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EXPRESS WARRANTY LIABILITY OF REMOTE SELLERS: ONE PURCHASE, TWO RELATIONSHIPS

DONALD F. CLIFFORD*

[L]ogic precludes rendering meaningless a manufacturer's express warranty to a retail purchaser.

—*Seekings v. Jimmy GMC of Tucson, Inc.*¹

It has always seemed to me rather silly to say that I make a “contract” when I drop a nickel in the subway turnstile; yet correct usage still permits this nomenclature.

—Edwin W. Patterson²

I. INTRODUCTION

It is surprising to many that Article 2 does not literally apply to the ubiquitous manufacturer's warranty³ even in cases involving only economic loss. Many courts have had the good sense to pretend as if it did and have proceeded to apply Article 2 without discussing the question. There have, however, been rude awakenings in some cases in which courts have felt stymied by privity “rules” or befuddled about whether one must give notice of breach to a “nonseller” or whether one can revoke acceptance of a noncontract or refund a retail purchase price the manufacturer never received.

The drafters of Article 2 considered the problem episodically but did not

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1. *Seekings v. Jimmy GMC of Tucson, Inc.*, 638 P.2d 210, 215 (Ariz. 1981) (en banc).

2. Edwin W. Patterson, *Compulsory Contracts in the Crystal Ball*, 43 COLUM. L. REV. 731, 743 (1943).

3. See Curtis R. Reitz, *Manufacturers' Warranties of Consumer Goods*, 75 WASH. U. L.Q. 357 (1997); Task Force of the A.B.A. Subcomm. on Gen. Provisions, Sales, Bulk Transfers, and Documents of Title, Comm. on the Unif. Commercial Code, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1103-05 (1991) [hereinafter *Task Force Report*].

try to resolve it despite their conviction that something should be done to enable buyers to sue manufacturers who, with the advent of new marketing practices,⁴ issued warranty “certificates” to induce buyers to purchase from retail sellers. I am tempted to believe, without evidence, that their failure to deal with these issues was related to their failure to come to grips with standard form contracts, which received attention only in the commercial context of the battle of the forms.⁵

Marketing practices, of course, have changed radically in the fifty or so years since the Uniform Commercial Code (“UCC” or the “Code”) was drafted, and the law has fallen behind these developments. New thought has been given to the issues in the revision process, and a revised Article 2 will likely provide a statutory basis for dealing with at least some aspects of them.

The justification for and the interpretation and application of these new provisions will ultimately turn on an understanding of the nature of warranty, the legal and commercial influences that have shaped it, and the changed circumstances of modern selling and marketing practices that will influence it in the future. Those inquiries should also shed some light on what kind of room there will be in the new provisions for case-law evolution and response to continuing changes in the marketplace. These inquiries may also be helpful during the period before enactment of the new provisions, in which the courts must get by with the old ones.

A formidable obstacle against imposing liability on remote sellers is the perception that “the contract” the buyer made was with the retailer, and the manufacturer was not “privity” to that contract. Therefore, the logic continues, the manufacturer cannot be liable in contract; liability of anyone in the chain of distribution other than the immediate seller must be rooted in tort.

These notions stem in part from the usual, modern descriptions of the uneasy relationship between tort and contract law. As Professor Feinman

4. See George G. Bogert & Eli E. Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400 (1930-31).

5. The battle of the forms provisions of section 2-207 made it far easier for commercial buyers to avoid warranty disclaimers and remedy limitations than for consumers. See U.C.C. § 2-207 & cmts. (1995). Commercial buyers could preserve Article 2 default rules for implied warranties and consequential damages by appropriate clauses that would cancel out sellers’ standard form attempts to contract out of them. Because consumers do not use standard forms, they could not avoid disclaimers and remedy limitations in that way. I have suggested elsewhere that it would be reasonable to assume that consumer buyers would use a standard form preserving the default rules if they knew about section 2-207 and should therefore avoid disclaimers and limitations on the implied warranty of merchantability. See Memorandum from Donald F. Clifford to Subcomm. on Consumer Issues of the Article 2 Drafting Comm. 3 (Jan. 1, 1996).

notes, "Contract law is concerned with relations that are created primarily by affirmative promissory acts that plan for the future conduct of the contracting parties"⁶ and involves a "bargain transaction between two parties,"⁷ contemplating protection of the contractors' reasonable expectations and reasonable reliance.⁸ Tort law, in contrast, "seeks to remedy wrongful violations of established interests that are not created by agreement," especially personal injury and damage to property,⁹ and is "concerned with accident avoidance and efficient and appropriate allocation of risk."¹⁰

If one seeks to fit remote-seller warranty obligations into one of these two categories, it could be said to be one "not created by agreement" and therefore tortious in nature. As applied to problems of economic loss, however, such a conclusion is contrary to current law and fails to respond appropriately to the current and developing marketplace. The argument also suggests the inherent limitations of categorical characterizations.

Professor Feinman not only points out the overlap between those described categories, but he also argues that reconstruction of the "traditional doctrinal structures is long overdue" and that in deciding cases "we ought to begin by focusing on the relationships in the factual setting that gives rise to the case, recognizing that the relationships often will be more complex than is acknowledged by the traditional categories."¹¹

One way of looking at the thesis of this Article is that the law of sales warranty has never been, is not now, and should not be confined to the bargain-agreement concept of contract and that issues of remote-seller express warranty liability should focus on relationships. If one considers that one deal may create two relationships—one with the retailer, and another with the manufacturer or other remote seller—a broad vista of possibilities opens up.

After exploring some history in Part II, I turn in Parts III and IV to materials that illuminate the kinds and nature of relationships that may exist between buyers and remote sellers and point out in Part V that the new drafts do not cover all the bases. In Part VI, I consider the change in marketing

6. Jay M. Feinman, *Implied Warranty, Products Liability, and the Boundary Between Contract and Tort*, 75 WASH. U. L.Q. 469, 475 (1997).

7. *Id.* at 477.

8. *Id.* at 476.

9. *Id.* at 475.

10. *Id.* at 476.

11. *Id.* at 477-78.

practices that necessitate new responses. In Part VII, I briefly discuss developments in the European Community (both within member states and in Community Directives) that point toward increased recognition of remote-seller liability because these changes will apply to American goods sold within the Community and form part of the context in which the revision of Article 2 should be assessed.

In Parts VIII and IX, I also consider some cases which on the one hand show the risk for retailers in not having explicit treatment of remote-seller warranties and, on the other, suggest some new arguments for actions against retailers who disclaim warranties. Throughout, I touch on some of the problems that inhere both in the nature of the underlying issues and in the drafts which seek to accommodate them. These include questions in Part X about the enforcement of remote-seller disclaimers and what remedies should be available for breach of remote-seller express warranties. I propose to discuss only matters of economic loss, leaving personal injury concerns to other discussions in this Symposium.¹² Although I occasionally separate out special consumer considerations, I have for the most part proceeded on the basis of general principles. This in most cases is true to the resolution of some difficult problems. It also recognizes some true political realities.

Although I occasionally refer to prior drafts, I have not tried to trace each shift and change in the work of the Drafting Committee. My reasons for that go beyond the legend in italicized language on the face of each draft: "The ideas and conclusions herein set forth, including drafts of proposed legislation . . . do not necessarily reflect the views of the Committee, Reporters or Commissioners [on Uniform State Laws]. Proposed statutory language, if any, may not be used to ascertain legislative meaning of any promulgated final law."¹³

One cannot expect to find deep meaning in changes of language from one draft to the next. Some of the draft language emanated from the Reporter before consultation. Some came after discussion at a Drafting Committee meeting without a vote being taken and some after a vote "in principle." Some of the draft language probably was influenced by discussion of related issues without specific consideration of the language in question. The subject of warranties, for example, came up while considering many other issues,

12. See Feinman, *supra* note 6; Reitz, *supra* note 3.

13. See, e.g., Draft, Uniform Commercial Code Revised Article 2 Sales (Nat'l Conference of Comm'rs on Unif. State Laws, July 12-19, 1996) [hereinafter July 1996 Annual Meeting Draft, Art. 2], available at <<http://www.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 23, 1997).

such as the parol evidence rule, the battle of the forms, standard forms, disclaimers, limitation of remedies, failure of essential purpose, and privity. The trail is also complicated because of the shifting of section numbers through various drafts, culminating (perhaps) in the placement of the warranty provisions in a revised Part 4 of Article 2.¹⁴

II. SOME OF THE COMMON-LAW AND ARTICLE 2 BACKGROUND OF WARRANTY

Much has been written about the multiple origins of warranty law. Some of the history is probably incomprehensible to contemporary readers because they have not experienced the agony of the old forms of actions. I have elsewhere traced the principal strands of warranty law, which illustrate the overlapping influences of contract and tort and the significant impact of public policy considerations.¹⁵

At an early stage, the mode of expression—affirmation or promise—was determinative (i.e., “I warrant.”). There then evolved concepts of solemn assumption of liability. Still later, public policy shaped the evolution of the special role of the description of the goods and the implied warranties.¹⁶ Reliance arose on the tort side out of the law of misrepresentations, from which also came distinctions between “mere” opinion and statements of fact.

The drafters of Article 2 still felt the impulse of the old law keenly enough to disavow in section 2-313(2) some of the required ancient formalities.¹⁷ They likewise chose not to use the language of “reliance” in the old Uniform Sales Act,¹⁸ opting instead for the new comprehensive “part of the basis of the bargain” test,¹⁹ which was loose enough to encompass all the old strands, some of which had never been burdened with the weight of reliance requirements.

The history of Article 2 shows that the drafters periodically considered

14. See, e.g., Draft, Uniform Commercial Code Revised Article 2 Sales (Nat'l Conference of Comm'rs on Unif. State Laws, Mar. 21, 1997) [hereinafter Mar. 1997 Draft, Art. 2], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Apr. 8, 1997).

15. See *Task Force Report*, supra note 3, at 1089-105 (The author of this Article Donald F. Clifford, wrote these portions of the report).

16. This public policy basis was much different than that used in the “implied warranty” cases leading to strict liability in tort.

17. See U.C.C. § 2-313(2) (1995) (discarding requirement of the words “warrant” or “guarantee”).

18. UNIF. SALES ACT (1905).

19. See U.C.C. § 2-313(1) (1995).

how to deal with affirmations and promises made by remote sellers—usually manufacturers of products sold to the public by retailers. For example, a 1942 subcommittee report noted:

The suggestion of Williston and Vold that labels and some kinds of advertisements, “manufacturer’s guaranty” and the like should run in favor of the retail purchaser, is sound; and this result needs expression, to avoid that older case-law trend which limits “warranty” strictly by the requirement of privity.²⁰

Similarly, a comment to the warranty section of the second draft of the Uniform Revised Sales Act noted:

The problem goes here quite as much to *direct warranty by the producer* to the ultimate buyer. “Certificates” are commonly a manufacturer’s device to aid resale.

And at this point (with the problem of the effect of general advertising reserved) this section ought probably to become explicit, in regard to giving rights to sub-buyers who rely on manufacturer’s “certificates” or “guaranty.”²¹

In the same draft appeared the following:

Possible addition: manufacturer’s direct obligation to consumer-buyer left open. It is probably desirable to add to this section another point intentionally left open for such further development as the Courts may find it wise to undertake:

(5) Where the circumstances may be such as to raise a direct obligation in regard to quality, servicing, or otherwise, by a “manufacturer” who puts goods upon the market to a purchaser of such goods from a dealer, neither this section nor the fact that the warranties declared in this Act are declared between seller and buyer shall negate such direct obligation.²²

The commentary went on to note:

At present the law is in flux, third-party beneficiary doctrines, a

20. REVISED UNIF. SALES ACT § 12 note (Preliminary Draft No. 1, Oct. 1942).

21. REVISED UNIF. SALES ACT § 12 note cmt. 4 (Nat’l Conference of Comm’rs on Unif. State Laws, Report & 2d Draft 1941).

22. *Id.* § 16-B.

loose concept of some warranties “running with the goods,” representation and invitation to purchase made by advertising, all being in course of budding of a direct obligation of some sort. There are in addition express “manufacturer’s guarantees” in use, and various types of assurance of servicing and the like. The subsection would simply avoid negation of such obligation either by implication, or by the historical limitation thereof to the “seller.”²³

A final example is from the 1944 Proposed Final Draft:

Direct Action Against Prior Seller. Damages from breach of a warranty sustained by the buyer or by any beneficiary to whom the warranty extends under Section 43 may be recovered in a direct action against the seller or any person subject to impleader under Section 120. An action against one warrantor does not of itself bar action against another.²⁴

It thus appears that the drafters were concerned about the increase in remote-seller contacts with remote buyers, especially those in the form of advertising, manufacturers’ guarantees, and “certificates.” Just why their final product did not try to cope with these practices is not clear. Perhaps they were unable to resolve the complexities, were diverted by other issues, were concerned about the political risk of enacting pro-consumer provisions, or felt that neither commercial practices nor legal thought had sufficiently matured.

The only remnants of their concern appear in the Official Commentary to section 2-313 and the text and commentary to section 2-318.²⁵ The former acknowledges that the drafters deliberately finessed the issues, leaving them for case-law evolution.²⁶

The sporadic nature and substance of that case law evolution seem a little curious in hindsight. There have been, of course, numerous mixed sales-service and lease cases in which the issues were explored, contributing in no small way to the drafting of Article 2A.²⁷ The use of warranty law as a bridge

23. *Id.* cmt.

24. REVISED UNIF. SALES ACT § 121 (Proposed Final Draft No. 1, 1944). The commentary to section 121 explained that section 43 “follow[ed] the established line of cases which . . . have worked out avoidance of hardship and expense by allowing immediate suit against a party more remotely, or ultimately, responsible.” *Id.* § 43 cmt.

25. See U.C.C. § 2-313 cmt. 2 (1995); *id.* § 2-318 & cmt. 3.

26. See *id.* § 2-313 cmt. 2. The status of such warranties under current Article 2 is discussed in the *Task Force Report*, *supra* note 3, at 1103-05.

27. See U.C.C. § 2A-216 & cmt. (1995).

to the action of strict liability in tort is well known, although much of that use was of the implied warranty rather than the express warranty that is the subject of this inquiry.²⁸

Some of the policies identified in the personal injury case law evolution included explicit reference to marketing and manufacturers' reaching out directly to buyers.²⁹ Gradually, however, the emphasis shifted to public policies not rooted in marketing practices but in unreasonable risks of harm—"accident avoidance and efficient and appropriate allocation of risk."³⁰ Tort theory then claimed that the cases using warranty analysis during the period of evolution really had been in tort, not sales, and had strayed from the sales-warranty last. Implicit in that criticism was that actions against anyone in the chain of distribution, other than the retailer, had to be in tort.

Despite the shift of the center of gravity to tort for personal injury actions against remote parties, it became hornbook law that direct actions for direct economic loss against remote sellers for breach of express warranty was the rule, not the exception.³¹ Although some of those cases used the public policies articulated in the personal injury cases,³² much of the development

28. See e.g., Feinman, *supra* note 6, at 469; Reitz, *supra* note 3, at 370-74.

29. The 1932 decision in *Baxter v. Ford Motor Co.* has been widely cited:

Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.

12 P.2d 409, 412 (1932). Another favorite example is *Rogers v. Toni Home Permanent Co.*:

Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise . . . make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer . . . Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products.

147 N.E.2d 612, 615 (Ohio 1958).

30. Feinman, *supra* note 6, at 10.

31. BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* ¶ 10.01[1] (1984); 2 JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 11-7 (4th ed. 1995).

32. The most famous example may be *Randy Knitwear, Inc. v. American Cyanamid Co.*:
The world of merchandising is, in brief, no longer a world of direct contact . . .

was sub silentio. Many courts simply had the good sense to deal with remote-seller express warranties as if Article 2 applied,³³ although they experienced difficulties in coping with such issues as basis of the bargain, notice of breach, and the remedy of revocation of acceptance.

III. RECOMMENDATIONS OF THE STUDY GROUP

Considering the legal complexities touched on above, the widely diverse factual situations which can give rise to warranties,³⁴ and the extraordinary changes in marketing, distributing, advertising, and selling goods, it is not surprising the Study Group recommended that Article 2 be revised.

Two of the Study Group's decisions presaged the work of the Drafting Committee with respect to warranties of remote sellers. First, its report on

....

... The manufacturer places his product upon the market and, by advertising and labeling it, represents its quality to the public in such a way as to induce reliance upon his representations. He unquestionably intends and expects that the product will be purchased and used in reliance upon his express assurance of its quality and, in fact, it is so purchased and used. Having invited and solicited the use, the manufacturer should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contract directly with the user.

181 N.E.2d 399, 402-03 (N.Y. 1962).

33. In contrast, lack of privity has been a much greater obstacle to assertion of implied warranty claims.

34. A partial list is illustrative:

1. Pre-contract affirmations and promises contained in advertising and marketing brochures:
 - a. consulted during negotiations
 - b. available but not consulted during negotiations
 - c. known to buyer before contracting
 - d. known to buyer after contracting but before full performance
 - e. unknown to buyer until litigation
 - f. stale at relevant times
2. Pre-contract oral representations:
 - a. factual
 - b. opinion
 - c. exaggeration (puffing)
3. reference to sample or model during negotiations
4. description of goods
5. post-writing affirmations and promises
6. affirmations made by the seller known by the buyer to be untrue
7. exaggerations and importunings
8. affirmations and promises made by a remote seller who did not sell or deal directly with the remote buyer.

section 2-318, although in disagreement over most issues other than that a “major revision” was required, indicated unanimous agreement that a remote buyer should be allowed to sue a remote seller for breach of express warranty and posed a series of questions that should be answered if the decision was made to permit warranty suits against remote sellers.³⁵

Second, the Study Group expressed dissatisfaction with the “part of the basis of the bargain” test and the failure of section 2-313 to set forth a way for distinguishing between those things which can become warranties and those which cannot.³⁶

Despite its own disagreement over how to resolve these issues,³⁷ the Committee agreed that “Comments 3 and 8 . . . suggest a common strategic approach: All statements made, whether ultimately classified as those governed by § 2-313(1) or (2), are presumed to be part of the basis of the bargain unless taken out by ‘clear affirmative proof’ or for ‘good reason . . . shown to the contrary.’”³⁸ Its final recommendation was that the Drafting Committee “resolve the debate . . . without returning to an explicit reliance test” and, more particularly, (1) incorporate the comments’ “presumption” test into the text and (2) clarify when statements of opinion and value become part of the “presumption.”³⁹

IV. THE VARIETY OF CONCERNS REGARDING REMOTE-SELLER WARRANTIES

Early concerns flagged by the Drafting Committee about remote-seller liability included the ominous specter of unforeseeable and ruinous consequential damages, application of the “puffing” rules to advertising, fishing by litigants for stale and unseen brochures, and the imposition of

35. *Task Force Report*, *supra* note 3, at 1111-15.

36. *See id.* at 1088-91.

37. “The Study Committee disagreed on what the test should be. The disagreement ranged between a suggestion that the buyer must prove reasonable reliance on the affirmation (a return to the USA test) to a proposal that ‘basis of the bargain’ be replaced by a ‘reasonable expectations’ test that applied both before and after the contract was made [noting in footnote 35 that “[t]his is, in essence, Professor Murray’s test. *See* John E. Murray, Jr., ‘Basis of the Bargain:’ *Transcending Classical Concepts*, 66 MINN. L. REV. 283 (1982).”]. In the middle, some supported the ‘presumption’ test stated in the comments and, with clarifications, were content to leave the matter for the courts.” *Id.* at 1088-89.

38. *Id.* (second omission in original).

39. *Id.* at 1089 (Recommendation A2.3(10)). The group’s recommendation that the revised statute elaborate on when post-formation conduct becomes part of the bargain is not considered here. *See id.*

liability on remote sellers for warranties made in contexts which did not include a contractual limitation of remedies or damages. Close behind on the list were issues such as disclaimers and the availability of rejection and revocation of acceptance. Intertwined with the issues was the debate about whether or how to deal with personal injury questions. Finally, there were two structural complications: first, the period of hub and spoke⁴⁰ and second, the deferral of issues affecting consumers until a subcommittee on consumer policy could address underlying principles.⁴¹

In those early years of the revision process, there was an informal consensus that manufacturers' warranties addressed directly to remote buyers should be directly enforceable. Until recently, however, the bulk of discussion regarding warranties of remote sellers focused on (1) so-called "derivative" warranties (e.g., the warranty made by a supplier to the manufacturer) and (2) warranties in advertising or other materials addressed to the public at large.

Policy responses to the derivative warranty issues gradually evolved and are now set forth in draft section 2-409(a).⁴² That subsection permits a buyer or transferee to assert claims against a remote party, but it preserves for that remote party the allocation of risk arrived at in the contract between the remote party (e.g., a supplier) and its immediate buyer (e.g., the manufacturer) when claims are made by others down the chain of

40. In the early years of the drafting process, questions were increasingly raised about whether software and goods should be treated the same. An associate reporter was appointed to focus on those questions. The Drafting Committee determined that the differences between goods and software were sufficient that different rules should apply to some issues. The common issues could be treated in the "hub" of the revised article, and different "spokes" would emanate for goods and software. The process was stopped in July 1995 when the Executive Committee of NCCUSL determined that software should be governed by a separate article. A new drafting committee was appointed to draft Article 2B. *Preface to Draft, Uniform Commercial Code Article 2B Licenses* (Nat'l Conference of Comm'rs on Unif. State Laws, Dec. 12, 1996), available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Apr. 19, 1997).

41. See Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 WASH. U. L.Q. 69 (1997).

42. March 1997 Draft section 2-409 states:

A seller's express or implied warranty made to an immediate buyer extends to any remote buyer or transferee that may reasonably be expected to use or be affected by, the goods and that is damaged by a breach of warranty. The rights of the remote buyer or transferee and its remedies against the seller for breach of a warranty extended under this subsection are determined by the enforceable terms of the contract between the seller and the immediate buyer and this article. However, the seller is not liable for consequential lost profits for breach of warranty under this section.

Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-409(a).

distribution.⁴³ The following example illustrates the limitation:

Supplier sells components to Manufacturer under a contract in which Supplier extends an express warranty, disclaims implied warranties, and limits remedies and damages. Manufacturer sells the product to Buyer. Under the derivative warranty theory, Buyer may sue Supplier, but Buyer's claims derive from, and are thus limited by, the terms in the Supplier-Manufacturer contract.

These derivative warranty provisions are of considerable importance, but they do not involve warranty obligations running directly from the remote seller to a remote buyer or transferee and are not considered here. The focus of this Article is direct, as contrasted to derivative, claims asserted against remote sellers.

V. THE NATURE AND VARIETY OF REMOTE-SELLER EXPRESS WARRANTIES ARE NOT FULLY EXPRESSED IN THE NEW DRAFT

Until the September 1996 meeting of the Drafting Committee, the creation of express warranties of remote sellers was treated in a subsection of the basic express warranty rules, and various remedy limitations on recovery for their breach were covered in new subsections of the rules dealing with extension of warranties.⁴⁴ Several months before the meeting, the ABA Task Force proposed that some express warranties of remote sellers be treated for all purposes of Article 2 as if they were warranties of immediate sellers.⁴⁵ Professor Curtis Reitz at first proposed that they be treated as common-law warranties not covered by Article 2.⁴⁶ After consultation with some members of the Drafting Committee and members of the ABA Task Force, he formulated the proposals discussed in his article in the Symposium.⁴⁷ These

43. *See id.* The Reporter's Notes to section 2-409(a) state:

Subsection (a). Under subsection (a), the seller's warranty made to an immediate buyer is extended to a foreseeable purchaser or transferee . . . who is damaged by the breach. . . . The protected remote person's rights against the seller are defined and limited by the terms of the contract between the seller and the immediate buyer and the terms of this Act. It is, in short, a derivative warranty and the beneficiary stands in the shoes of the immediate buyer.

Id. § 2-409(a) cmt. 2.

44. *See, e.g.*, July 1996 Annual Meeting Draft, Art. 2, *supra* note 13, §§ 2-313(d), 2-318(b), (c)

45. Memorandum from ABA/UCC Subcomm. on Sales of Goods (Formerly the Task Force on Article 2 Revision) to NCCUSL-ALI Article 2 Drafting Comm. 2-3 (Aug. 19, 1996).

46. *Id.* app. (Letter from Curtis Reitz to Donald Clifford).

47. *See* Reitz, *supra* note 3.

proposals were adopted in principle at the September meeting for further development.

The changes extracted certain remote-seller express warranties from the rewrite of old section 2-313 for sui generis treatment. As considered in subsequent drafts,⁴⁸ the proposals (1) treated remote-seller express warranties delivered to the buyer through the chain of distribution as obligations arising “other than as part of agreement of sale,” (2) provided for creation of remote-seller obligations “arising from communications to the public,” and (3) imposed remedy and privity limitations not applicable to express warranties of immediate sellers. In addition, because these warranties were treated as not arising from agreement, the various sections governing the process of agreement, disclaimer, and the like were considered not applicable.

These new provisions may be perceived as creating a distinct status for the remote, express warranty as a statutory noncontractual obligation. That conclusion implies far too narrow a view of sales warranty “contract” law and is wrong in two respects. First, the title of the section only indicates the warranties arise “other than as part of agreement of sale.” It does not follow that contract law per se will not apply. Secondly, the categorization in the new section is incomplete in that it does not encompass some relationships with remote sellers and it. Not all remote-seller warranties will be confined to the limitations of the “nonagreement” section 2-404 remote-seller express warranty.

Three classes of transactions illustrate the problem of characterization and will be separately considered:

(a) the cases in which a sale to a final buyer results in two contracts: one with the immediate seller and another with the manufacturer under *Carlill v. Carbolic Smoke Ball Co.*⁴⁹ or other contract theory;

(b) the direct dealings cases, which border on immediate seller (section 2-403) warranties because of aspects of “agreement,” but which retain some formal characteristics of remote-seller warranties (section 2-404) because the purchase is through an intermediary; and

(c) the cases rooted in classic sales warranty theory of liability for formal undertakings and representations.

48. The changes at first appeared in two new warranty sections but have since been consolidated in what is now draft 2-404. See Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-404.

49. 1893 Q.B. 256 (Eng. C.A.).

A. Cases Involving a Contract Between Remote Seller and Remote Buyer

Some remote-seller warranties should be treated as direct warranties governed by section 2-403 because under the *Carbolic Smoke Ball* theory,⁵⁰ a direct contract is created between a remote buyer and a remote seller. This approach was applied from time to time even before the UCC. For example in 1937, a commentator noted:

The obstacle of privity was successfully satisfied by some of the courts when they found that a unilateral contract existed between the manufacturer and the ultimate purchaser. Of course if the essentials of a contract between the injured plaintiff and the manufacturer were found, there was a good basis for the warranty action and the privity requirement vanished. But the rule of *Carlill v. Carbolic Smoke Ball Co.* could not be applied to mere representations which were not accompanied with an offer (express or implied) to contract. If the manufacturer's representations were made in such a way that the natural tendency was to induce the sub-purchaser to rely upon them, one could spell out the promise or offer of the manufacturer to be bound. Then if the sub-purchaser accepted this offer and did the acts requested by the manufacturer it would seem proper to hold the manufacturer liable directly to the sub-purchaser upon the unilateral contract that was thereby created.⁵¹

Several earlier student notes had made similar observations. For example, a 1928 piece pointed out, "This sort of warranty might be described as 'contractual' in the same sense as an ordinary warranty by representation, that is to say, as an offer by the manufacturer for a unilateral contract to be

50. See *id.* Defendant manufacturer advertised that it would pay a 100£ reward to any who contracted influenza after using a Carbolic Smoke Ball according to instructions. *Id.* at 256-57. Plaintiff had purchased a smoke ball and used it as directed three times a day for an extended period until she came down with the flu. *Id.* at 257. She sued. Holding for plaintiff, Lord Justice Lindley reasoned, "In point of law this advertisement is an offer to pay 100£ to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer." *Id.* at 262. Lord Justice Bowen noted that "if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them." *Id.* at 268.

51. Lindsey R. Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134, 149-50 (1937) (citing *Carbolic Smoke Ball*, 1893 Q.B. 256) (footnotes omitted).

accepted by the act of purchasing from a retailer.”⁵² In 1933, an author referred to “[a] more or less sporadic group of cases recognizing warranties by representation” as enforceable by persons not in an immediate sales relationship.⁵³

Despite the widespread exposure of American law students to the famous *Carbolic Smoke Ball* case, it has not been widely cited in our sale-of-goods cases,⁵⁴ although it continues to receive attention in the commentaries.⁵⁵ The theory is sound, and there seems little reason why it could not be applied in appropriate fact situations.⁵⁶ Further, the *Carbolic Smoke Ball* analysis has likely influenced some courts that did not specifically cite the case.

There are still other approaches that courts have endorsed to supply a basis for a direct contractual relationship between remote parties when the actual contract of sale was with an intermediary. For instance, in the contract-law analysis of *Henningsen v. Bloomfield Motors, Inc.*, the New Jersey Supreme Court, addressing the enforceability of a manufacturer’s warranty, held, “The consideration for this warranty is the purchase of the manufacturer’s product from the dealer by the ultimate buyer.”⁵⁷ Thus, the court treated the warranty as a separate contract, arising simultaneously with the contract between the buyer and the retailer. That approach, although seldom articulated, probably underlies many of the cases in which courts have permitted express warranty claims to be asserted against remote sellers.

Many courts have consistently treated remote warranties as covered by Article 2 for purposes of finding the existence of express warranty.⁵⁸ Clark

52. Note, *Necessity for Privity of Contract in Warranties by Representation*, 42 HARV. L. REV. 414, 419 n.42 (1928) (citing *Carbolic Smoke Ball*, 1893 Q.B. 256; 3 SAMUEL WILLISTON, THE LAW OF CONTRACTS §§ 1505-1506 (1927)).

53. Note, *Manufacturers’ and Vendors’ Liability Without Fault to Persons Other Than Their Immediate Vendees*, 33 COLUM. L. REV. 868, 871 (1933). The author also observed that “these cases have apparently been decided with little or no consideration of one another.” *Id.* at 871 n.18.

54. The case does not appear in the English appellate decisions in advertising cases. The redoubtable Professor Atiyah notes, “Apart from the famous case of *Carlill v. Carbolic Smoke Ball Co.*, there are hardly any illustrations of this possibility in English law.” P.S. ATIYAH, THE SALE OF GOODS 108 (4th ed. 1971)(footnote omitted). He then notes that in America, *Baxter v. Ford Motor Co.*, 35 P.2d 1090 (Wash. 1934), held a manufacturer liable on an advertisement for a “shatterproof” windshield. Several English professors assure me that the theory will still support an action against manufacturers in England.

55. P.S. ATIYAH, THE SALE OF GOODS 238 (8th ed. 1990); JOHN EDWARD MURRAY, MURRAY ON CONTRACTS 70-72 (3d ed. 1990).

56. For example, formal warranty documents and some advertising could reasonably be construed to constitute offers to remote buyers to be accepted by purchase from retailers.

57. 161 A.2d 69, 78 (N.J. 1960).

58. See, e.g., *Capitol Fire Protection Co. v. Fire Spec, Inc.*, 13 U.C.C. Rep. Serv. 2d (CBC) 369

and Smith have commented on these cases:

[I]t makes policy sense to ignore vertical privity as a defense where a manufacturer makes an express warranty (normally in writing) that is intended to follow the product into the hands of the ultimate purchaser, though several links removed in the chain of distribution. If affirmations of fact or promises are made regarding the goods, to whom are they beamed if not the retail purchaser?⁵⁹

Clark and Smith explain, “The leading case recognizing this ‘beaming’ principle is the pre-Code case of *Randy Knitwear, Inc. v. American Cyanamid Co.*”⁶⁰ They argue that this case, “as reflected in Official Comment 2 to Section 2-313, is still good law under Article 2” and that “fortunately, *the great weight of authority follows [it]*.”⁶¹

B. Direct Dealings Cases

The Reporter’s notes in the November draft acknowledge that “a court might conclude . . . that there were sufficient direct dealings between the seller and the remote buyer before and after the contract *to establish privity*.”⁶² The notes go on, however, to conclude that the relationship is then governed by other remote-seller rules, presumably including the limitations on standing and remedies.⁶³

This approach is another example of the difficulty of trying to segregate and provide different rules for “privity” and “nonprivity” situations. The Reporter’s notes are clearly correct in indicating that courts have held that direct dealings create “privity.” A very strong case is *Richards v. Goerg Boat & Motors, Inc.*,⁶⁴ in which the manufacturer of a boat had significant direct dealings with the buyer but required that the sale be made through a dealer. The court identified a number of “factors which should be considered sufficient to bring [the manufacturer] into the transaction directly as a seller”

(D.N.H. (1990); *Graham Hydraulic Power, Inc. v. Stewart & Stevenson Power, Inc.*, 797 P.2d 835 (Colo. Ct. App. 1990); *Brazzuto v. Intelligent Sys., Inc.*, 532 N.E.2d 148 (Ohio Ct. App. 1987).

59. CLARK & SMITH, *supra* note 31, ¶ 10.01[1].

60. *Id.* (citing *Randy Knitwear, Inc. v. American Cyanamid Co.*, 181 N.E.2d 399 (N.Y. 1962)).

61. *Id.* (emphasis added); accord 1 WHITE & SUMMERS, *supra* note 3, § 11-7.

62. Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-409 rptr.’s note 2 subsec. (b) (emphasis added) (citing *U.S. Roofing, Inc. v. Credit Alliance Corp.*, 279 Cal. Rptr. 533 (Cal. Ct. App. 1991)).

63. *Id.*

64. 384 N.E.2d 1084 (Ind. Ct. App. 1979).

and found “all of the attributes of a sales transaction” except for the direct exchange of payment.⁶⁵

Even though the direct dealings in such cases may or may not be treated as creating classic contract privity, they are functionally treated as surrogates for that relationship. The new statutory distinctions in the revised text must not stand in the way of that analysis. The text of the basic warranty section⁶⁶ would not preclude that result because it is not limited to “immediate” buyers. However, some might have trouble fitting direct dealings into the concept of “agreement” where the facts are not as strong as those in cases like *Richards* above.

The temptation to fit these cases into the new remote-seller section⁶⁷ simply because a remote-seller express warranty is involved must be avoided. Some of the recent direct dealings cases have likely involved facts in which a manufacturer’s warranty had been issued. The direct dealings analysis, however, should override the application of the section 2-404 limitations, which are inappropriate when the buyer has dealt directly with the “remote” seller. In short, the direct dealings should cast the warrantor into the status of an “immediate” seller for purposes of Article 2, including the possibility of imposing an implied warranty of fitness for a particular purpose, which could not arise in the absence of those dealings.⁶⁸

If privity or a surrogate for privity (such as direct dealings) is substantively established, the usual direct contract rules should apply. A

65. *Id.* at 1092 (citing *Randy Knitwear*, 181 N.E.2d 399).

66. November 1996 Draft section 2-403 states:

(a) An affirmation of fact or promise made by a seller to the immediate buyer which relates to the goods and becomes part of the agreement, or any description of the goods or sample or model which becomes part of the agreement, creates an express warranty that the goods will conform to the affirmation of fact, promise, or description or that the whole of the goods will conform to the sample or model. To create an express warranty, the seller need not use formal words, such as “warrant” or “guarantee”, or have a specific intention to make a warranty.

(b) An affirmation of fact, promise, description, sample, or model described in subsection (b) becomes part of the contract unless a reasonable person in the position of the immediate buyer would believe otherwise or would believe that any affirmation or statement made was merely of the value of the goods or purported to be merely the seller’s opinion or commendation of the goods.

Draft, Uniform Commercial Code Revised Article 2 Sales § 2-403 (Nat’l Conference of Comm’rs on Unif. State Laws, Nov. 1, 1996) [hereinafter Nov. 1996 Draft, Art. 2], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 23, 1997). The March 1997 Draft has limited the section to the immediate buyer. See Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-403.

67. *Id.* § 2-404.

68. See U.C.C. § 2-315 (1995) (requiring the seller to have “reason to know any particular purpose” of the buyer before implying a warranty of fitness for a particular purpose).

buyer in that relationship should therefore be regarded not as a “remote,” but rather as an “immediate” buyer and hence, should not be subject to the statutory limitations imposed on remote-buyer actions by the new statute.⁶⁹ The Reporter’s notes in the March 1997 draft of section 2-403 go far in this direction.⁷⁰ Commentary to this effect in the final product would be very helpful.

C. Cases Rooted in Classic Warranty Theory of Liability for Formal Undertakings and Representations

Two aspects of the hoary history of warranty law suggest that the warranty liability of “remote” warrantors should be treated as direct rather than remote. The first is that enforcement of formal undertakings is one of the very first steps in the evolution of modern warranty law:

Early on, warranty was not considered part of the sales contract. Originally, a buyer of goods was obligated to pay for and receive goods regardless of any defects in them. The only ground for objection was that the object delivered was not that which was contracted for. Thus, if a buyer wanted quality protection, he was obliged to find it in a separate contract of warranty. That separate obligation in turn was rooted in rigorous requirements, as special words of warranty—what Rabel has called “solemn assumption of liability”—were necessary.⁷¹

The modern manufacturer’s warranty would surely suffice as a “solemn assumption of liability” or a “formal collateral promise of warranty”⁷² within the very oldest of warranty cases. It ought to be so recognized today.

The second aspect is that warranties evolved from affirmations. Among other things, this evolution shows that putting the analysis in terms of privity invokes too much of ordinary (nonsales) contract law. Williston, the classic contracts scholar and author of the Uniform Sales Act, wrote in 1913 that

69. In the context of the current draft, section 2-403 should apply and the limitations of section 2-404(e) should not.

70. If the intermediary is an agent of the seller, section 2-403 (the basic warranty provisions) applies. Other cases where section 2-403 should apply include those where there is direct dealing between the seller and buyer through an intermediary or where the manufacturer makes an offer to the public (if you buy and use this product, the following will occur. . .) and individuals accept the offer by purchasing the goods from a retailer. p.61, lines 19-23.

71. *Task Force Report, supra* note 3, at 1092 (footnotes omitted).

72. This is the characterization of Professor Kessler in Friedrich Kessler, *The Protection of the Consumer Under Modern Sales Law, Part 1, A Comparative Study*, 74 YALE L.J. 262, 263 (1964).

some express warranty obligations went beyond contract.⁷³ He noted that “much confusion would be avoided if it were borne in mind that not only historically but analytically the scope of warranty in sales goes beyond the bounds of contract”⁷⁴ Two years earlier, he wrote that “a warranty is a hybrid between tort and contract. This was clearly recognized by Blackstone, who classifies warranties with contract ‘implied by reason and construction of law.’”⁷⁵

In Williston’s view, “when a seller is held liable on a warranty for making an affirmation of fact in regard to goods in order to induce their purchase, to hold that such an affirmation is a contract is to speak the language of pure fiction.”⁷⁶ That obligation “is imposed . . . not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement.”⁷⁷ It is “quasi-contractual” (or “quasi-tortious”) in nature because available remedies evolved over time to included those appropriate both to contract and tort.⁷⁸ He attributed some of the “confusion of thought as to the nature of the obligation” to this expansion of remedies.⁷⁹

Williston emphasized the nature of the representation as a basis for warranty. This is illustrated by his criticism of judicial pronouncements requiring a showing of actual reliance for warranties based on representations. Thus, while approving of a court’s view that “[i]t is true that if an express warranty had been given in express terms as a part of the contract of sale, no proof of reliance there would have been necessary,” he strongly disapproved of the court’s next statement that “where a mere representation of fact is proved . . . it must be shown to have been relied upon by the vendee in order

73. Samuel Williston, *Representation and Warranty in Sales—Heilbut v. Buckleton*, 27 HARV. L. REV. 1, 4 (1913).

74. *Id.*

75. Samuel Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 420 (1911) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 163-65 (1902) (footnote omitted)).

76. *Id.*

77. *Id.*

78. He added “quasi-tort” in his treatise. 1 SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS § 197 (rev. ed. 1948).

79. Williston, *supra* note 75, at 420. Kessler found Williston’s view that contract did not encompass express warranties by affirmation to reflect a voluntaristic theory of contracts usually attributed to Civilians . . . strange indeed coming from the defender of the objective theory of contract. . . . Williston overlooks the fact that “Anglo-American law, with its consensual-relational duties, its feudal survivals and its original tort theory of contract, can stretch its conception of consensual obligation pretty far.” Kessler, *supra* note 72, at 278 n.79 (quoting Patterson, *supra* note 2, at 743 (footnote omitted)).

to constitute a warranty.”⁸⁰ That latter view, Williston insisted, should not be regarded as a matter of law. Rather, “[i]f a representation was evidently made for the purpose of inducing a sale, and was of a kind appropriate for that purpose and a sale followed, this should be enough.”⁸¹

Modern courts that have found obligations imposed by law on representations made by remote sellers have undoubtedly been influenced by these historical roots in solemn undertakings and warranty by representation. The drafters of current section 2-313 lumped together affirmations and promises, thus attempting to fuse the promissory and representation strains of warranty law.⁸² The result, however, is not and cannot be a unitary notion. Nor, it is important to emphasize, can it be entirely within the boundaries of nonsales contract law. Sales warranty law is, in some respects, *sui generis*.

VI. RESPONDING TO THE MODERN REALITIES OF SELLING AND BUYING GOODS

The most compelling argument for recognizing remote-seller express warranty obligation is the need to comport the concept of warranty to the modern realities of mass production, mass distribution, mass merchandising (including mass contracting), and mass advertising. The classic contract paradigm of two parties bargaining over a product has been supplanted by sellers who speak to masses of potential buyers through advertising, promotions, and brochures. In Arthur Leff’s memorable analysis, with respect to many sales contracts, there is bargaining only “over two things: price and standard variations in the product.”⁸³ The “contract” itself “has not been the subject of any contracting process.”⁸⁴ It may look like a contract, but it is just one part of “a unitary, purchased bundle.”⁸⁵

The role of the remote seller in the modern sale further confounds

80. WILLISTON, *supra* note 78, § 206 (quoting *Smith v. Reed*, 124 N.W. 489, 491 (Wis. 1910) (citations omitted)).

81. *Id.*

82. Current section 2-313 states:

Express warranties by the seller are created as follows:

(a) any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

U.C.C. § 2-313(1) (1995).

83. Arthur Allen Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 146 (1970).

84. *Id.*

85. *Id.* at 146-47.

analysis. It is the remote seller who has reached out to the remote buyer and may well have executed a warranty document that in terms is addressed to the remote buyer. The actual purchase, however, is from an intermediary and such bargaining as occurs (e.g., over price and accessories) is not between the warrantor and the buyer, but rather between the buyer and the immediate seller—whom the remote seller rigorously attempts to keep from classifying as its agent.

The ubiquitous manufacturer's warranty is often packaged physically with or in the product. It contemplates a direct relationship with the remote buyer: the warranties are addressed not to the intermediaries in the chain of distribution but to the ultimate purchaser or user, who is often directed to deal with the remote warrantor in the event of breach. The retailer simply passes on the warranty with—as part of—the product and may even disassociate itself from it. The result is that buyers have come to expect that the most important terms of the contract regarding product quality are pre-packaged and beyond the control of the immediate seller.

The situation gets even more complex when products come with multiple warranties from remote parties. In one recent case, for example, a motor home came with three warranties: the separate manufacturers respectively warranted the chassis, the diesel engine, and the coach.⁸⁶ There were likely separate warranties on various fixtures and appliances in the home as well.⁸⁷ The dealer disclaimed all warranties. The motor home manufacturer's warranty in turn may not cover components directly warranted by separate suppliers.

Current manufacturing trends may increase this fractious warranty approach. A recent article discussed the plans of automobile manufacturers to delegate to their suppliers more and more design and development work:

Brakes are a good example. Squeaking brakes drive customers mad, and are the biggest single source of warranty claims. So car companies are changing their way of operating. Instead of buying in the mechanical, hydraulic and electronic bits of brakes and putting them together on the car, they want their suppliers to assemble whole

86. *Hylar v. Garner*, 548 N.W.2d 864, 867 (Iowa 1996).

87. *Cf. Murphy v. Mallard Coach Co.*, 582 N.Y.S.2d 528 (App. Div. 1992) (The court appears influenced by buyer's concern that warranties on various appliances and fixtures were about to expire without an adequate opportunity to test the products because of warrantor's delay in repairing serious plumbing defects.).

braking systems. They hope to get brakes that do not squeak; but if they fail, it will be somebody else's responsibility.

The company that makes the braking system in [the] future will have to specify, design, deliver and guarantee all that is needed to make the brakes work. One day, industry experts believe, suppliers may even have their own staff in the assembly factory. The car factory of the future may come to resemble a department store in which various parts companies have their own stalls or concessions where they bolt on the whole set of brakes, suspension and so on. In the process, the car company can pass the risk of warranty claims over to the supplier, who will have to take responsibility for every system on every car.⁸⁸

Just how all this will sort out is yet to be seen. It is not difficult to contemplate nightmares for buyers (both consumer and commercial) who buy products covered by multiple warranties without a clue as to which might apply to the problem at hand. Presumably, such complexity could be averted by market pressure, which would induce the party assembling the product to offer its own overall warranty and then to look to its component suppliers for indemnity. However, the law, at the very least, should supply buyers with a mode to enforce those remote warranties addressed to them.

Professors Holdych and Mann have recently applied a law and economics analysis to Leff's insight that the contract for mass-produced goods is simply part of "a unitary, purchased bundle" consisting of the goods and the "contract."⁸⁹ They describe modern products as "complex," composed of a multitude of attributes, one of which is the warranty, and emphasize:

An understanding that the market price is the payment for *all* of the attributes embodied in a product is important. Not all attributes will be desired by all consumers; indeed, not all consumers need be aware of all attributes in a product. A consumer purchases a product when the desired bundle of attributes is available at a price below the individual's subjective valuation. The product purchased may have additional attributes that the buyer is unaware of or does not value.

88. *Coming Together*, THE ECONOMIST, June 8, 1996, at 64-65.

89. Thomas J. Holdych & Bruce D. Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties—Getting What You Pay for and Paying for What You Get*, 45 DEPAUL L. REV. 781 (1996)

However, the market price will select the cost of all the attributes in the product. Buying a product means paying for all the attributes bundled in the product whether or not the buyer knows of their existence or prefers to purchase them.⁹⁰

Sellers will include warranty provisions, just as they include other product features, to appeal to marginal buyers who have a special interest in the warranty attribute.⁹¹ Because the market price will reflect all attributes, regardless of whether consumers are aware of them, “unexamined and unknown attributes will be part of the basis of the bargain.”⁹²

Holdych and Mann also point out, “It would be inefficient for a test to require prior knowledge by all buyers of all affirmations, promises, or product descriptions. . . . [T]he opportunity cost of the purchaser’s time in reading and processing the information in the warranty prior to sale compared to the expected value of the warranty would not justify such buyer behavior.”⁹³ Further, “[g]iven the fact that the affirmations or promises made in such documents are likely to reflect buyer preferences, there is little value in a particular buyer examining and processing [them].”⁹⁴

VII. DEVELOPMENTS WITHIN THE EUROPEAN COMMUNITY

The revision process has attempted to ensure or at least consider compatibility with the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). American exporters will also have to consider developments within the European Community (“EC”) relating to warranties of goods sold within the Community. These developments are a part of the context in which the Article 2 revision proposals must be assessed.

Formal consideration of an EC-wide legal construct for basic core rights of consumers began in 1993 with publication of a very thorough Green Paper, which proposed a framework for deliberations.⁹⁵ Included in the commentary was a strong policy statement for creating enforceable rights directly against manufacturers. Included in those views are the following:

90. *Id.* at 792 (footnote omitted).

91. *Id.* at 794.

92. *Id.*

93. *Id.* at 801-02.

94. *Id.* at 815 (footnote omitted).

95. Commission of the European Communities, Green Paper on Guarantees for Consumer Goods and After-Sales Services, COM(93)509 final.

Traditionally, in an economy where crafts and small business predominate, the bond of trust between the purchaser and the vendor was a primordial element in the contractual relationship. In modern consumer societies, based on systems of mass production and distribution, consumer confidence concerns the product as such, and is bound up more with the consumers' faith [in] the manufacturers than in the sellers: competition between similar products is also more between brands than between vendors; the latter compete mainly on the basis of "price" and "after-sales service" (without totally ignoring their role as "advisers"). When a product's defect results from its manufacture it is illogical that the vendor, who has no influence on the production process and who in many cases may not even have packed the product, should be the only person to whom the purchaser can turn.⁹⁶

The commentary went on to note that it was "also counter-intuitive" that a producer might be liable for personal injury or damage to other goods "but that he can disclaim liability when, quite simply, the product fails to work or when a manufacturing defect causes damage to the product itself."⁹⁷ Moreover, holding the manufacturer directly liable enhances the likelihood that a consumer will be able to recover when the retailer is insolvent.⁹⁸

The Green Paper indicated that some of the EC countries had "already moved towards making the manufacturer directly liable" even without a manufacturer warranty,⁹⁹ and that it was likely that others would follow suit.¹⁰⁰ Concern was expressed that this situation would create competitive disadvantages in some countries and would also "stand in the way of giving consumers a genuine opportunity to invoke their guarantee in the case of cross-border purchases."¹⁰¹ Moreover, consumers of one EC country who purchase goods in another cannot easily return to the place of purchase; they ought to have recourse to a manufacturer's representative in their own country.¹⁰² After all, "it is with the manufacturer that the consumer establishes

96. *Id.* § 3.2, at 86-87.

97. *Id.* at 87.

98. *Id.*

99. "As we have seen, this applies to France, Belgium and Luxembourg; the proposal aired by the British authorities in their document (see annex) also goes in this direction." *Id.*

100. "To some extent, this has already occurred in Spain."

101. *Id.*

102. *Id.*

a relation of trust when he purchases a brand-name product abroad.”¹⁰³
Holding the manufacturer directly liable

would simply bring the law more into line with reality. The relation between the consumer and the vendor falls back on the manufacturer anyhow, since the vendor normally returns the defective products. To allow the consumer directly to address the manufacturer would in no way upset the de facto situation.¹⁰⁴

Views of member countries were solicited and considered, and consultations with various groups took place over the next few years. In the summer of 1996, the Commission of the European Communities adopted a Proposal for a Directive on the sale of consumer goods and associated guarantees.¹⁰⁵ It will now proceed through the necessary steps for adoption by the European Parliament.¹⁰⁶

The purpose of the Directive is to provide all consumers within the EC basic core rights of a uniform nature. These core rights, referred to as the “legal guarantee,”¹⁰⁷ would be provided by statute in each member country. Consumers would have, irrespective of where they shop in the Community, a legal guarantee of two years from the date of delivery of the goods enforceable against the “final” seller.¹⁰⁸ The remedies scheme would permit consumers to elect between repair and a price reduction and, during the first year, between rescission and replacement of the defective product.¹⁰⁹

Although the final product does not go as far as some of the proposals set forth in the Green Paper,¹¹⁰ the Directive provides significant statutory rights for consumers against retailers and makes enforceable any voluntary warranties issued by manufacturers. Only final sellers are liable under the

103. *Id.*

104. *Id.*

105. Commission of the European Communities, Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, COM(95)520 final [hereinafter Directive Proposal].

106. A first reading before the European Parliament was expected in early 1997. A study under the auspices of the Consumer Council on the economic impact of the proposal is also contemplated. It seems likely final action will not be taken in 1997.

107. Directive Proposal, *supra* note 105.

108. *Id.*

109. *Id.* at 20.

110. In particular, the proposed Directive does not include the proposals put out for discussion purposes in the 1993 Green Paper for (1) joint and several statutory liability of manufacturers and immediate sellers or (2) promulgation of a Euro-guarantee somewhat analogous to a Magnuson-Moss full warranty which would carry the same rights everywhere in the Community. *See id.*

legal guarantee (the statutory rules), and they are entitled to indemnity from anyone in the chain of distribution who is responsible for the defect.¹¹¹ The Directive also touches on the concept of the “commercial guarantee,” which refers to warranties voluntarily offered by sellers or producers that go beyond the statutory minimum rules.¹¹²

To avoid liability, the goods must conform to the guarantees, and the concept of “conformity” includes “taking into account the public statements made” about the goods by the seller and the producer.¹¹³ This clearly contemplates advertising. The seller is entitled to show under limited circumstances that such public statements do not apply. The liability of a seller or producer under a “commercial guarantee” includes the conditions in the guarantee and in “associated advertising.”¹¹⁴ There are also certain disclosure requirements.¹¹⁵

The EC’s goal, as the commentary indicates, is that the Directive would be consistent with the approach of the CISG and “most modern national legislation” with respect to the concept of nonconformity to contract and remedies.¹¹⁶ It does not purport to be a code of sales law.¹¹⁷

VIII. CLAIMS AGAINST REMOTE SELLERS UNDER MAGNUSON-MOSS, NON-UCC STATE STATUTES AND JUDICIAL DECISIONS ARE NOT SUBJECT TO THE REMEDY AND HORIZONTAL PRIVILEY RESTRICTIONS IMPOSED ON ACTIONS AGAINST REMOTE SELLERS UNDER THE DRAFT PROVISIONS

The November 1996 Draft appropriately recognized that a direct claim could be asserted against a remote warrantor for “other reasons”¹¹⁸—i.e., beyond the specific statutory bases set forth in section 2-404. The Reporter’s

111. *Id.*

112. *Id.*

113. *Id.* at 19.

114. *Id.* at 21.

115. The guarantee must include a written document which clearly sets out the necessary steps for making a claim, including the duration and territorial scope of the guarantee and the name and address of the guarantor. *Id.* at 21.

116. *Id.* at 11.

117. “In no way does it attempt to completely harmonise sales law. For this reason all questions concerning the formation of the contract between the parties, defects in the contract, the effects of the contract, including those linked to performance or non-performance of the contract, or forms of imperfect performance other than non-conformity of the product with the contract, are not addressed by the text and remain entirely and completely subject to national law.” *Id.* The proposed Directive also does not address issues of either direct or consequential damages. *Id.* at 6.

118. Nov. 1996 Draft, Art. 2 *supra* note 66, § 2-410(b).

notes explained that a direct action would be available under this language when “a court decides or applicable law dictates for any other reason that a seller has a direct warranty obligation.”¹¹⁹

The reference to judicial decisions implemented the Drafting Committee decision to leave to the courts the resolution of the current case-law split whether a merchantability claim may be asserted against a remote seller and also encompassed the cases, described above,¹²⁰ in which there are some direct dealings falling short of a contract of sale between the remote warrantor and the remote purchaser.

The incorporation of “applicable law” encompassed statutes such as the federal Magnuson-Moss Act, state motor vehicle lemon laws, mobile home laws, and state provisions barring disclaimer of implied warranties or limitation of remedies and dispensing with privity. Presumably, the language was intended to preserve actions grounded in such statutes.

The placement of this incorporation by reference of claims rooted in “other reasons” raised several interpretative problems through several drafts. One problem was the apparent subjection of such claims to a ban of rejection and revocation and the limitation of standing to buyers and lessees—limitations that would have conflicted with various provisions in those statutes.¹²¹ That result was not contemplated. There had been no suggestion in the Committee deliberations that actions sanctioned by other statutes against remote sellers should be subject to any of the limitations of the new Article 2 provisions.

A second inadvertent problem arose after reorganization and synthesis of the remote-seller provisions.¹²² That was the possibility that the revised sections might be interpreted as precluding states from deciding that remote sellers can be held to obligations of merchantability.¹²³ The commentary,

119. *Id.* note 2 subsec. (b).

120. *See supra* Part V.B.

121. In the November 1996 draft, for example, the incorporation of claims against remote sellers rooted in “other reasons” appeared in draft 2-410(b) which contained the remedy and privity limitations then imposed on claims against remote sellers. Nov. 1996 Draft, Art. 2, *supra* note 66, § 2-410(b).

122. The phrase had appeared in section 2-410(b), some of which the Committee voted should be moved into redrafted 2-404(e). *See* Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-404(e).

123. That conclusion could have rested on the interpretation that the revised section 2-404 was preemptive. Even the title—“Obligations to Remote Buyers or Lessees Arising Other than as Part of Agreement of Sale”—was broad enough to encompass a merchantability obligation of a remote seller. But, since the text nowhere referred to that implied warranty, it was arguable that it could not exist. The expansive language of section 2A-216 which the committee voted to add to revised section 2-

however, continued to restate the committee's decision that states should remain free to decide whether to assert such a merchantability claim. Fortunately, the March 1997 Draft removed the uncertainty by retitling section 2-404 to clarify that it applies only to express warranties and restating in section 2-409(b) that the "principles of law and equity that extend an express or implied warranty to or for the benefit of a remote buyer, transferee, or other person" are not displaced either by section 2-404 or section 2-409.¹²⁴

Leaving the states free to determine whether to grant standing to remote parties to assert a merchantability claim is of particular importance to those states that might wish to give teeth to Magnuson-Moss's broad standing provisions for consumers to assert claims for breach of "implied warranty."¹²⁵ Courts clearly recognize such a Magnuson-Moss claim against remote sellers where the state rule permits remote buyers to assert a merchantability claim.¹²⁶ But, in states that require privity to assert an implied warranty claim against remote sellers, there is a split in the Magnuson-Moss decisions whether the broad Magnuson-Moss standing provisions overcome the state privity requirement.¹²⁷

The result under one line of these cases is that a Magnuson-Moss claim for breach of an express ("written") warranty may be asserted directly against the remote warrantor but that a merchantability claim cannot be asserted against that same warrantor although the Act itself prohibits disclaimer of merchantability in conjunction with that express warranty.¹²⁸ States may wish to change the underlying rule to give substance to the Magnuson-Moss provisions, and the new Article 2 should not preclude such evolution.

The March 1997 Draft's more inclusive preservation of "principles of law and equity that extend an express or implied warranty to or for the benefit of a remote buyer, transferee, or other person"¹²⁹ is a welcome clarification. Even

410(c) did not overcome the problem because it would have applied only to the extension of express or implied warranties "made to an immediate buyer." See Nov. 1996 Draft, Art. 2, *supra* note 66, § 2-410(c).

124. Mar. 1997 Draft, Art. 2, *supra* note 14, §§ 2-404, 2-409.

125. See 15 U.S.C. §§ 2304(a), 2308 (1994).

126. See, e.g., *Abraham v. Volkswagon of Am., Inc.*, 795 F.2d 238 (2d Cir. 1986); *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513 (D.D.C. 1984), *rev'd on other grounds*, 807 F.2d 1000 (D.C. Cir. 1986); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982); CURTIS R. RIETZ, *CONSUMER PRODUCT WARRANTIES UNDER FEDERAL AND STATE LAWS* 114 (2d ed. 1987).

127. Compare *Szajna v. General Motors Corp.*, 503 N.E.2d 760 (Ill. 1986), with *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513 (D.D.C. 1984).

128. See cases cited *supra* note 127.

129. See Mar. 1997 Draft, Art. 2 *supra* note 14, §§ 2-404 note, 2-409 note 1.

without such a provision, courts that now recognize a direct merchantability claim would probably continue to do so, and some others would choose to join them, at least for consumer transactions in which there is an express warranty beamed to the remote buyer.

IX. REGULATION OF DISCLAIMERS IN REMOTE-SELLER WARRANTIES

This difficult series of issues has not been fully resolved by the committee—and it may be left to the courts for final resolution. Several committee members in discussions at several meetings appeared to assume that the Article 2 disclaimer rules (other than the rules of interpretation of inconsistent language) would not apply to remote-seller warranties. As more issues relating to remote sellers were discussed, consideration was given to listing either those Article 2 sections which would apply to remote-seller cases or those that did not apply. The committee rejected both options, choosing instead to provide that a remote buyer's remedies were to be "determined by this Article to the extent appropriate in the circumstances,"¹³⁰ subject to several enumerated limitations.¹³¹

One of the limitations is that the remote party is "subject to any valid limitations on rights or remedies" in the remote seller's warranty. The word "valid," however, is not defined, seemingly left to interpretation by the courts as "appropriate in the circumstances." Obviously, the Magnuson-Moss disclaimer requirements applicable to consumer products will be a "valid" limitation, along with any other overriding state statutes. Interpretation will be necessary in other cases.

The Reporters' issues memo for the March 1997 meeting suggests that examples of "valid" limitations "might include violations of seed labeling laws and requirements that disclaimer or excluder clauses be conspicuous or mention particular language. The limitation presumably would not include more specific controls on agreement, such as a requirement that a consumer 'expressly agree' to a disclaimer, because that parties are not in direct contractual relationship."¹³²

One should not make too much of this note, which is just part of a memo designed to elucidate what issues still remain to be resolved in the draft. It

130. Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-404(e).

131. *Id.* 2-404(e)(1)-(6).

132. Memorandum from Dick Speidel & Linda Rusch to Article 2 Drafting Committee and Observers 8 (Mar. 21, 1997).

certainly does not rise to the level of direct commentary to the draft. Nevertheless, it seems likely that interpretation is likely to start from a comparison of the remote-seller warranty with that produced by a transaction with an immediate seller.

That inquiry, however, may not be quite as promising as one might first expect. There is some logic to the argument that disclaimers only make sense in the context of ascertaining the terms of an “agreement”—the bargain “struck” by the parties. But, many “agreements” (consumer and commercial) are both nonnegotiable and nonnegotiated even between direct parties, and courts have not hesitated to apply the Code disclaimer rules to them.

Clearly the Code’s drafters contemplated that the disclaimer rules should have a role other than highlighting buyer-unfriendly terms to illuminate the bargaining process. In fact, disclaimer rules serve several purposes even in a nonnegotiable transaction. One is a prophylactic function. Perhaps sellers will “lighten up” if they must conspicuously disclose disclaimers. Even if sellers do include disclaimers, buyers may actually see conspicuous ones in advance of agreement and decide to look elsewhere. Additionally, disclosure requirements may help inform the market—if not the individual buyer—about the value of the goods.

Yet another relevant consideration is that remote sellers currently draft warranties and disclaimers under the assumptions that Magnuson-Moss requires a conspicuous disclaimer of any limitation of the duration of implied warranties and that the current rules of Article 2 will apply to some extent. Sellers would likely welcome clarification of the Article 2 rules. Buyers, on the other hand, would not want to see an enforceable return to the bad old days of shotgun disclaimers in fine print.

Discussion during the revision process has touched from time to time on several arguments against regulation. Three arguments in particular surfaced at various meetings and are considered below, along with considerations under the Federal Magnuson-Moss Act and a variety of state statutes that regulate remote-seller warranties in various ways.

A. Three Arguments Against Regulation of Disclaimers

1. Contractual Regulatory Rules Do Not Apply Because This Is Not a Contractual Relationship

As indicated at some length above, some remote-seller express warranties fit within contract theory; and others have been treated, because of direct

dealings, as if they did.¹³³ Thus, if the argument is at this formalistic level, the disclaimer and other regulatory rules of Article 2 should apply. With modern merchandising and widespread use of the media, a very large quantum of remote-seller conduct is designed to reach over intermediaries in the chain of distribution directly to ultimate buyers to tell their story. Some modes of communication permit the remote seller to say more than is possible in person-to-person dealings.¹³⁴ Finally, many remote sellers act as if they have a direct relationship with remote buyers. Their warranty documents in express terms run to them, and they also may direct remote buyers to deal directly with them after the sale.

Ultimately, however, the “no contract” argument is merely a formalistic one. The real question is whether disclaimer and remedy policing rules should apply to these kinds of transactions even if they are not in classic, bilateral contract form.

2. *Freedom of Contract Permits Remote Sellers to Limit Warranties and Remedies*¹³⁵

This argument is overblown. Article 2 is based on freedom of contract, but that freedom is subject to regulation. Sellers are free not to give warranties, but the disclaimer of implied warranties is subject to regulation,¹³⁶ as is a conflict between language of express warranty and limitation thereof.¹³⁷ Sellers are free to limit remedies even if they give (or do not limit) warranties, but that limitation is subject to UCC regulation,¹³⁸ the doctrine of failure of essential purpose,¹³⁹ and, in the rare case, unconscionability.¹⁴⁰ Regulation of warranties would not interfere with freedom of contract any more in the remote-seller context than it does in that of the immediate seller.

133. *See supra* Parts V.A., .B.

134. Program-length television infomercials are the best example. Some sellers make videos available, and similar developments can be anticipated on the Internet.

135. I put aside the irony that this argument may be inconsistent with the first argument.

136. *See* U.C.C. § 2-316(2) (1995).

137. *See id.* § 2-316(1).

138. *See generally id.* §§ 2-701 to 2-719.

139. *See id.* § 2-719(2).

140. *See id.* § 2-302.

3. *Remote-Seller Warranties Are Icing on the Retail-Sales Cake, and Buyers Should Be Pleased and Surprised to Get Them (Whether Tasty or Not)*

The icing-on-the-cake argument is predicated on the assumption that there is only one contract: the one with the retailer. That assumption overlooks the fact that the contract with the retailer may create two relationships. That is most clear when the retailer sells without warranties and passes on the manufacturer's warranty. That is a clearly established pattern in the sale of some goods, including many new car sales. In fact, many of these sales would probably not take place if the dealer could not hold out to the buyer the promises made by the manufacturer. Thus, some manufacturers contemplate that their warranty will be the only warranty extended to the buyer, and the warranty given is expressly addressed to that remote buyer. The manufacturers' warranty is not the icing in those sales; it is the cake.¹⁴¹

B. *The Role of the Magnuson-Moss Act and Non-UCC State Statutes*

The enactment of the Federal Magnuson-Moss Act and a variety of state statutes relating to remote-seller warranties indicate dissatisfaction with the Article 2 pattern. The widespread experimentation with these statutes over several decades suggests that they have not caused difficulties for remote sellers

The Magnuson-Moss Act, building on prior state experiments, applies to remote sellers in cases involving "consumer products" by requiring more explicit disclosures,¹⁴² banning total disclaimer of merchantability when the warrantor has issued a written warranty,¹⁴³ conferring standing for enforcement of express and implied warranties against remote sellers,¹⁴⁴ and providing a presumption of attorney fees for successful claimants.¹⁴⁵ The variety of non-UCC state statutes relating to warranty disclaimers and remedy limitations includes some that relate to manufacturers as well as immediate sellers.¹⁴⁶ Many state lemon laws apply only to manufacturer warranties.

141. Some sales, of course, are of (retailer-manufacturer) marbled cake.

142. See 15 U.S.C. § 2302 (1994).

143. See *id.* § 2308(a).

144. See *id.* § 2301(3).

145. See *id.* § 2311(d)(2).

146. See generally Donald F. Clifford, Jr., *Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sales of Goods*, 71 N.C. L. REV 1011 (1993). It is notable that

The breadth and persistence of state and federal regulation of remote-seller warranties are an expression of discontent with the current Article 2's treatment of this set of issues. The revised Article 2 needs to address more directly disclaimers of remote-seller warranties.

C. Disclaimers in Remote-Seller Warranty Records Should Be Fit for the Ordinary Purpose

A sensible, functional approach to disclaimer by remote sellers would be to require that remote-direct warranties be merchantable—like the goods of which they are “a part.” That could be achieved in at least two ways.

One approach would be to provide that the merchantability warranty could not be disclaimed. The Magnuson-Moss Act so provides, although in the case of the commonly used “limited warranty,” the duration of merchantability may be limited to that of the “written” (express) warranty.¹⁴⁷ The current European Community proposed Directive on the sale of consumer goods would ensure undisclaimable merchantability standards for two years and would permit member states to require a longer period.¹⁴⁸ These rules would apply to American goods sold within the European Community.¹⁴⁹ The Reitz proposal is worthy of very serious consideration on the point.¹⁵⁰

The second approach is to apply ordinary disclaimer rules. Some have expressed concern about how such rules could be applied to remote sellers.¹⁵¹ Some of the possibilities have been explored in jurisdictions that have permitted assertion of a merchantability claim against a remote seller. In Texas, for example, in *Nobility Homes of Texas, Inc. v. Shivers*¹⁵² the court held that a manufacturer's fears of unlimited and unforeseeable liability from merchantability claims are not justified because the UCC permits manufacturers to restrict liability with disclaimers and modifications. Later decisions have grappled with just how that may be done.

In *Hininger v. Case Corp.*,¹⁵³ the buyer of a combine asserted a

California, the most populous state, is included in the list. *See id.* at 1035-47.

147. 15 U.S.C. § 2308 (1994).

148. Directive Proposal, *supra* note 105.

149. *Id.* The Directive imposes this liability directly only on the “final seller.” It does, however, provide for indemnity claims by such sellers against the “producer” of the goods. *Id.*

150. *See* Reitz, *supra* note 3.

151. *See id.*

152. 557 S.W.2d 77 (Tex. 1977).

153. 23 F.3d 124 (5th Cir. 1994).

merchantability claim for lost profits and repair costs against the supplier who furnished the wheels to the manufacturer of the combine. The Fifth Circuit, asked to apply the Texas merchantability rule, expressed concern that it “may be difficult or even impossible” for a component manufacturer to disclaim its warranty liability and held that no merchantability claim should be available.¹⁵⁴ The court thus distinguished between the liability of a remote manufacturer of a finished product and a component manufacturer. The court reasoned that “*Clark v. DeLaval Separator Corp.* illustrates our point.”¹⁵⁵ In *Clark* the Fifth Circuit observed that “a remote manufacturer can effectively disclaim its warranty liability either by including a disclaimer in the materials that accompany the product or by insisting that the retailer include the manufacturer’s disclaimer in the sales contract with the consumer.”¹⁵⁶

In contrast, the court continued, it is often difficult, if not impossible, for a component manufacturer to notify the purchaser of its disclaimer of warranty liability because components are often hidden within the product.¹⁵⁷ Based on this inability of the component manufacturer to effectively disclaim, coupled with a lack of expectation that the component manufacturer would fix any defect in the finished product,¹⁵⁸ the court concluded that a merchantability claim should not be available against the component manufacturer.¹⁵⁹

154. *Id.* at 129 (citing *Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1257 (10th Cir. 1988) (Logan, J., concurring and dissenting)).

155. *Id.* at 129 (citing *Clark v. DeLaval Separator Corp.*, 639 F.2d 1320 (5th Cir. Unit. A. Mar. 1981)).

156. *Id.* (citing *Clark*, 639 F.2d at 1324).

157. *Id.* (citing *Patty Precision Products*, 846 F.2d 1247).

158. The *Hininger* trial court had concluded that buyer “had no expectation that [the wheel supplier] or any of the other manufacturers of unbranded components would resolve any problem they might experience with the combines.” *Id.* (quoting the unpublished district court opinion).

159. *Hininger*, 23 F.3d t 128-29; see also *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 108 (Iowa 1995) (“In addition, an extension of implied warranty theories to non-privacy buyers would seriously hamper the ability of remote sellers to disclaim warranties as allowed by the Uniform Commercial Code.”)

The Court of Appeals also noted that the buyer did not contend she had any contact with the supplier, that the supplier’s name was on the wheels, or that the supplier advertised its product to the public at large. *Hininger*, 23 F.3d at 124 n.3 (citing *Spring Motors Dists., Inc. v. Ford Motor Co.*, 489 A.2d 660, 676-77 (N.J. 1985)). *Hininger* appears to have been influenced by a 1990 law review article exploring the “Ascendancy of Contract over Tort” in cases of products causing commercial loss. See William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract over Tort*, 44 U. MIAMI L. REV. 731, 789-93 (1990). The author emphasizes that his analysis does not consider consumer issues:

This Article does not attempt to address disclaimers of product liability in consumer cases. Suffice it to say that because of limitations on consumer knowledge and because of disparities in consumer wealth, it cannot be said that contractual reallocations of risk are economically efficient and socially

D. Leaving Remote-Seller Disclaimers Unregulated by Article 2 May Result in a Return to the Excesses of the Past

The legislative history of the Magnuson-Moss Act documented long-standing concern with several problems: the use of deceptive language and captions, disclaimer of implied warranties in such a way as to take away more protection than conferred by a very narrow express warranty, unavailability of warranties before sale of the product, and failure of warrantors to honor warranty obligations.¹⁶⁰

The Magnuson-Moss Act does not purport to resolve all of those problems: it applies only to “consumer products”; most of its provisions apply only if there is a “written warranty” (a concept narrower than an Article 2 express warranty); and it does not deal with remedies except in the unusual situation in which the warrantor has issued a “full” warranty. That leaves a number of gaps. Some of these have been filled by the willingness of courts to apply portions of current Article 2 to remote-seller warranties. The revised statute should be interpreted to provide meaningful protection to remote buyers against unexpected and onerous disclaimers and limitations of Article 2 default rights and remedies.

X. REMEDIES FOR BREACH OF REMOTE-SELLER WARRANTIES AND
POLICING OF REMOTE-SELLER LIMITATIONS ON REMEDIES

As of the time of writing this Article, the shape of the provisions for remedies and consequential damages in remote-seller cases was still unclear. Some prior drafts had precluded remedies of rejection and revocation against remote sellers and also excluded recovery of consequential damages in commercial, but not consumer, remote-seller cases unless the remote seller effected a cure pursuant to a statutory procedure.¹⁶¹ These provisions gave way in subsequent drafts to the general mandate in the March 1997 Draft that remote buyers’ remedies be “determined by this Article to the extent appropriate in the circumstances,” subject to (1) “any valid limitations on . . . remedies” and to the rules that (2) rejection and revocation are not available

acceptable in the general run of manufacturer-consumer transactions.

Id. at 797.

160. See generally S. CONF. REP. NO. 93-1408 (1974), reprinted in 1974 U.S.C.C.A.N. 7755; H.R. REP. NO. 93-1107 (1974), reprinted in 1974 U.S.C.C.A.N. 7702.

161. See, e.g., Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-318(c).

and remote buyers may not recover consequential lost profits for breach of advertising warranties.¹⁶²

Until the final language is available, it is useful to discuss the issues in principle. That discussion should also inform what is “appropriate under the circumstances” and provide guidance for answers to categories discussed above of warranties of remote sellers that do not fall clearly within the concept of “obligations . . . arising other than as part of agreement of sale.”¹⁶³

A. The Availability of Rejection and Revocation of Acceptance

Except in the context of the direct dealings cases and some of the contract cases, a ban on the remedy of rejection in remote-seller cases is quite defensible. Moreover, when the remote-seller relationship involves a warranty document, that remedy will almost certainly have been avoided by an exclusive repair or replacement clause. A ban against revocation, however, is another matter entirely.

Applying “revocation” as against a remote seller is admittedly troublesome when one conceptualizes the remote seller as a stranger to the only contract entered into with the buyer—namely, that with the immediate buyer. In one case, for example, the North Carolina Supreme Court reasoned that revocation in relation to a remote manufacturer “would not restore the *status quo ante*; it would, instead, require a manufacturer to refund a purchase price it had not received in exchange for a product it did not sell to the revoking party.”¹⁶⁴

Those two arguments, however, ignore some important points: (1) as argued above,¹⁶⁵ there may be a contract or at least a direct relationship with the remote seller (although not predicated on the usual bilateral agreement paradigm) that could be rescinded;¹⁶⁶ (2) the remote seller might well be

162. Mar. 1997 Draft, Art. 2, *supra* note 14, 2-404(e)

163. *See supra* Part V.

164. *Alberti v. Manufactured Homes, Inc.*, 407 S.E.2d 819, 824 (N.C. 1991). The court could have rested its decision on a unique North Carolina UCC amendment that defines “seller” to include “[a]ny manufacturer of self-propelled motor vehicles” for purposes of extending to buyers all rights and remedies under Article 2. *Id.* at 823 (The amendment was passed as an early “lemon law” to reverse an intermediate court of appeals decision holding that revocation was not available against an automobile manufacturer.) By implication, other manufacturers are not so situated. *Id.* at 823-34.

165. *See supra* Part V.

166. In a footnote, the *Alberti* court acknowledged that the “direct contractual relationship” required for revocation “may sometimes include the manufacturer, such as where the buyer has some direct dealings with the manufacturer, bypassing the seller from whom he ultimately purchases. In this

liable to the retailer for the full retail purchase price if the buyer obtained revocation as against the retailer; and (3) the nature of the remedy of revocation goes beyond the goal of restoring the status quo.

In a thorough analysis, Professor Monserud persuasively argues against the majority view, which denies revocation against remote sellers.¹⁶⁷ The basis of his objection is that the majority of courts take too narrow a view of the remedy of revocation, treating it as equivalent to rescission and cancellation of a contract to which the remote seller was not a party.¹⁶⁸ Monserud summarizes:

According to modern remedial theory, three interests, or a combination thereof, can be protected in contract cases. These interests include the expectation interest, the reliance interest, and the restitution interest. The expectation interest is the promisee's interest "in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed." . . . The Code's main remedial objective is *not* restoration of the status quo ante. Further, the Code's stated objective is future-oriented. It commonly involves calculations based upon a hypothetical situation, namely, what would have happened if the party in breach had performed in full. Section 2-608 is one component of a cluster of remedies designed to effect this result.¹⁶⁹

Thus, revocation is not synonymous with rescission and restitution. A buyer who revokes may, in addition to obtaining a refund of the price, cover and obtain cover damages.¹⁷⁰ This is not just restoration of the status quo; it is "meant to operate along with the other remedial sections to accomplish the more ambitious objective of fulfilling the aggrieved buyer's reasonable expectations."¹⁷¹

Monserud notes that the minority of courts who permit revocation against remote sellers implicitly take the view that damages are inadequate and "employ sections 2-608 and 2-711(1) under the code's mandate that remedies

or similar situations, the ultimate purchaser may be able to revoke acceptance against the manufacturer." *Alberti*, 407 S.E.2d at 824 n.4.

167. Gary Monserud, *Rounding Out the Remedial Structure of Article 2: The Case for a Forced Exchange Between a Buyer and a Remote Seller*, 19 U. DAYTON L. REV. 353 (1994).

168. *Id.* at 358.

169. *Id.* at 400 (citing RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981)) (footnotes omitted).

170. See U.C.C. § 2-711 (1995).

171. Monserud, *supra* note 167, at 402.

'shall be liberally administered.'"¹⁷² Some of these courts view the remote seller as a profit-maker in a situation where the hapless buyer is left with an insolvent immediate seller and, at best, an action for damages against the remote seller. One can also envision the buyer who is stuck with a complex machine that does not work.

Monserud's arguments suggest that fidelity to the larger remedial policies of Article 2 requires that the buyer be permitted to return the goods to the remote seller. To avoid the difficulties related to use of the word "revocation," more neutral terminology could be employed, such as "return of the goods and refund for buyer after acceptance." The Magnuson-Moss Act provides an example; it defines "remedy" to include repair, replacement, or refund.¹⁷³

Denial of revocation in remote-seller cases would seriously disadvantage some buyers in at least two ways: (1) the ultimate buyer might be forced to keep seriously defective goods (albeit with a diminution-of-value damage claim); and (2) the buyer would be stripped of the bargaining leverage of the right to force the goods back on the remote seller. That approach would probably have had the most severe consequences for consumers, but could also be troublesome in various commercial cases. For example, must a commercial buyer keep a seriously defective machine and try to get it fixed? Could it "cover" and obtain ordinary cover damages?

I was under the impression that the Drafting Committee in Salt Lake concluded in principle that although revocation should not be available (for some of the reasons discussed above), the buyer should be entitled to refund of the retail purchase price from the remote seller when breach of the express warranty resulted in a substantial impairment of value to the buyer. Such a rule would mirror the standard that permits revocation under current law.¹⁷⁴ Subsequent drafts, however, do not include any express reference to that remedy.

Perhaps courts will be willing to award a refund in a remote-seller case under general damage principles, as in the case discussed below.¹⁷⁵ A statutory refund rule would, of course, be preferable even though it fell short

172. *Id.* at 387. The Clark and Smith treatise has a useful discussion of the cases and predicts a continuing trend allowing revocation against remote sellers. CLARK & SMITH, *supra* note 31, ¶ 7.03[3][d].

173. 15 U.S.C. § 2301(10) (1994).

174. *See* U.C.C. § 2-608 (1995).

175. *See infra* Part XIII.

of an express authorization for revocation. While the availability of a refund would give a buyer leverage to obtain a voluntary "revocation," it does not provide as strong a tactical position as the right to require the remote seller to take the goods back. Surely a court which awarded a total refund of the price (either under a statutory rule or under general damage principles) would require the buyer to make the defective product available to the remote seller: that looks like revocation.

B. When the Remote Seller's Warranty Includes an Exclusive Limited Remedy of Repair or Replacement (or Refund), the Doctrine of Failure of Essential Purpose Should Apply in Both Consumer and Commercial Transactions

Denial of refund and revocation is especially inappropriate when the remote warrantor has entered into a direct relationship with remote parties by extending a remote-direct warranty in which the manufacturer has decided on the length and scope of the warranty, whether to disclaim implied warranties, and whether to limit consequential damages.¹⁷⁶ Many such warranties contemplate a direct relationship with the remote seller, or its designated repair facility, in the event of defects. Remitting the remote buyer to damages only weakens the warrantor's incentive to perform its obligation to repair or replace. Moreover, the remote buyer should not have to retain goods when the warrantor's failure to perform results in substantial impairment of the value of the contract to the buyer.

The substance of draft section 2-810(b) should be available to provide for revocation and, in appropriate cases, consequential damages, when a remote seller's exclusive limited remedy has failed "substantially to achieve the intended purposes of the parties." There are many decisions under current law that apply section 2-719 to manufacturer's warranties, and courts should not be cut off from the analysis of those cases.

The commentary to draft section 2-810 infers that the doctrine is available in remote-seller cases.¹⁷⁷ Unfortunately, however, that does not textually overcome the ban on revocation in section 2-404(e). It obviously would be

176. The ABA August 1996 Taskforce Report proposed that remote seller warranties that carried remedial undertakings should be treated as creating "a direct obligation to the remote buyer or lessee" and "shall be treated as a warranty to an immediate seller for all purposes under this Article." The proposal was never directly considered by the Committee.

177. See Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-810 note 2 ("the seller, either directly or through a dealer").

preferable to have a statutory fix for the problem. If it is not available, courts will no doubt find a way in appropriate cases. And, as suggested above, a damages remedy for the entire purchase price may be available under general contract principles.

C. Availability of Consequential Damages

As indicated above, Drafting Committee discussions in at least three particular areas disclosed serious concerns about unbridled liability for consequential damages. First, consideration of the nature of consequential damages resulted in new limitations available in extreme cases.¹⁷⁸ Second, after lengthy discussion of the so-called “derivative” warranty (i.e., whether a supplier to a manufacturer should be liable for the consequential damages of the buyer of the final product), the Drafting Committee decided that the supplier could control that exposure by provisions in the contract with its immediate seller, the manufacturer.¹⁷⁹ Third, the committee considered whether different rules should apply to cases in which warranties were based upon advertising and other sources of remote-seller warranties that do not contain remedy and damage limitations.

A number of the earlier drafts denied consequential damages to all remote buyers. Later, the Drafting Committee modified this ban in advertising cases to exclude only “consequential lost profits” and lifted it altogether in the “warranty-in-the-box” cases. Thus, the original much different treatment of consequential damages in remote-seller cases has been changed considerably.

XI. THE ROLE OF ASSIGNMENT THEORY TO PROTECT DONEES, SUB- VENDEES, AND OTHERS AS APPLIED TO WARRANTIES FROM REMOTE SELLERS

There has been considerable evolution in the drafts regarding the extension of remote-seller warranties beyond the remote “buyer.” For some time, the section dealing with the creation of remote warranties referred only to buyers and lessees.¹⁸⁰ The rules extending warranties to “transferees” applied only to warranties “made to an immediate buyer” and, hence, did not

178. See Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-706(1).

179. See *id.* § 2-409(a). The January and March 1997 Drafts went further to provide a remote seller is not liable for “consequential lost profits” under the section.

180. The word “lessees” appeared in the warranty sections in several drafts. It gradually was incorporated into the definition of “remote buyer.” See, e.g., *id.* § 2-401(4).

literally apply to remote-seller warranties.¹⁸¹ Thus, it appeared that protection of persons other than buyers and lessees would have to come under the new provisions expressly incorporating the law of third-party beneficiaries and assignments.¹⁸²

In more recent drafts, “transferees” were incorporated into the section relating to the creation of remote warranties, thus achieving some symmetry with the extension of warranties made to immediate buyers.¹⁸³ Moreover, through several drafts, the language relating to extension by assignment, operation of law, and the like was expanded so that by March 1997 it read:

(b) This Section and 2-404 do not displace:

(1) the rights and remedies of a third party beneficiary or assignee under the law of contracts or of persons to which goods are transferred by operation of law;

(2) principles of law and equity that extend an express or implied warranty to or for the benefit of a remote buyer, transferee, or other person.¹⁸⁴

The path to this draft, as well as its explicit language, reminds us that the law of third-party beneficiaries and assignment remains available to provide warranty protection beyond privity parties and “transferees.” One might think it unnecessary to repeat such an obvious proposition. In fact, however, it is surprising to find that it has not been widely used under the current Article 2 except in a few cases of express assignment. It is useful, therefore, to speculate why principles of assignment law have not figured more prominently in warranty cases.

Several possible reasons occur to me for this lack of use. One may be that the focus of the original section 2-318 on expansion of liability to specified

181. See, e.g., *id.* § 2-409(a), (b).

182. The November Draft provided: “This section supplements and does not displace rights and remedies of third party beneficiaries and assignees under the law of contracts or of persons to whom goods are transferred by operation of law.” Nov. 1996 Draft, Art. 2, *supra* note 66, § 2-410(c).

183. See, e.g., Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-404(a)-(b). It is my understanding that the Drafting Committee at the March meeting voted to authorize the Reporter to define “buyer” to include family members for purposes of section 2-409 and perhaps for all of Part 4.

184. *Id.* § 2-409(b). Subsection (b)(2) was modeled, by vote of the Drafting Committee on current Section 2A-216. See U.C.C. § 2A-216 (1995).

classes¹⁸⁵ led readers to conclude that the statutory delineation exhausted the possibilities. Perhaps the current case law would be different if the original section 2-318 had a provision like that in the current revised draft so that courts could have evolved the law of assignment in the warranty context.

Another reason may be that the pre-Code law of assignment as applied to warranties was so limiting as to be of little assistance. Thus, it was not invoked even though section 2-210 liberalized the law of assignment in sales of goods in ways that would have permitted breaking free from the older constraints.¹⁸⁶ The common-law difficulties were well explicated in a 1937 article:

In an effort to afford the injured plaintiff a direct remedy against the manufacturer, it has been suggested that this cause of action should be assignable to the sub-purchaser. Professor Williston says that there seems to be no reason why warranty should be an exception to the general rule of assignments. "But, however this may be," he continues, "it seems settled that the mere resale of the warranted article does not give the sub-purchaser a right to sue the original seller for damages caused him by defects either in the title or quality of the goods; even though the sub-purchaser assumes payment of the original price. But it seems clear that the buyer can assign his contract of purchase with all his rights thereunder, and the assumption by the sub-purchaser of the original buyer's debt to the seller seems some evidence of such a

185. Current section 2-318, Third Party Beneficiaries of Warranties Express or Implied, provides three alternatives:

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

U.C.C. § 2-318 (1995).

186. See U.C.C. § 2-210 (1995).

bargain.” The mere resale of the article is not sufficient evidence in and of itself, however, to show that the original buyer intended to part with his cause of action for damages against the one who originally sold the article to him. On the contrary, it may be assumed that if the original warranty has been broken, the original purchaser meant to retain whatever right he had. After one has produced sufficient evidence to show that the cause of action was assigned, it still must be remembered that the assignee received only the rights of his assignor. Warranty must, it seems, be construed like an insurance policy, as a contract of personal indemnity. Therefore, though one who purchased the goods with a warranty might assign the right of action that had already accrued on the warranty, he could not enlarge its scope so as to make it include the indemnification of the sub-purchaser.

The right which the assignee received was simply the right to damages for the injuries that the first buyer (*i.e.*, the dealer) suffered by the defective condition of the article. As a matter of fact, the first buyer seldom suffers any injuries in these cases; thus the ineffectiveness of this theory to establish an adequate direct remedy against the manufacturer becomes obvious.¹⁸⁷

These old case-law obstacles should have been overcome by the original Article 2, and a stronger case for that result is made by the draft revision provisions.

Both the original section 2-210 and draft section 2-503 make clear that “all rights” of a buyer “may be assigned unless the assignment would materially change the duty of the other party, increase the burden or risk imposed on that party by the contract, or impair that party’s likelihood of obtaining return performance.”¹⁸⁸ That surely encompasses the right of the buyer to the warrantor’s warranty obligation if the increase-of-burden limitation is not applicable.

It seems very unlikely that assignment would increase the burden or risk of the warrantor for a standard product ordinarily sold in the marketplace to anyone willing to buy. Moreover, the warrantor has protection beyond the

187. Jeanblanc, *supra* note 51, at 151-52 (quoting 4 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 998 (rev. ed. 1936)).

188. See U.C.C. § 2-210 (1995); Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-503.

increase-of-risk test for assignment in the form of the new limitations on consequential damages.¹⁸⁹ Hence, assignment under the Code rules should be readily available.

The next question is whether the law of assignment has sufficiently evolved so that it would be available in donee and subpurchaser cases in which there is no express reference by the assignor to the assignment of rights. The commentary to the original section 2-210 states that what constitutes an assignment is determined under ordinary contract law.¹⁹⁰ The contract treatises indicate that under contemporary law the transfer of rights by assignment is not difficult. For example, Farnsworth writes:

To make an effective assignment of a contract right, the owner of that right must manifest his intention to make a present transfer of the right without further action by him or by the obligor. He may manifest his intention directly to the assignee or to a third person. No words of art are required; the assignor need not even use the word *assign*. Whether the owner of a right has manifested an intention to transfer it is a question of interpretation to be answered from all the circumstances, including his words and other conduct.¹⁹¹

Is an assignment effected under that test when a buyer simply transfers the product to a donee without mentioning warranty rights? That would certainly seem to be within the expectations of both donor and donee—at least if they had thought about it. There seems little reason to hold that the warranty rights would transfer when they were mentioned in such a transaction but not when the parties were silent. The ordinary test of increase of risk or burden would be sufficient to deal with the unusual case. However, commentary affirming that analysis in the sections dealing with remote sellers and that dealing with assignment would be helpful. The new draft provisions embracing “transferees” and affirming the availability in warranty cases of third party beneficiary and assignment law should help to clarify what was a muddled area through several drafts and what has been a troubled area under current law.

189. *See supra* Part X.C.

190. U.C.C. § 2-210 cmt. 7 (1995).

191. E. ALLAN FARNSWORTH, *CONTRACTS* § 11.3, at 754 (1982).

XII. AUTHORIZATION AND DELIVERY OF WARRANTY RECORDS

A. *The Buyer Should Not Have the Burden to Establish Authorization and Delivery of a Record in Draft Section 2-404(a)*

Under proposed draft section 2-404(a), an affirmation or promise contained in a record becomes a warranty if (1) the seller authorized delivery of the record and (2) delivery actually occurred as authorized.¹⁹² The draft does overcome the industry concern that the remote seller not be liable for unauthorized affirmations made by the immediate seller. However, it goes much further than necessary to achieve that objective and may put inappropriate burdens of pleading and proof on buyers to establish both authorization and delivery, perhaps denying recovery in cases in which delivery of the record was authorized but not made.

The rationale for the delivery requirement presumably is assurance that the record is of the sort designed by the remote seller to relate to the goods in question and is not obsolete, intended for a distinctly different market, or uncorrected. Because knowledge by the buyer is not required, in recognition of the fact that such items as the warranty-in-the-box are not commonly read or even readily available prior to sale,¹⁹³ it is not contemplated that the terms will be brought home to the buyer. Thus, the real concern is not that every delivery was authorized but that an unusual actual delivery was *not* authorized. Compare two cases:

(a) The manufacturer intends for a record to accompany the product or instructs the retailer to hand over the record to the buyer but the buyer does not get the record.

(b) The manufacturer does not intend for the warranty to accompany the goods, but the retailer manages to acquire a record and provides it to the buyer. Or, similarly, the record has become stale.

The possibility of a sale involving infrequent situation (b) does not justify imposing the proof burdens of authorization and delivery in all cases. Is it really necessary that all buyers maintain records of receipt of warranties? What of the commercial buyer that has one department for handling paper

192. Mar. 1997 Draft, Art. 2, *supra* note 14, § 2-404(a). The affirmation or promise may be "on or in a container, on a label, or in a record." *Id.*

193. Under the FTC rules and the Magnuson-Moss regulations, 16 C.F.R. § 702.3(a)(2) (1996), the pre-sale availability requirement may be satisfied by posting a notice.

and another for using the product? What of the consumer who mislays or throws out the warranty? A proof-of-delivery requirement simply adds an extraneous and possibly litigious element to a warranty claim. The buyer's proof of purchase should be enough to support claims under the remote seller's standard warranty materials.

Imposing on the buyer the burden of proving the remote seller's authorization is especially inappropriate. In routine sales, authorized warranty documents will ordinarily be delivered with the product. Why must the buyer show the remote seller authorized their delivery? Such evidence is in the possession of the remote seller, not the buyer, and it is the remote seller who presumably unleashed the materials.

Other record items, such as manufacturer brochures and specification sheets, may have been delivered to the retailer for distribution to, or scrutiny by, prospective buyers. Surely it will be a most unusual case in which the retailer receives unauthorized materials of the remote seller. If remote-seller materials are in fact delivered to a buyer, the buyer should not have to bear the burden of proving they were authorized. Indeed, as suggested above, there seems no real reason to require the buyer to show the materials were delivered at all.

B. Alternative Approaches

1. A Presumption of Authorization by Proof of Delivery

If authorization is to be a requirement, the buyer should have the benefit of a presumption of authorization upon proof of delivery. This would put the burden on the remote seller to show that the case was unusual enough that liability should not attach to its record affirmations. The buyer who does not prove delivery could still come forward to show authorization in cases in which the usual record warranty was authorized but did not in fact accompany the goods.¹⁹⁴ Suit could also be maintained when the buyer read the materials in the showroom, although that might satisfy a "delivery" requirement, or was told about them by someone who had received delivery of them.

194. See, e.g., *Massey Ferguson, Inc. v. Laird*, 432 So. 2d 1259 (Ala. 1983); *Winston Indus., Inc. v. Stuyvesant Ins. Co.*, 317 So. 2d 493 (Ala. Civ. App. 1975).

2. A Presumption of Authorization Without Proof of Delivery for Remote-Seller Affirmations Intended or Furnished for Distribution

Even the presumption of authorization by the proof-of-delivery approach retains too large a role for both delivery and authorization. As indicated above, the underlying concerns are (1) not binding the remote seller by unauthorized affirmations made by the immediate seller and (2) assuring that the record on which the buyer relies for her claim is of the sort designed by the remote seller to relate to the goods in question, and is not obsolete, intended for a distinctly different market or uncorrected. Placing the burden on the seller with respect to those issues in all cases seems more appropriate.

A more appropriate focus would be on whether the record materials were prepared or intended for distribution to ultimate buyers or even whether they were "furnished" by the remote seller.¹⁹⁵ The buyer would enjoy the benefit of a presumption that the materials were authorized simply by buying the goods; proof of delivery would not be required. Commentary could explain that sellers would be entitled to show that the record was obsolete or intended for a distinctly different market. However, it should avoid the implication that the manufacturer can make changes in its records without recalling those already circulated.

The focus on materials prepared by or furnished by the remote seller for distribution avoids the problem of binding the remote seller to representations made by the immediate seller. It also avoids putting burdens on the buyer to deal with problems that arise only in infrequent cases and which involve evidence within the possession of the seller.

XIII. HOLDING RETAILERS RESPONSIBLE WHEN PRIVACY RULES ARE APPLIED TO PRECLUDE A DIRECT ACTION ON THE MANUFACTURER'S WARRANTY

Illustrating the difficulties the courts have had in grappling with the puzzle

195. The ABA Taskforce warranty-of-record proposal treated as direct warranties those remote-seller affirmations and promises in a record (containing an undertaking to refund, repair, replace, or take other remedial action) that was "supplied" to the remote buyer or lessee. It went further to reach samples, models, and any other affirmations or promises "furnished by a remote seller that relate to" the record warranty. Thus contemplated was a connection between the other materials and the warranties in the delivered record. Under the proposal, the remote seller would only have to have "furnished" the materials; they would not to have been furnished directly to the buyer. A narrower alternative, set forth in brackets, would have required that the material have been "furnished in connection with" the record warranty.

of sticking with contract privity rules on the one hand and holding a manufacturer to its formal warranty on the other are several cases in Arizona. In *Flory v. Silvercrest Industries, Inc.*,¹⁹⁶ the Arizona Supreme Court held that a manufacturer's warranty addressed to the owner of a mobile home was not an Article 2 warranty because it was not part of the contract with the retailer, and there was no contract between the buyer and the manufacturer. The court, however, relied upon a series of out-of-states cases to hold that the manufacturer's warranty could be "an express warranty outside the Uniform Commercial Code," which would be enforceable without privity.¹⁹⁷

The next Arizona case, *Seekings v. Jimmy GMC of Tucson, Inc.*,¹⁹⁸ illustrates the pitfalls of the *Flory* analysis. The dealer had disclaimed all warranties and passed on the manufacturer's warranty.¹⁹⁹ Buyer sued for revocation and incidental and consequential damages. The Arizona Supreme Court held that lack of privity barred the buyer from asserting against the manufacturer either UCC warranty claims, as in *Flory*, or the Article 2 remedy of revocation.²⁰⁰ Although buyers may assert damage claims for breach of non-UCC warranties against the manufacturer, the claim for consequential damages was not available here because the manufacturer's consequential damage exclusion is effective both for UCC and non-UCC warranties.²⁰¹

The court apparently felt it had painted itself into a corner and sought to get out. Expressing concern that "logic precludes rendering meaningless a manufacturer's express warranty to a retail purchaser,"²⁰² the court held that although the dealer's disclaimer was effective to preclude any warranty liability against the dealer, the buyer was still entitled to revoke acceptance as

196. 633 P.2d 383 (Ariz. 1981) (en banc).

197. *Id.* at 389; see, e.g., *Randy Knitwear, Inc. v. American Cyanamid Co.*, 181 N.E.2d 399 (N.Y. 1962).

198. 638 P.2d 210 (Ariz. 1981) (en banc).

199. *Id.* at 213.

200. *Id.* at 214-15.

201. *Id.* at 215. The court held that ordinary damages for breach of common-law warranties were not available because the buyers had "returned the vehicle and recovered the purchase money paid." *Id.* This holding is very confusing in light of the litigated issues over the availability of revocation against either the remote or immediate seller. Also baffling is the court's reference in footnote 2 to the election required by common law between rescission or damages as a remedy for non-UCC claims. *Id.* at 215 n.2. The pre-Code case relied upon was not a common-law case, but rather one governed by the Uniform Sales Act. It seems doubtful that rescission would have been available under that Act against a non-privy remote seller. Compounding the confusion is the court's concluding footnote sentence that "We do not decide at this time which rule to apply when a plaintiff may have both U.C.C. and non-U.C.C. claims." *Id.*

202. *Id.*

against the dealer.²⁰³

The court insisted that revocation is not limited to breach of warranty and is “available whenever goods sold fail to conform to the seller’s representation of the goods if the nonconformity ‘substantially impairs’ the value of the goods to the buyer.”²⁰⁴ In *Seekings*, the dealer impliedly represented that the home was warranted by manufacturers for which the dealer was an authorized repair agent and that the buyer would not have to take the vehicle directly to the manufacturer for repairs.²⁰⁵ Revocation was available because the vehicle did not conform to those representations. Because incidental and consequential damages are available in a revocation action, they may be recovered from the dealer even though it had effectively disclaimed all warranties.²⁰⁶

Clark and Smith correctly conclude that “[t]he *Flory* case, and decisions like it,” denying standing to buyers on manufacturer warranties are flat wrong. If a manufacturer gives a written express warranty covering a product that is intended to be passed through the chain of distribution to an ultimate retail purchaser, vertical privity should be no bar.²⁰⁷

A federal case in the Ninth Circuit shows another layer of confusion about the Arizona “common law” warranty. In *Apollo Group, Inc. v. Avnet, Inc.*, the court held that such a common-law claim, even one for economic loss, sounded in tort and, hence, was precluded by the “economic loss” rule.²⁰⁸

Consumer advocates may find another use for the theory in the Arizona cases that a dealer who passes on a manufacturer’s warranty while disclaiming its own may be liable for breach of an implied representation that

203. *Id.* at 216-19.

204. *Id.* at 216. A somewhat similar case is discussed at length in Gary L. Monserud, *Judgment Against a Non-Breaching Seller: The Cost of Outrunning the Law to Do Justice Under Section 2-608 of the Uniform Commercial Code*, 70 N.D. L. REV. 809 (1994) (discussing *Troutman v. Pierce, Inc.*, 402 N.W.2d 920 (N.D. 1987)).

205. *Seekings*, 638 P.2d at 216-17.

206. *Id.* at 217. The Arizona cases leave only a very short step toward the imposition of liability under state unfair and deceptive acts and practices statutes (with treble damages and attorney fees in some states) on dealers who disclaim warranties but pass on a manufacturer’s warranty which the manufacturer does not fulfill.

207. CLARK & SMITH, *supra* note 31, ¶ 10.02[1], at 10-13 to 10-14.

208. 58 F.3d 477 (9th Cir. 1995). There is one difference between *Flory* and *Seekings* on the one hand and this case on the other. In the two Arizona decisions, the common-law warranty claim was asserted against a non-privity party; in *Avnet*, the buyer attempted to assert it against its immediate seller. The *Avnet* court noted that the buyer’s argument was “not entirely clear” and that it apparently rested on the seller’s rendition of services. *Id.* at 481. The court also held that the “economic loss” doctrine precluded a claim for negligent misrepresentation. *Id.* at 480-81.

the manufacturer will fulfill its warranty obligations. That approach might work under some state unfair and deceptive trade practices statutes, some of which carry the added appeal of multiple damages and attorney's fees.

Another way to impose liability on a retailer who disclaimed warranties appears in *Hylar v. Garner*, an Iowa case.²⁰⁹ There, the consumer buyer was entitled to rescission of a purchase of a motor home on the theory of misrepresentation because the dealer failed to disclose "(1) the manufacturer's troubled financial condition and its bankruptcy [two months before the consumer's purchase], (2) the negligible value of the manufacturer's warranty, and (3) the extent of repairs which the [consumer] could anticipate during [the] first year of ownership."²¹⁰

The court noted that proving the elements of a claim for rescission for misrepresentation "is less demanding than the proof necessary for the tort of misrepresentation" because "relief may be obtained without proof of scienter or pecuniary damage."²¹¹ The intent required in this rescission action is the "intent to induce the plaintiff to act or refrain from acting," as distinguished from an "intent to deceive."²¹²

The court also concluded that the dealer had adopted the manufacturer's warranty obligations, thus triggering the Magnuson-Moss Act and, thereby, invalidating the dealer's disclaimer in the contract of sale.²¹³ Therefore, buyer was entitled to assert a claim for breach of a fitness warranty—apparently that the motor home would be suitable for a disabled person who desired a low maintenance vehicle covered by a good warranty²¹⁴—and recover both consequential damages and attorney fees.²¹⁵

Another innovative approach is illustrated in a suit by buyers of a new motor home which the court described as "the culmination of a one-year ordeal by plaintiffs to have certain plumbing defects in their new motor home remedied."²¹⁶ After several unsuccessful attempts to repair the problem,

209. 548 N.W.2d 864 (Iowa 1996).

210. *Id.* at 870.

211. *Id.* at 871.

212. *Id.* at 871-72.

213. *Id.* at 875. The court also noted that the manufacturer did not disclaim implied warranties. *Id.*

214. The court reasoned, "The Autorama salesperson assured her 'there was nothing to worry about,' the motor home 'had a full one-year warranty—factory warranty.'" *Id.* at 872. The court found that on the facts it made no difference that the actual warranty was "limited" rather than "full." *Id.*

215. *Id.* at 875. The facts of the case are strong. One wonders whether the same result would obtain if the manufacturer had been solvent and had simply refused to perform its warranty obligations.

216. *Murphy v. Mallard Coach Co.*, 582 N.Y.S.2d 528, 529 (App. Div. 1992).

defendants had dismantled the interior of the home for still another try. Adding insult to injury, they neither repaired the plumbing problem nor restored the interior satisfactorily. By that time, almost a year had passed and the buyers were concerned that the warranties on various appliances and fixtures would expire without a sufficient opportunity to test them out under normal living conditions.²¹⁷ Buyers sued for a refund of the purchase price and damages.

The court approved the award of the full purchase price plus interest, costs, and disbursements conditioned on the transfer of title jointly to retailer and manufacturer.²¹⁸ The monetary liability was apportioned seventy-five percent to the manufacturer and twenty-five percent to the retailer.²¹⁹

The opinion is unclear whether the retailer's contract of sale contained a disclaimer of implied warranties. The court held that two theories might be available against the retailer. The first was that "the inspection checklist issued by the retailer to plaintiffs at the time they initially picked up the motor home qualifies as a written warranty under the [Magnuson-Moss] Act."²²⁰ Accordingly, the dealer's disclaimer was void. The second ground was a simple assertion that the retailer was liable for breach of the implied warranty of merchantability.²²¹

The court strongly rejected two of the manufacturer's arguments. The first apparently was that the manufacturer's warranty was not binding because it was not handed to buyers until after the contract was made. Technically, the argument was that it could not satisfy the "part of the basis of the bargain" requirement of the definition of "written warranty" under Magnuson-Moss.²²² The court had no patience for the assertion:

217. *Id.* at 530.

218. *Id.* at 532.

219. *Id.* (upholding the lower court's apportionment of damages). There is no explanation of the basis for the apportionment. The appellate court simply noted that defendants did not challenge the apportionment.

220. *Id.* The court cited *Marine Midland Bank v. Carroll*, 471 N.Y.S.2d 409 (App. Div. 1984), in which the court held that the disclaimer in the retailer's contract of sale was ineffective because the "Dealer's Pre-Delivery Inspection Requirements" form constituted a written warranty under the Magnuson-Moss Act. *Id.* at 411. Under the Act, one who issues a written warranty may not disclaim implied warranties. See 15 U.S.C. § 2308(a) (1994). The form, which was supplied to the dealer by the manufacturer and completed and signed by the dealer's service manager, represented that the motor home had been inspected and tested and was found to "perform, function, operate and/or serve exactly as intended." *Marine Midland Bank*, 471 N.Y.S.2d at 411.

221. *Murphy*, 582 N.Y.S.2d at 532.

222. See *id.* at 531.

[W]e believe that while the warranty as technically handed over *after* plaintiffs paid the purchase price, the fact that it was given to plaintiffs at the time they took delivery of the motor home renders it sufficiently proximate in time so as to be fairly be said to be part of the basis of the bargain To accept the manufacturer's argument that in order to be part of the basis of the bargain the warranty must actually be handed over during the negotiation process so as to be said to be an actual procuring cause of the contract, is to ignore the practical realities of consumer transactions wherein the warranty card generally comes with the goods, packed in the box of boxed items or handed over after purchase of larger, non-boxed goods and, accordingly, is not available to be read by the consumer until after the item is actually purchased and brought home. Indeed, such interpretation would, in effect, render almost all consumer warranties an absolute nullity.²²³

The second argument involved the remedy of revocation. The manufacturer apparently argued that restoration of the purchase price amounted to revocation and either that revocation is not available as against a manufacturer or that plaintiffs had not given sufficient notice and had continued to live in the mobile home. The court did not bother to explain the argument because it held that "even assuming that plaintiffs' actions were insufficient to constitute a valid revocation of acceptance," it was appropriate to award full refund of the purchase price.²²⁴ The facts constituted "special circumstances," which supported deviation from the general loss of value rule of section 2-714.²²⁵

XIV. CONCLUSION

The statutory recognition of an enforceable relationship between a remote seller and a buyer is an important step in dealing with the realities of the modern marketplace. It is not a perfect solution and does not even purport to

223. *Id.*

224. *Id.*

225. *Id.* at 532. The court reasoned that the usual loss of value calculation presumes that the buyer will retain title. Here, however, buyers made clear "that they do not want the motor home since they have lost confidence in its integrity." *Id.* The special circumstances included "the sordid history of this matter, the 'hit or miss' way defendants went about determining and fixing the plumbing defects and the ostensibly shoddy workmanship involved in reconstructing the unit after it was dismantled for repairs." *Id.* The court also pointed out in a footnote that the manufacturer's warranty did not limit remedies to repair or replacement, but provided for a refund at the option of the buyer. *Id.* at 532 n.3.

be a complete one. It should, however, be very helpful in overcoming some of the barriers in current Article 2—such as the “basis of the bargain” requirement, the language of “buyer” and “seller,” and the enumeration of certain classes as beneficiaries—toward defining and enforcing the relationship between remote parties.

In retrospect, it appears that the drafters of Article 2 expected too much of the commentary suggestions to sections 2-313 and 2-318 that courts were free to go beyond the text to deal with remote-seller issues. Perhaps both bench and bar, considering for the first time a seemingly comprehensive statutory treatment of commercial law, assumed that answers to all relevant questions were to be found in the text of the statute and that courts were not free to explore beyond. That is surely one explanation for the total lack of development of the law of assignment as it relates to warranties and how many courts found the language of “basis of the bargain” and “seller” and “buyer” to exclude consideration of remote-seller issues.

One of the substantial obstacles to dealing with the issues has been the traditional contract-law paradigm of the bargain-agreement. There was some recognition in the Article 2 “battle of the forms” provisions that the bargain-agreement model does not apply to many provisions in documents that pass between commercial parties. Roughly speaking, the statute sought to preserve the “agreement” of the parties while discarding material terms not agreed to in favor of the statutory default rules. This treatment stretched but did not break the bargain-agreement paradigm. For many, the remote-seller relationship (other than one involving direct dealings), could not be fit even into a stretched paradigm.

The Article 2B Drafting Committee has been struggling with a structure to squeeze the remote-seller relationship into a bargain-agreement paradigm. The focus of the new provisions is the license and warranty (and disclaimer) provisions either (1) contained in the “shrinkwrap” packaging of software, (2) imbedded in the software, or (3) made part of an offer to sell on the Internet.

In order to preserve some modicum of the concept of actual agreement, the draft rules provide a process in which a buyer (putative licensee) may pay for and take delivery of the product and thereafter—after an opportunity to inspect the terms (in the shrinkwrap or software)—determine whether to “agree” to them.

The proposed statutory process for obtaining that “agreement” requires as a precondition to a “manifestation of assent” that there be an “opportunity to review” before being bound to the terms. That opportunity to review, in turn, is defined to include an option for the buyer (putative licensee) to return the

product for a refund of the purchase price either from the remote licensor or the retail seller of the product, who, in turn is entitled to indemnification from the remote licensor.

Thus, while assuring the licensor a means to preserve its exclusive rights, the provisions give an out for the buyer (putative licensee) who acquires the software and finds the terms of the nonnegotiable shrink-wrap license too restrictive for her taste. If she makes that determination, she may reject the product and obtain a refund of the retail price. Even if she does not reject, she will enjoy some protection from onerous terms.

This approach appears to come from the software industry. As one of the members of the Article 2B Drafting Committee has explained: "Because information industry producers wish to create privity to retain control over uses of information (and to disclaim warranties), Article 2B develops the concept of bypassing retailers (and Internet service providers) to create a contract directly between the producer and the user."²²⁶

The draft provisions have been criticized both on grounds that the assent "by pressing 'OK' post-sale, is a fiction,"²²⁷ and that the substantive protections are far too weak to prevent over reaching by remote licensors.²²⁸ There has also been difficulty in reaching agreement on the definition of "mass market."²²⁹

Even assuming the Article 2B Drafting Committee reaches agreement, that specific model would not work under Article 2 because the Article 2B transaction type rests on the assurance that every licensing transaction with a remote licensee will involve an "agreement" whose terms—and limitations—are set forth in a record (on the shrink-wrap or computer screen). Although remote-seller warranty records are commonly used in mass market sales of goods transactions and are certainly analogous to shrink-wrap license terms, the Article 2 express warranty provisions contemplate obligations that arise in contexts that may not relate to a record of the remote seller's terms and limitations.²³⁰

226. See Stephen Y. Chow, *Proposed New UCC Article 2B—Software Contracts and Licensing of Information*, COM. L. NEWSL., Mar. 1997, at 9.

227. See Cem Kaner, *Proposed Article 2B: Problems From the Customer's View, Part 2*, UCC BULL., Feb. 1997, at 1, 4.

228. See Hillebrand, *supra* note 41; Kaner, *supra* note 227.

229. See Chow, *supra* note 226; Kaner, *supra* note 227; see also Draft, Uniform Commercial Code Article 2B Licenses § 2B-102(24)-(25) (Nat'l Conference of Comm'rs on Unif. State Laws, Mar. 21, 1997), available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Apr. 22, 1997).

230. It may be suggested that the nature of the process by which the remote licensor obtains

The problems encountered in drafting Article 2B suggest that the approach in draft Article 2 of breaching the confines of the constructive or actual bargain-agreement paradigm is preferable, and perhaps necessary. On the other hand, the Article 2 Drafting Committee (and, after enactment, the interpreters) would do well to heed the Article 2B draft rejection of the proposition that a remote software buyer (putative licensee) is stuck with whatever terms are in the shrink-wrap or disk simply because she “manifested consent” to the record terms by using the software or clicking a mouse as instructed.

The Article 2B Draft recognizes the need for minimal protection against onerous remote-license terms in mass market transactions—even if the remote licensee has manifested assent to them. Thus, there is some policing of surprising or unexpected terms (albeit the standard for policing is eerily reminiscent of common-law fraud requirements and not as helpful to consumers as draft section 2-206); disclaimer rules apply; remote licensees enjoy the remedies of rejection and revocation and the doctrine of failure of the essential purpose of agreed exclusive limited remedies; there are no damage limitations other than those that apply to direct transactions; there is a presumption that members of the immediate family or household of the licensee are “third-party” beneficiaries of the license provisions; and a warranty of quality by the remote licensor is implied (unless disclaimed).

These provisions—despite the debate over their fairness—illustrate a more comprehensive response to modern mass marketing. However, it may be the better part of prudence not to attempt to answer every question relating to remote-seller questions in sale of goods transactions. More experience in dealing on a case-by-case basis with remote-seller relationships will be useful in fashioning rules for remote-seller transactions. Thus, although it is disappointing that the Article 2 Drafting Committee did not resolve such important issues as the validity of disclaimers, the enforceability of limitations on remedies and the failure of the essential purpose of those limited remedies, there is enough flexibility in the draft to permit further exploration.

Explicit statutory recognition that a buyer often has a relationship with both its immediate seller and a remote seller should open the way for more

“agreement” differs significantly from remote-buyer sales transactions. This may be true of the “click to agree” process imbedded in software. But the software shrink-wrap cannot really be distinguished from the sales warranty in the box. Moreover, it seems likely that the “click to agree” technique may be used in connection with the sale of goods over the Internet.

comprehensive consideration of market realities. When dealing with the new provisions, we must not repeat a mistake of the past, assuming the statute says it all. It is, after all, part of the tradition of the Code that it looks to the marketplace not only to see what problems are to be solved but also for clues as to how to solve them.

Interpretation of these new provisions must take into account the nature of warranty and the commercial influences of the modern marketplace. Modern sellers have found modern and efficient ways to communicate with masses of modern buyers to prepare and attempt to shape the market. The law of warranty is flexible enough to apply to these changed conditions. The approach in draft Article 2 is a good start even though it has not resolved all issues relating to policing of terms and limitations in remote-seller warranties or remedies in the event of breach.