created the risk by putting its product in commerce; the manufacturer can control its risk by manufacturing safer products; and the manufacturer can more equitably distribute the damages its defective products caused through price adjustments.¹³³ Those same principles apply to the implied warranty of merchantability.¹³⁴ The manufacturer should not be permitted to place a product in commerce that is not fit for its ordinary purpose. The manufacturer has complete control over the product it places in commerce, and lifting the privity requirement encourages the manufacturer to build quality into its products.¹³⁵ Also, some courts believe that “[e]conomic loss can certainly be as disastrous as physical injury.”¹³⁶ Finally, the manufacturer is in the best position to equitably distribute the economic loss caused by its defective product through price adjustments.¹³⁷ The risk of the lemon is passed along to all buyers, as opposed to the individual, unlucky buyer.¹³⁸

In the modern marketplace, the retail seller is simply the economic conduit for the manufacturer’s product, and as such, the implied warranty of merchantability should pass through to the remote buyer. Most products sold in the marketplace are sold through a conduit such as a wholesaler or retailer,

130. *Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc.*, 262 So. 2d 377, 381 (La. 1972).

131. *See Northridge Co. v. W.R. Grace & Co.*, 162 Wis. 2d 918, 933, 471 N.W.2d 179, 184–85 (1991).

132. *Id.* at 933–34 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 95, 95A (W. Page Keeton ed., 5th ed. 1984)).

133. *Dippel v. Sciano*, 37 Wis. 2d 443, 451, 155 N.W.2d 55, 58 (1967).

134. *State v. Mitchell Constr. Co.*, 699 P.2d 1349, 1352 (Idaho 1984) (quoting *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 289 (Alaska 1976)).

135. *Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 959 (Ind. 2005).

136. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977).

137. *Kemp v. Miller*, 154 Wis. 2d 538, 550, 453 N.W.2d 872, 876 (1990) (quoting *Dippel*, 37 Wis. 2d at 450–51).

138. *Hyundai Motor Am., Inc.*, 822 N.E.2d at 959.

and not directly from the manufacturer.¹³⁹ The reason for this is simple. It's cheaper for the manufacturer to sell its products through a conduit rather than incurring the costs of direct sales themselves.¹⁴⁰ In light of the fact that manufacturers currently do, and likely will continue to, sell their products through conduits, the law should reflect the commercial realities of those transactions. The intermediaries between the ultimate buyer and the remote manufacturer are simply the economic conduits of the manufacturer.¹⁴¹

Finally, the manufacturer can control its exposure to economic loss damages as a result of a breach of the implied warranty of merchantability through the effective use of disclaimers and limitation of remedies. First of all, the measure of damages for breach of the implied warranty of merchantability “is the difference . . . between the value of the goods [as] accepted and the value” of the goods as warranted.¹⁴² Also, consequential damages include those losses that the seller “at the time of contracting had reason to know and [that] could not reasonably be prevented by cover or otherwise.”¹⁴³ In other words, the potential contract damages are not open ended as is often the case with tort damages. Further, the manufacturer can manage these contract damages by limiting the remedy for breach of the implied warranty of merchantability.¹⁴⁴ Or, the manufacturer can simply eliminate any contract damages by disclaiming the implied warranty of merchantability.¹⁴⁵ Unquestionably, a manufacturer can protect itself from unpredictable and excessive damage claims by limiting remedies and issuing disclaimers.¹⁴⁶

F. Analysis

The requirement of vertical privity provides that in order for a buyer to sue a remote manufacturer for breach of the implied warranty of merchantability, they must be parties to the same contract.¹⁴⁷ That rarely happens, and frankly

139. Lars Perner, *Distribution: Wholesaling and Retailing of Food Products*, http://www.consumerpsychologist.com/food_Distribution.html [<https://perma.cc/H85E-QZ3M>] (last visited Nov. 7, 2017).

140. *Id.*

141. *State v. Mitchell Const. Co.*, 699 P.2d 1349, 1352 (Idaho 1984); *see also Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41, 53 (Mo. 1963).

142. WIS. STAT. § 402.714(2) (2015–2016).

143. *Id.* § 402.715(2)(a).

144. *Id.* § 402.719(1)(a).

145. *Id.* § 402.316(2).

146. *Peterson v. N. Am. Plant Breeders*, 354 N.W.2d 625, 632 (Neb. 1984).

147. *Prinsen v. Russos*, 194 Wis. 142, 145, 215 N.W. 905, 906 (1927) (citing *Peterson v. Gales*, 191 Wis. 137, 142–43, 210 N.W. 407, 409 (1926)).

should no longer be required. The requirement of vertical privity was created when manufacturing was in its infant stage.¹⁴⁸ Its creation was designed to protect manufacturers from costly litigation until they had a sufficient opportunity to establish themselves financially.¹⁴⁹ That time period has long passed. In today's society, manufacturers are clearly financially able to defend themselves against litigation. Therefore, the current focus should shift from protecting the manufacturer to protecting the buyer.

The implied warranty of merchantability requires that any product sold by a manufacturer must be fit for its ordinary purpose.¹⁵⁰ Common sense suggests that every product made by a manufacturer should meet that minimum standard. No product should be sold in the marketplace that is not fit for its ordinary purpose. The importance of this common-sense standard is underscored by the fact that it is mandated by law and imposed on every manufacturer.¹⁵¹ The implied warranty of merchantability is a statutory warranty.¹⁵² Its importance is further underscored by the fact that it can only be disclaimed by using the word "merchantability" and the disclaimer must be conspicuous.¹⁵³ Given the obvious importance and significance of the implied warranty of merchantability, it does not seem just to permit a manufacturer to hide behind various defenses when its product proves un-merchantable. For example, a buyer can be denied remedy against the manufacturer because of the dealer's insolvency, lack of jurisdiction over the manufacturer, dealer disclaimers in the contract of sale, or statute of limitation issues.¹⁵⁴ If the implied warranty of merchantability is as important as the UCC suggests, these defenses should not be available. They simply perpetuate an injustice.

Further, manufacturers do not need the various defenses noted above. Manufacturers have ample opportunity to protect themselves when their product is sold. The UCC permits manufacturers to disclaim the implied warranty of merchantability¹⁵⁵ and also to limit the remedy of an unsatisfied buyer.¹⁵⁶ Is it not more honest to require a manufacturer to conspicuously

148. *Dippel v. Sciano*, 37 Wis. 2d 443, 450, 155 N.W.2d 55, 58 (1967).

149. *Id.*

150. WIS. STAT. § 402.314(2)(c).

151. *Id.* § 402.314(1).

152. *Id.*

153. *Id.* § 402.316(2).

154. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77, 83 (Tex. 1977) (quoting Prosser, *supra* note 51, at 1124).

155. WIS. STAT. § 402.316(2).

156. *Id.* § 402.719.

disclaim the implied warranty of merchantability in the contract of sale, rather than permit the manufacturer to hide behind the various defenses noted above?

Also, it's a simple task for manufacturers to disclaim the implied warranty of merchantability and limit a buyer's remedies. Virtually every product sold by a manufacturer contains some type of an express warranty.¹⁵⁷ As such, the manufacturer can simply place any disclaimers and limitation of remedies in with its express warranty. The courts have already approved such an approach.¹⁵⁸ Actual knowledge is not required by the buyer or dealer, but simply that the disclaimer and limitation of remedy be "reasonably noticeable" when the sale occurs.¹⁵⁹

As noted, manufacturers simply need to make sure that their disclaimer or limitation of remedy is reasonably noticeable to the buyer.¹⁶⁰ One of the primary ways to make the manufacturer's disclaimer or limitation of remedy reasonably noticeable is to place that burden on the manufacturer's dealer or retailer. One of the primary arguments espoused by the courts in support of keeping the vertical privity requirement is that the requirement of vertical privity encourages a buyer to be more careful when selecting its seller.¹⁶¹ In fact, the converse should be true. The manufacturer should be more careful when it chooses its seller to be sure that its seller will make the manufacturer's disclaimer or limitation of remedy reasonably noticeable.

Removing the vertical privity requirement as an impediment to a suit against a remote manufacturer is an outgrowth of the economic loss doctrine. The economic loss doctrine provides that a claim solely for economic loss can only be brought as a contract action.¹⁶² A breach of the implied warranty of merchantability is clearly a claim for economic loss and, therefore, must be brought as a contract action.¹⁶³ Since the buyer is forced by law to pursue only a contract action, the law should provide every opportunity for the aggrieved buyer to secure a full recovery in that contract action. Thus, extending the

157. V. Padmanabhan, *Marketing and Warranty*, in *PRODUCT WARRANTY HANDBOOK* 393, 402 (Wallace R. Blischke & D.N. Prabhakar Murthy eds., 1996) (citing E. PATRICK MCGUIRE, *INDUSTRIAL PRODUCT WARRANTIES: POLICIES AND PRACTICES* 1 (1980)) ("Although virtually all producers of industrial goods offer some sort of warranty, there is substantial variation in the kind of protection provided, the length of the warranties, and in the method of administration.").

158. *E.g.*, *R & L Grain Co. v. Chi. E. Corp.*, 531 F. Supp. 201, 207 (N.D. Ill. 1981).

159. *Id.* at 208-09.

160. *See id.* at 209.

161. *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383, 388-89 (Ariz. 1981) (quoting *State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 217-18 (Or. 1968)).

162. Ralph C. Anzivino, *The False Dilemma of the Economic Loss Doctrine*, 93 MARQ. L. REV. 1121, 1121 (2010).

163. Anzivino, *supra* note 18, at 1083.

implied warranty of merchantability to the remote manufacturer is entirely consistent with and a fair outgrowth of the economic loss doctrine.

Interestingly, both the majority and minority of state courts cite the legislature's adoption of the UCC section 2-318 (Third Party Beneficiaries of Warranties Express or Implied) as support for their particular rule when it comes to extending the implied warranty to the remote manufacturer.¹⁶⁴ Of course, the legislature's adoption of section 2-318 can't support both positions. It's more likely the adoption doesn't support either position, which is exactly what the official comments to the UCC state.¹⁶⁵ Wisconsin has adopted alternative A to section 2-318.¹⁶⁶ It is the narrowest of the three alternatives available under the UCC.¹⁶⁷ The argument that the adoption of section 2-318 precludes any further extension of warranties was made and rejected by the Wisconsin Supreme Court.¹⁶⁸ In *Dippel v. Sciano*, it was "argue[d] that the legislature by enacting sec. 402.318, . . . acted in the field and [therefore,] has specifically limited the seller's liability for breach of implied warranty to the buyer's family and guests."¹⁶⁹ The court responded by quoting the UCC section 2-318, comment 3, which provides that "the section 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."¹⁷⁰ Based on the comment, the court rejected the preclusion argument.¹⁷¹ In other words, the adoption of Wisconsin Statutes section 402.318 and its language is not a bar to the extension of the implied warranty of merchantability to a remote manufacturer.

Finally, it should be noted that extending the implied warranty of merchantability to the remote manufacturer does not necessarily mean that the aggrieved buyer will win its case. Rather, the buyer must still carry its burden of proof, and if it fails to do so, the buyer will lose.¹⁷²

164. See *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 437 S.W.2d 459, 462 (Ark. 1969) (demonstrating the majority opinion); see also *Tex Enters., Inc. v. Brockway Standard, Inc.*, 66 P.3d 625, 628 (Wash. 2003) (demonstrating the minority opinion).

165. U.C.C. § 2-318 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 1999).

166. Compare WIS. STAT. § 402.318 (2015–2016), with U.C.C. § 2-318 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 1999).

167. WIS. STAT. § 402.318.

168. *Dippel v. Sciano*, 37 Wis. 2d 443, 458, 155 N.W.2d 55, 62 (1967) (quoting U.C.C. § 2-318 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 1962)).

169. *Id.* at 458 (citing U.C.C. § 2-318 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 1962)).

170. *Id.* (quoting U.C.C. § 2-318 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 1962)).

171. *Id.*

172. See, e.g., *Clark v. DeLaval Separator Corp.*, 639 F.2d 1320, 1326 (5th Cir. 1981).

IV. CONCLUSION

The requirement that an aggrieved buyer may not sue a remote manufacturer for breach of the implied warranty of merchantability was created at a time when it was thought necessary to protect the fragile manufacturing industry in this country. Those days have long passed. Nowadays, manufacturers are well able to defend themselves, both financially and through disclaimers or limitation of remedies, when their products are sold. At this point in time, the focus should shift from protecting the manufacturers to protecting the aggrieved buyer.

The implied warranty of merchantability is the most basic warranty that every manufactured product must meet. It is simply common sense that no manufacturer should make and sell a product that is not fit for its ordinary purpose. This obligation is so essential that the Uniform Commercial Code mandates it by requiring every manufacturer to give the warranty as a matter of law. To be fair, however, the Uniform Commercial Code does permit a manufacturer to limit its exposure by allowing the manufacturer to disclaim the implied warranty or limit the buyer's remedy. The balance provided by the UCC seems to be the correct one in that every buyer receives the implied warranty unless the manufacturer has reasonably disclaimed it. That seems a fair bargain to both sides. Inserting the requirement of vertical privity into the balance unfortunately has created technical defenses that has left buyers without a remedy. The net effect of these defenses is that the manufacturer can avoid its responsibility without having to disclaim the implied warranty of merchantability. On balance, the requirement of vertical privity is unnecessary, unfair to any buyer, and should not be tolerated by the law.