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Judgment against a Non-Breaching Seller: The Cost of Outrunning the Law to Do Justice under Section 2-608 of the Uniform Commercial Code

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JUDGMENT AGAINST A NON-BREACHING SELLER: THE COST OF OUTRUNNING THE LAW TO DO JUSTICE UNDER SECTION 2-608 OF THE UNIFORM COMMERCIAL CODE

A CRITICAL REREADING OF *TROUTMAN V. PIERCE*

GARY L. MONSERUD*

I. INTRODUCTION

Article 2 of the Uniform Commercial Code offers buyers who receive non-conforming goods an array of remedial options.[1] For example, disappointed buyers can rid themselves of non-conforming goods by using the "goods-oriented remedies" of rejection and revocation of acceptance.[2] These goods-oriented remedies provide an aggrieved buyer two opportunities for relief. First, an aggrieved buyer, before acceptance, can reject non-conforming goods.[3] Subject to the seller's right to cure the non-conformity, the aggrieved buyer can obtain a refund of the purchase price, or any part thereof.[4] Alternatively, after acceptance, an aggrieved buyer can revoke acceptance if the non-conformity substantially impairs the value of the goods to the revoking buyer and the procedural requisites of section 2-608 have been met.[5] Like the buyer who makes a rightful rejection, a buyer who rightfully revokes acceptance is entitled to refund of the purchase price, or any part thereof.[6] Thus, both rejection and revocation of acceptance,

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* Professor of Law, New England School of Law, Boston, Massachusetts; J.D. 1976, University of South Dakota School of Law; LL.M. 1985, New York University School of Law. As author of this article, I want to gratefully acknowledge the help I received from Mr. Fred Rathert, of Bjella, Neff, Rathert, Wahl & Eiken, Williston, North Dakota, in gathering background material. Mr. Rathert allowed me to borrow his file, including the transcript of the trial and the record on appeal. This file is the basis for much of this article. I am also indebted to the trial counsel to whom I have spoken. Mr. William McKechnie, Grand Forks, North Dakota (formerly in the same firm as Mr. Rathert) was counsel for the plaintiffs. Mr. Jon Brakke, Fargo, North Dakota, was counsel for Pierce, Inc. Mr. Don Peterson, Minot, North Dakota, was counsel for Schult Home Corporation. I benefitted greatly from discussing the case with each of them. Mr. David Walker, Valley City, North Dakota, helped me very much by sharing his recollections of Erling v. Homera, Inc., 298 N.W.2d 478 (N.D. 1980). Their free and easy style and willingness to talk were much appreciated.

1. *See* U.C.C. § 2-711 (1989) (providing a catalogue of buyer's remedies).

2. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 8-3 (3d ed. 1988). White and Summers use the phrase "goods-oriented remedies" to describe rejection (§ 2-601) and revocation of acceptance (§ 2-608). *Id.* § 8-3, 8-4.

3. *See* U.C.C. § 2-601 (1989) (embodying the so-called perfect tender rule). *See* U.C.C. § 2-606 (1989) (outlining the ways in which a buyer makes an acceptance).

4. *See* U.C.C. § 2-711(1) (1989). The aggrieved buyer may employ other remedies as well. *See* U.C.C. § 2-712 (1989) (outlining the buyer's right to "cover" or procure substitute goods); U.C.C. § 2-713 (1989) (providing for buyer's damages for nondelivery); U.C.C. § 2-508 (1989) (outlining a seller's right to cure).

5. *See* U.C.C. § 2-608(2) (1989). A buyer must revoke acceptance within a reasonable time and before any substantial change in the condition of the goods which is not caused by their own defects. *Id.* The buyer must give notice to the seller within a reasonable time. Revocation is not effective until the seller receives notice of it. *Id.*

6. U.C.C. § 2-711(1) (1989). The aggrieved buyer may be entitled to other remedies as well. *See supra* note 4 (outlining buyer's remedies).

operating in conjunction with section 2-711(1), provide for a forced exchange: the non-conforming goods are exchanged for the purchase price.[7]

Consider a hypothetical situation to illustrate revocation of acceptance after the time for rejection has passed. Suppose Eric buys a new snowmobile in December, paying full price to the dealer on the date of delivery.[8] From the date of delivery through February, the snowmobile works well. For lack of a timely rejection, we can assume Eric has legally "accepted" the snowmobile.[9] Suppose that in March, the clutch starts malfunctioning and the drive belt shows excessive wear. An experienced mechanic examines the snowmobile and concludes that the clutch was defective on manufacture, and that the drive belt wear is excessive due to the clutch malfunction. Unless Eric bargained away his rights at the time of purchase,[10] he may still be able to get rid of the snowmobile in return for the full purchase price, if he can meet the requirements for revocation of acceptance under section 2-608 of the Uniform Commercial Code.[11] Those requirements are: (1) a non-conformity which substantially impairs the value of the goods to him, (2) an acceptance (i) (with discovery of the defect) on the reasonable assumption that the non-conformity would be cured or (ii) (without discovery) reasonably induced by the difficulty of discovery or seller's assurances, (3) revocation within a reasonable time, (4) revocation before a substantial change in the snowmobile not caused by its own defects,

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7. U.C.C. § 2-711(1) (1989). Of course, other remedies may be sought in the same action. *See supra* note 4 (outlining buyer's remedies).

8. The hypothetical is based on the facts of Gochey v. Bombardier, Inc., 572 A.2d 921 (Vt. 1990).

9. U.C.C. § 2-606(1)(b) (1989). "Acceptance" occurs simply by lapse of time when the buyer fails to make an effective rejection. *Id.*

10. Sellers may limit remedies thereby precluding revocation of acceptance and refund, for example, by "repair or replacement" clauses under section 2-719(1)(a) of the Uniform Commercial Code. Of course, such a limitation may fail its essential purpose thereby clearing the way for Code remedies. *See* U.C.C. § 2-719(2) (1989).

11. Section 2-608 of the Uniform Commercial Code states:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
> (a) on the reasonable assumption that its non-conformity would be cured; or
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

U.C.C. § 2-608 (1989).

and (5) due notice of revocation to the seller.[12] The reasonable time for notice of revocation is generally longer than the reasonable time within which notice of rejection must be given.[13] Consequently, revocation of acceptance is a buyer's second chance to get rid of goods which fail to conform to the terms of the contract for sale.

If the number of reported cases is an index of popularity, revocation of acceptance cases were not especially popular in the early days of the Code as judges granted revocation of acceptance and refund infrequently.[14] In recent years, however, hundreds of decisions arising under section 2-608 have been reported.[15] As courts have widened the outer limits of the "reasonable time" within which notice of revocation must be given,[16] revocation of acceptance has become an increasingly valuable remedial device for aggrieved buyers. Nonetheless, a stumbling block to its effective use has arisen: namely, a defendant's often successful employment of the doctrine of privity as a bar to revocation of acceptance.[17]

Defendants have been successful in raising privity as a bar to revocation of acceptance because of ambiguities in the text of section 2-608 and related sections.[18] The ambiguities concern the meaning of the term "seller" which appears in sections 2-608 and 2-711(1) and is defined in section 2-103(1)(d). The term "seller" against whom revocation of acceptance can be invoked could be restricted to immediate seller, i.e. a seller in contractual privity, or it could include remote seller, i.e. a seller upstream in the distribution chain and not in contractual privity with the buyer who seeks to employ revocation of acceptance.[19] Cases wherein privity has been raised have presented the

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12. WHITE & SUMMERS, *supra* note 2, § 8-4.

13. U.C.C. § 2-608, cmt. 4 (1989).

14. "[D]uring the early years of the Code the courts did not take to it." WHITE & SUMMERS, *supra* note 2, § 8-4. The early years of the Code were the late 1950's and early 1960's. Pennsylvania enacted the Code in 1953. *Id.* § 1. After many changes in the Official Text, Massachusetts in 1957 became the second state to enact the Code. *Id.* In 1962, four states adopted the Code; in 1963, 11 adopted the Code; in 1964 one; in 1965, 13; so that, by 1968 the Code was effective in 49 states. *Id.*

15. *See* UNIFORM COMMERCIAL CODE DIGEST ¶ 2608 (1993) (providing synopses of cases under U.C.C. § 2-608 on pages 345-608).

16. *See* St-Laurent v. Fiermonti Oldsmobile, Inc., 611 A.2d 638 (N.H. 1992) (finding notice within 19 months reasonable in the case of a car with a latent defect).

17. *E.g.* Conte v. Dwan Lincoln-Mercury, Inc., 374 A.2d 144 (Conn. 1976) (refusing to allow a buyer to revoke acceptance against the remote seller, Ford Motor Company, for lack of privity).

18. I have said "ambiguities" in the plural because the possible double meaning of "seller" creates different possibilities under both section 2-608, which allows revocation of acceptance, and section 2-711(1), which allows refund.

19. BLACK'S LAW DICTIONARY 1199 (6th ed. 1990). "*Privity of contract*. That connection or relationship which exists between two or more contracting parties. It was traditionally essential to the maintenance of an action on any contract that there should subsist such privity between the plaintiff and the defendant in respect of the matter sued on." *Id.* In a typical car purchase, the customer is in

vexing question: Can revocation of acceptance be used against any person who breaches an express or implied warranty running to the aggrieved buyer, or is its use limited to actions against a seller in contractual privity? Thus, the perennially puzzling privity problem has made it appearance in the midst of Article 2's remedial scheme.

The courts have split[20] as have the commentators.[21] The majority of courts presented with the question have limited the use of revocation of acceptance to a seller in privity with the complaining buyer.[22] However, a significant minority have held that revocation of acceptance is available

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privity with the dealer, and the dealer is in privity with the manufacturer, but there is no privity (immediate connection) between the customer and the manufacturer.

20. In at least 12 reported cases, courts have held or stated in *dicta* that revocation and acceptance and refund can only be employed against a seller in contractual privity. Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208, 1211 (6th Cir. 1974) (applying Ohio law); Seekings v. Jimmy GMC of Tucson, Inc., 638 P.2d 210, 214 (Ariz. 1981); Conte v. Dwan Lincoln-Mercury, Inc., 374 A.2d 144, 149-50 (Conn. 1976); Volvo of Am. Corp. v. Wells, 551 S.W.2d 826, 829 (Ky. Ct. App. 1977); Henderson v. Chrysler Corp., 477 N.W.2d 505, 507 (Mich. Ct. App. 1991); Alberti v. Manufactured Homes, Inc., 381 S.E.2d 478, 480 (N.C. Ct. App. 1989), *aff'd in part, rev'd in part, vacated in part*, 407 S.E.2d 819 (N.C. 1991); Wright v. O'Neal Motors, Inc., 291 S.E.2d 165, 169 (N.C. Ct. App. 1982); Cooper v. Mason, 188 S.E.2d 653, 655 (N.C. Ct. App. 1972); Edelstein v. Toyota Motor Distrib., 422 A.2d 101, 104 (N.J. Super. Ct. App. Div. 1980); Noice v. Paul's Marine & Camping Ctr., Inc., 451 N.E.2d 528, 532 (Ohio Ct. App. 1982); Fund v. Montgomery AMC/Jeep/Renault, 586 N.E.2d 1113, 1116-17 (Ohio Ct. App. 1990); Gasque v. Mooers Motor Car Co., Inc., 313 S.E.2d 384, 390 (Va. 1984); Reece v. Yeager Ford Sales, Inc., 184 S.E.2d 727, 731 (W. Va. 1971); Crume v. Ford Motor Co., 653 P.2d 564, 566 (Or. Ct. App. 1982). *See also* Andover Air Ltd. Partnership v. Piper Aircraft Corp., 7 U.C.C. Rep. Serv. 2d (Callaghan) 1494, 1500 (D. Mass. 1989) (assuming that the Massachusetts Supreme Judicial Court would follow the majority); Ayanru v. General Motors Acceptance Corp., 495 N.Y.S.2d 1018, 1023 (N.Y. Civ. Ct. 1985) (finding revocation effective only between buyer and person who sells or contracts to sell goods); Hart Honey Co. v. Cudworth, 446 N.W.2d 742, 744 (N.D. 1989) (defining the term "seller" with reference to WHITE & SUMMERS § 8-4 (3d ed. 1988) thus aligning itself with the majority).

Several courts have rejected the majority view represented by the foregoing cases and have allowed revocation and refund without privity between buyer and the defendant-seller. Ford Motor Credit Co., v. Harper, 671 F.2d 1117, 1126 (8th Cir. 1982) (applying Arkansas law); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 357 (Minn. 1978); Volkswagen of Am., Inc., v. Novak, 418 So. 2d 801, 804 (Miss. 1982); Royal Lincoln-Mercury Sales, Inc. v. Wallace, 415 So. 2d 1024, 1029 (Miss. 1982); Ventura v. Ford Motor Corp., 433 A.2d 801, 811 (N.J. Super. Ct. App. Div. 1981); Gochey v. Bombardier, Inc., 572 A.2d 921, 923 (Vt. 1990); *see* Smith v. Navistar Int'l Transp. Corp., 714 F. Supp. 303, 309 (N.D. Ill. 1989); (applying the "close connection" doctrine of Christianson v. Venturi Const. Co., 440 N.E. 2d 226, to allow buyer to bring action against financing company for seller's breach under financing instrument); Erling v. Homera, Inc., 298 N.W.2d 478, 479 (N.D. 1980) (sustaining a judgment which allowed revocation of acceptance and held both the immediate seller and remote seller (manufacturer) liable for return of the purchase price). See *infra* note 23, for more on the *Erling* case.

21. *E.g.*,Professors White and Summers support the majority viewpoint requiring privity for revocation of acceptance and refund. WHITE & SUMMERS, *supra* note 2, § 8-4. Professors Henning and Wallach support the minority viewpoint which does not require privity for revocation of acceptance and refund. WILLIAM HENNING & GEORGE WALLACH, THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE ¶ 9.02[6] (1992). This article is my second shot at the majority viewpoint. My first shot was in my article *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).

22. See *supra* note 20 for a listing of majority cases.

against a remote or non-privity seller when the requirements of section 2-608 are met.[23]

In the previously discussed hypothetical situation, suppose Eric's dealer (immediate seller) went bankrupt between the time of sale and Eric's attempt to revoke acceptance. Suppose further that an express warranty on the clutch and drive belt, which warranty was breached, ran not from the defunct dealer to Eric, but instead from the snowmobile manufacturer (remote seller) to Eric. According to the majority viewpoint, Eric could not employ section 2-608 to revoke acceptance and section 2-711(1) to gain a refund from the manufacturer because of lack of privity, no matter how serious the problem. Under the minority viewpoint, however, Eric could use sections 2-608 and 2-711(1) to revoke acceptance and obtain a refund of the purchase price from the manufacturer. Consequently, the viewpoint adopted by the courts in Eric's jurisdiction will have very serious consequences if Eric sues for revocation of acceptance and refund.

In researching this privity problem, I became intrigued with *Troutman v. Pierce, Inc.*[24] in which the North Dakota Supreme Court sustained a trial court's judgment which allowed revocation of acceptance *against an immediate seller where the only party in breach was a remote seller.*[25] Neither the trial court nor the supreme court swept away the privity requirement for revocation of acceptance (as have minority-view courts), yet the privity doctrine did not constitute a bar to revocation of acceptance. It occurred to me that perhaps the North Dakota Supreme Court had devised a solution to the privity problem implicit in section 2-608 by simply focusing on the concept of non-conformity. According to the court's reasoning, if a non-conformity substantially impairs the value of the goods, revocation of acceptance and refund can be allowed whether or not the immediate seller is in breach. Liability for the purchase price, along with title to the non-conforming goods, can be

23. See *supra* note 21 for a listing of minority cases. I am not completely comfortable stating whether North Dakota is in the minority or majority camp though I think it leans toward the majority view. Based on dicta and the citation to WHITE AND SUMMERS, § 8-4, in Honey Hart Co. v. Cudworth, 446 N.W.2d 742 (N.D. 1989), it seems North Dakota should be classified as adhering to the majority viewpoint (privity required). However, on the basis of Erling v. Homera, Inc., 298 N.W.2d 478 (N.D. 1980) (allowing revocation of acceptance and ordering refund by both the immediate and remote seller) one could argue that minority viewpoint has been adopted. Since the absence of privity was not discussed in the *Erling* opinion (and presumably was not argued), the North Dakota Supreme Court cannot be said to have adopted the minority position allowing revocation of acceptance in the absence of privity. Of course, Troutman v. Pierce, Inc., 402 N.W.2d 920 (N.D. 1987), assumes the necessity of privity.

24. 402 N.W.2d 920 (N.D. 1987).

25. Troutman v. Pierce, Inc., 402 N.W.2d 920, 922-23 (N.D. 1987).

passed up the distribution chain to the party who has breached a warranty, and hence, was responsible for the non-conformity.

In pondering this matter, I have come to believe, however, that while *Troutman v. Pierce, Inc.* was a good result on its facts, the opinion sowed some seeds which will sprout some very bad law in the future if left unchecked. A better choice would have been to tear down the privity barrier to revocation of acceptance and refund. In this article, I argue the case for revocation of acceptance without privity. I use the *Troutman* case in its factual setting to demonstrate that the North Dakota choice, if followed, will lead to undesirable results, and, in any event, is violative of the Code's remedial scheme as a whole. As the title to this article implies, I believe that in the *Troutman* case, justice was achieved by outrunning the law under Article 2.[26] By "outrunning the law," I mean sustaining entry of a judgment against a party whom the jury decided was not in breach. Allowing judgment against a non-breaching seller is not in accord with the remedial principles of Article 2 and has undesirable policy implications which I will explore in the sections following.

II. AN ANALYSIS OF *TROUTMAN V. PIERCE*

To lay the foundation for my viewpoint, I extensively use the trial court record.[27] In sketching the story behind the supreme court's opinion in *Troutman*, I use the following organization: (a) undisputed facts, (b) disputed factual matters bearing on plaintiffs' theories of liability, (c) evidence and arguments of counsel relating to revocation of acceptance and refund, (d) the jury's answers to special interrogatories, and (e) the trial judge's decision to order revocation of acceptance in light of the jury's answers to special interrogatories.[28]

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26. Of course, if the jury verdict was erroneous on the evidence, an injustice was done to the remote seller, Schult Home Corporation. However, I am not trying to go behind the jury verdict for which the record seems more than sufficient.

27. The whole of the file to which many citations are made in this article will be returned to Bjella, Neff, Rathert, Wahl & Eiken in Williston, North Dakota and will henceforth remain in their custody after the publication of this article. The briefs of the parties on appeal as well as the transcript of proceedings are also available at the Thormodsgard Law Library at the University of North Dakota, School of Law, Grand Forks, North Dakota.

28. I realize fully that in discussing undisputed and disputed "facts" I make statements and raise questions that some lawyers would more exactingly describe as "mixed" in the sense that matters of fact and law are commingled. Moreover, in citing the transcript for facts, I am taking the transcript in a light most favorable to the jury verdict. Finally, thematic unity requires that I sketch the story behind the case in a manner not strictly chronological.

A. UNDISPUTED FACTS

The case was tried in Ward County, North Dakota, during the week of November 19, 1985.[29] The evidence presented tended to establish many basic background facts which were beyond any reasonable dispute. While the following narrative statement is not based on stipulations of the parties, I believe it to be fairly gleaned from the transcript and exhibits.

In March 1982, the plaintiffs, Edward and Debra Troutman (Troutmans), bought a mobile home from Pierce, Inc. (Pierce) at its sales office in Williston, North Dakota.[30] The mobile home was manufactured by Schult Home Corporation (Schult)[31] whose factory and offices were in Redwood Falls, Minnesota.[32] In making their purchase, Troutmans did not deal with any Schult agent,[33] but dealt mainly with LeRoy Larson, an agent for Pierce.[34] On or about April 1, 1982, Pierce delivered the mobile home to Troutmans' reserved lot in Williston.[35] Troutmans commenced living in the mobile home on its delivery and continued to living in it until January 1984.[36] Troutmans accepted the mobile home even though they knew of minor defects during the first days living in it.[37]

In June or July, 1982, Edward Troutman skirted the mobile home with plywood.[38] Schult's literature left in the mobile home stated that plastic must be put down as a vapor barrier.[39] On the advice of LeRoy Larson, Mr. Troutman did not put plastic (Visqueen) under the mobile home for a vapor barrier as LeRoy deemed plastic unnecessary in the North Dakota climate.[40]

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29. Transcript of Proceedings at 1, Troutman v. Pierce, Inc., 402 N.W.2d 920 (N.D. 1987) [hereinafter Transcript]. The Honorable Wallace D. Berning presided. *Troutman*, 402 N.W.2d at 920.

30. Transcript, *supra* note 29, at 92.

31. *Id.* at 90.

32. *Id.* at 382.

33. *Id.* at 215.

34. *Id.* at 92, 95.

35. Transcript, *supra* note 29, at 107, 108.

36. *Id.* at 155-56.

37. *Id.* at 113-15. Minor defects were repaired to Troutmans' satisfaction. *Id.* at 116. Failure to make an effective rejection is an acceptance. *See* U.C.C. § 2-606(1)(b) (1989). Plaintiff's case wherein revocation and refund of the price were sought assumes acceptance.

38. Transcript, *supra* note 29, at 111, 121-22, 230.

39. *Id.* at 239, 462.

40. *Id.* at 239-40.

Troutmans received several written warranties with the delivery of their mobile home.[41] The written warranty relevant to this article was the one year written warranty from Schult to Troutmans against "substantial defects in materials and workmanship attributable to warrantor [Schult]."[42] This written warranty was "given out by Schult" as part of the owner's manual.[43] At trial, Edward Troutman testified that he had discussed this warranty with LeRoy (Pierce's agent) before he and Mrs. Troutman made the purchase.[44] This was not disputed.[45] Therefore, the jury had evidence to infer that the warranty was a factor that helped to induce the sale.

While Pierce was not a warrantor,[46] it acted as an intermediary by responding for Schult to warranty claims made by Troutmans on the mobile home.[47] Troutmans made out a list of minor warranty claims, including a flawed carpet, a chipped countertop and a broken coffee table, within a month of occupancy.[48] These minor matters were rectified to Troutmans' complete satisfaction by Pierce or through connections made by Pierce.[49] Subsequently, Troutmans discovered a water problem in their front bedroom.[50] There was a puddle on the

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41. *Id.* at 96-102.

42. *Id.* at 95-98. The Schult warranty which was entered into the record as Plaintiff's Exhibit 35 was quoted in relevant part on the cited pages of the transcript. Exhibit 35 was not made part of the record on appeal. In any event, I have not been able to locate it. The phrases quoted in the transcript are, however, sufficient to establish the meaning of the express warranty under section 2-313 of the Uniform Commercial Code.

43. Transcript, *supra* note 29, at 96.

44. *Id.* at 95, 98, 225-26.

45. *Id.* at 95. Edward Troutman testified:

> Q Okay. While the financing was taking place did you discuss with anybody the warranties that you were going to receive as part of this purchase of the mobile home?
> A Yes, we discussed it quite a bit of warranties before we signed everything, first.
> Q And who did you discuss those with first?
> A Mr. LeRoy, the person we bought the home through.
> Q Do you recall what he told you about those warranties or did he show warranties to you or what took place?
> A He had one little warranty on Schult Home, just one little piece of paper and he said that I would get more with the trailer when I got it. And then he said it was a one year warranty and then he said I had a five year warranty on all the appliances in the home.

Id.

46. Transcript, *supra* note 29, at 33, ¶ 6; Appendix on Appeal, Troutman v. Pierce, Inc., 402 N.W.2d 920 (N.D. 1987) [hereinafter Appellate Appendix]. Troutmans alleged that Pierce had made a warranty. The jury found to the contrary. *See infra* Appendix 2 (reproducing the verdict form with special interrogatories).

47. Transcript, *supra* note 29, at 105, 459-60. While the record is not clear, Pierce must have had an agreement for reimbursement from Schult for the initial responses on warranty items.

48. *Id.* at 113.

49. *Id.* at 114-118. Edward Troutman refers to the repairman, Person, as a Schult man. *Id.* at 114. This initial warranty work was completed on May 10, 1982. *Id.* at 115.

50. *Id.* at 122-23, 200-02.

floor.[51] An inspection revealed an exterior wall in the front bedroom was saturated two and one half feet up from the floor.[52] Mr. Troutman found some wall saturation in other rooms of the mobile home.[53] Troutmans contacted Pierce and Schult about the water problem.[54]

In March 1983, Albert Panitzke, who did warranty work for Schult, inspected Troutmans' mobile home.[55] Mr. Panitzke returned one month later and made extensive repairs to the interior, including installing new sheetrock and paneling on two walls.[56] Mr. Panitzke did not work on the exterior of the mobile home.[57] However, at this time, Mr. Troutman told Mr. Panitzke that some of the siding was warped.[58] At the trial, Mr. Panitzke recalled this statement.[59] There was never any dispute that some siding was warped, but the *cause* of the warping was always in dispute.[60] Likewise, there was never any dispute about the presence of excessive moisture in two exterior walls; the cause of the saturation was disputed.

When Mr. Panitzke completed his work on the mobile home's interior, but declined to do any work on the exterior, Mr. Troutman indicated his concern about the siding by writing the following on a Schult work order: "I am very pleased with Albert's work but it would be a shame to see his work destroyed due to no new siding put on and I am very upset that I have to wait for the siding."[61]

Subsequently, Schult contacted the manufacturer of the siding, Masonite, about inspecting the siding.[62] Masonite contacted Troutmans and requested pictures of the siding.[63] Troutmans refused to furnish

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51. *Id.* at 123.

52. Transcript, *supra* note 29, at 124.

53. *Id.* There was water in the daughter's bedroom and in the bathroom. *Id.*

54. *Id.* Mr. Troutman testified:

Q Okay. What did you do when you found this defect or what you thought was a defect?

A I then called Schult immediately. I was really upset when I found this water.

Q Was it Schult or Pierce that you called immediately?

A Well, I called Schult and then I called Pierce. I called everybody is what I ended up doing . . .

54. *Id.* It should be noted that while the *time* of notice of the problem was hotly disputed, *e.g.*, *id.* at 196-200, the *fact* that Troutmans discovered a water problem and gave Pierce and Schult notice of the problem was never subject to dispute.

55. *Id.* at 137.

56. *Id.* at 138-39, 159-160.

57. Transcript, *supra* note 29, at 162-63.

58. *Id.*

59. *Id.* at 427-28. Joel Buller, who testified for Schult, also admitted that Exhibit 24 (picture of outside wall) showed warping which he attributed to moisture from the inside of the mobile home. *Id.* at 463-64.

60. *See supra* notes 50-54 and accompanying text (discussing disputed matters).

61. Transcript, *supra* note 29, at 136, 396 and exhibit 49.

62. *Id.* at 432-33, 469.

63. *Id.* at 274, 468-69.

pictures to Masonite taking the position that they had no warranty from Masonite and that the siding was Schult's problem.[64] Meanwhile, Troutmans, without results, expected Schult to dispatch a crew to replace the siding in early July 1983.[65] In August 1983, Troutmans wrote to Pierce complaining about the handling of the water problem.[66] Frustrated by the lack of any meaningful response, Troutmans sent a notice of revocation of acceptance to Pierce by letter dated September 22, 1983.[67] Pierce, through counsel, declined to acknowledge the right of revocation and refused to take the mobile home back.[68] Troutmans did not send notice of revocation of acceptance to Schult.[69]

Sometime later in the fall, 1983, Mrs. Troutman received an electrical shock.[70] After removing the outlet cover, Mr. Troutman found an accumulation of water.[71] Apparently, convinced that the home was unsafe, Troutmans, through counsel, filed suit against Pierce on October 28, 1983, and sought, *inter alia*, revocation of acceptance and refund of the purchase price.[72] Schult was added as a party defendant on November 18, 1983; however, Troutmans did not plead for revocation of acceptance or refund against Schult.[73] Pierce cross-claimed against Schult for indemnity.[74] In January, 1984, Troutmans moved out of the mobile home.[75] Pierce thereafter took possession of the mobile home.[76] The record does not reveal whether or not the siding was ever replaced.[77]

B. DISPUTED FACTUAL MATTERS

The main factual dispute was the *cause* of the excessive moisture in two exterior walls of the mobile home.[78] Also in dispute were the dates

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64. *Id.* at 167, 274-75, 329.

65. *Id.* at 165-66, 363-64.

66. Transcript, *supra* note 29, at 171.

67. *Id.* at 175-76, exhibit 53; Appellate Appendix, *supra* note 46 at 189. See *infra* Appendix I for a reproduction of the letter. While signed only by Edward J. and Debra K. Troutman, it appears to have been drafted by counsel as it cites the N.D. Century Code and is tailored to meet the criteria of section 2-608 of the Uniform Commercial Code.

68. Transcript, *supra* note 29, at 176; Appendix Appendix, *supra* note 46, at 29.

69. Transcript, *supra* note 29, at 279-80, 365.

70. *Id.* at 177.

71. *Id.* at 178.

72. *Id.* at 179. *See also* Complaint October 28, 1983.

73. *See* Appellate Appendix, Amended Complaint, *supra* note 46, at 2-9.

74. *See id.* Pierce Cross-claim, at 13-16.

75. Transcript, *supra* note 29, at 179.

76. *Id.* at 183-84 (indicating that the parties stipulated that Pierce take possession).

77. *See id.* at 471. According to Joel Buller: "The photographs we looked at yesterday, everything appears to be fine with it on the location it is at now." *Id.*

78. A reading of the entire transcript shows that there was never any doubt that some of the walls were saturated when Albert Panitzke came to the mobile home site in Williston in March of 1983. The fact that excess moisture was in some the walls and that these walls required extensive interior

when the Troutmans discovered and gave notice of the moisture problem.[79]

Schult's case was based on the theory that the excessive moisture in the walls was due to excessive humidity and accompanying condensation inside the mobile home.[80] Schult stuck tenaciously to the condensation theory and sought to establish the truth of this theory based on one or more of the following reasons: lack of plastic under the mobile home,[81] lack of adequate vents in the plywood skirting,[82] improper venting of a clothes dryer,[83] and an unauthorized installation of a gas water heater.[84] Mr. Troutman testified that a Schult representative in a telephone conversation added another possible cause: that his infant daughter might be watering the wall with a hose.[85]

Troutmans' case rested upon the theory that the moisture problems were caused by rainwater penetrating the walls through cracks and gaps in the Masonite siding.[86] They did not believe that the siding itself was defective; rather, they thought it had been installed improperly.[87] Schult took no action to make any repairs on the siding though someone from Schult did contact Masonite setting in motion the request for photographs which Troutmans declined to furnish.[88] Troutmans clung as tenaciously to the rainwater theory as Schult did to the condensation theory.[89]

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remedial work was never in dispute.

79. Apart from the dispute over damages, all factual disputes in one way or another related to the issues of causation, timeliness of the notice Troutmans gave, and opportunity to cure.

80. *Id.* at 392-93, 400, 413-14, 419-20, 464-65, 472. Schult fastened onto the condensation theory early on and never let go. According to Albert Panitzke:

> Q Isn't it true, Mr. Panitzke, that somebody at Schult before you even arrived at Mr. Troutman's home had already decided that the house's problem was moisture and condensation? Hadn't that already been decided by Schult?
>
> A Yes

Id. at 423, 443.

81. Transcript, *supra* note 29, at 237, 462.

82. *Id.* at 397-99, 461-62.

83. *Id.* at 401, 463.

84. *Id.* at 454-55.

85. *Id.* at 129.

86. Transcript, *supra* note 29, at 155-56, 174-75, 189-91, 359-60.

87. *Id.* at 190-91. The record contains evidence of the sincerity of their belief. Mr. Troutman borrowed a caulking gun from Mr. Panitzke and caulked some outside cracks himself. *Id.* at 163.

88. Appellate Appendix, *supra* note 46, at 42-45. *See infra* Appendix 1 (containing the reproduction of Troutmans' letter).

89. Of course, the jury agreed with Troutmans. Appellate Appendix, *supra* note 46, at 69-73. *See infra* Appendix 2 (containing a reproduction of the verdict form with special interrogatories). Additionally, the jury specifically found that Troutmans had given reasonable notice of the water problem to both defendants. *Id.* Interrogatories 6, 7. A finding of notice within a reasonable time was required for use of section 2-608 of the Uniform Commerical Code.

C. THE RECORD RELATING TO REVOCATION OF ACCEPTANCE

Troutmans' letter demanding revocation of acceptance was directed only to Pierce.[90] Troutmans did not give notice of revocation to Schult.[91] Furthermore, Troutmans' Amended Complaint sought revocation of acceptance against Pierce (the immediate seller), not against Schult (the remote seller).[92] Troutmans' counsel never sought to accomplish a forced exchange (goods for payments) between Troutmans and Schult. During the trial, Troutmans both testified that they only sought to revoke acceptance against Pierce.[93] Yet, each of them testified that Pierce did everything it could to solve their problems that originated with Schult's improper assembly of the mobile home's siding.[94] Hence, their remedial objective was aimed at the party whom each tended by testimony to exculpate completely, namely, Pierce.

When the jury verdict exculpating Pierce had come in, and post-trial motions were on for hearing, Pierce's counsel did not argue against revocation of acceptance as the appropriate remedy, but rather built a case for indemnification from Schult. For example, in support of Pierce's post-trial motion for indemnity, counsel argued: "Plaintiffs are arguably entitled to revoke acceptance of the home against Pierce, even if the jury also determined that Pierce did not expressly or impliedly warrant the Schult home purchased by Troutmans."[95]

Thus, counsel for Troutmans and counsel for Pierce laid the groundwork for revocation against the seller in privity on the shared assumption that revocation against the remote seller was not allowed under section 2-608. Their assumption was in accord with most of the cases which had been decided as of November 1985, when their case was

90. *See infra* Appendix 1 (containing a reproduction of exhibit 53).

91. Transcript, *supra* note 29, at 279, 365.

92. *See* Appellate Appendix, *supra* note 46, at 2-9 (containing Amended Complaints Counts I & II and prayer for relief). However, in Count II plaintiffs did demand *refund* from Schult which would seem logically to follow from revocation of acceptance. *Id.*

93. Transcript, *supra* note 29, at 265, 279-80.

94. *Id.* at 190-91, 354.

95. *See* Appellate Appendix, *supra* note 46, at 62 (containing the Brief in Support of Motion for Entry of Judgment in Favor of Pierce, Inc. and against Schult Home Corporation on Defendant Pierce, Inc.'s Crossclaim for Indemnity).

tried.[96] The minority view allowing revocation of acceptance had barely begun to blossom.[97]

D. THE COURT'S SPECIAL INTERROGATORIES TO THE JURY[98]

The jury found that Schult, but not Pierce, had made an express warranty to Troutmans.[99] The jury made the same findings as to an implied warranty of merchantability.[100] The jury also found that the mobile home was substantially defective and that Schult was given both reasonable notice of the defects and reasonable opportunity to remedy the defects.[101] The jury further found that the substantial defects were Schult's responsibility, and that there were no substantial defects which were Pierce's responsibility.[102] Not surprisingly, therefore, the jury found that Schult had breached the express and implied warranties;[103] but, having made no warranties, Pierce had breached none.[104]

The jury determined that the defects had substantially impaired the value of the mobile home to Troutmans and that Troutmans had received no benefit by occupancy of the home.[105] Finally, the jury awarded Troutmans $6,591 paid on the mobile home and $7,000 in incidental and consequential damages.[106] In summary, the jury found the facts in favor of Troutmans, against Schult, and exculpated Pierce. So, what should a trial judge do when the jury finds for the immediate seller and against the remote seller, but the main remedy sought is directed against the immediate seller?

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96. *See supra* note 21 (defining the majority viewpoint).

97. There were a very few cases allowing revocation of acceptance and refund against remote sellers. Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1978); Ford Motor Credit Co. v. Harper, 671 F.2d 1117 (8th Cir. 1982) (applying Arkansas law); Royal Lincoln-Mercury Sales, Inc. v. Wallace, 415 S.2d 1024 (Miss. 1982). In any event, Mr. McKechnie won everything he sought to win for Troutmans, and Mr. Brakke gained complete indemnity for Pierce. Assuming the jury was right, justice was done in a round-about way.

98. The special interrogatories and the jury's answers are affixed to this article as Appendix 2.

99. *See infra* Appendix 2, Interrogatories 1, 2.

100. *See infra* Appendix 2, Interrogatories 3, 4.

101. *See infra* Appendix 2, Interrogatories 5, 6, 8.

102. *See infra* Appendix 2, Interrogatories 10, 11.

103. *See infra* Appendix 2, Interrogatories 11, 13.

104. In light of the prior findings favorable to Pierce, the jury quite sensibly did not answer interrogatories 12 & 14. *See infra* Appendix 2, Interrogatories 12, 14.

105. The jury's answers to interrogatories constitute an explicit finding that the unremedied defects substantially impaired the value of the mobile home to the Troutmans. *See infra* Appendix 2, Interrogatories 15, 18.

106. *See infra* Appendix 2, Interrogatories 16, 17. The trial judge subsequently reduced the incidental and consequential damages to $1500 to accord with the evidence. Appellate Appendix *supra* note 46, at 127. The order was entered by Judge Wallace D. Berning on March 10, 1986.

E. THE TRIAL COURT'S JUDGMENT BASED ON THE JURY'S ANSWERS TO THE SPECIAL INTERROGATORIES

On January 27, 1986, counsel appeared for arguments on post-trial motions. The court heard arguments on Pierce's motion for indemnity against Schult.[107] Based on the jury's answers to the special interrogatories, the inevitable question arose: Should Schult be liable to Pierce if Pierce was not liable to Troutmans? As noted earlier, Pierce's counsel did not quarrel with Troutmans' claim for revocation of acceptance against Pierce;[108] rather, at the motion hearing he set up the claim for indemnity by emphasizing the fact that Pierce was merely an "intermediate link in the chain of commerce."[109]

> Mr. Brakke: The difficulty, Your Honor, is that as I understand North Dakota law, North Dakota's formulation of the Uniform Commercial Code because of the rules as far as extension of express and implied warranty the intermediate link in the chain of commerce, the wholesaler or the retailer, is going to be equally liable with the manufacturer to the consumer simply based on the fact that the product sold did not work regardless of who was responsible for the failure of the product to function as it should or could reasonably have been expected to. But the liability in that situation, Your Honor, is derived from the fault of the manufacturer. The retailer and the wholesaler are vicariously, secondarily or passively liable for the active, primary and direct fault of the manufacturer. It is the manufacturer that designs the product, constructs it, and first markets that product, Your Honor. If the product doesn't function properly, as certainly in a case here where the retailer didn't alter the product whatsoever, the true responsibility for the malfunction of the product must go back to the manufacturer, Schult, and, Your Honor, I think that the question of indemnity, Pierce's recovery of indemnity from Schult, is extremely clear under North Dakota law. The jury absolutely and concretely determined that Pierce did not expressly or impliedly warrant the mobile home so there is no different

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107. Pierce, through its counsel, Mr. Jon Brakke, sought to be indemnified for attorney's fees, but also for any liability which might be imposed upon Pierce as immediate seller due to the jury's determination of Schult's breaches of warranty.

108. Being liable for the purchase price to the extent paid would follow from revocation of acceptance. *See* U.C.C. § 2-711(1) (1989).

109. Transcript, supra note 29, at 632-33.

> express or implied warranties extended by the retailer other than those extended by the manufacturer, that is the mobile home was defective, but those defects weren't Pierce's responsibility. *In that kind of situation, Your Honor, even if because of those defects in the product which were Schult's fault, plaintiffs have a right to revoke their acceptance of the retail contract against Pierce, the true responsibility for that right to revoke is against Schult or lands on Schult's doorstep and I think that is the determinative question as far as Pierce's right to indemnity in this particular case, Your Honor.*[110]

Assuming Troutmans' right to revoke acceptance against Pierce, counsel argued that Pierce must necessarily have an indemnity claim because the jury put the breach of warranty liability *only* on Schult. Thus, Pierce's liability was vicarious and passive. Schult's counsel,[111] in attempting to avoid indemnity, countered with the argument that, because the jury had exculpated Pierce, there was no liability for which any indemnity could be owed.

> Mr. Peterson: Your Honor, on the indemnity claim, I believe the way the jury answered the special interrogatories that there is no claim over — or that Pierce has against Schult. . . .[112]
> What I am saying, the way the jury found, Pierce was exonerated by the jury. Therefore, if they are exonerated, the only way Pierce can seek to be indemnified by Schult was if there had been some liability assessed to Pierce.[113]

The argument thereafter turned to the fundamental question to which this article is addressed:

> Mr. Brakke: Your Honor, I think one of the interesting cases—or interesting questions in this case which arguably has yet to be resolved and really can't be resolved at this point in time is *whether where a retailer is not found to have expressly or implied warranted a product, if it is found that the product is substantially defective, whether the consumer can still revoke acceptance against the retailer.*[114]

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110. *Id.* at 630-32 (emphasis added).
111. Mr. Donald Peterson, Minot, North Dakota.
112. Transcript, supra note 29, at 635.
113. *Id.* at 636.
114. *Id.* at 639 (emphasis added).

Later, Troutmans' counsel[115] raised the question of revocation of acceptance for clarification:

> Mr. McKechnie: I guess, Your Honor, for the record to clarify, are you going to—based on the jury's special interrogatories in the verdict, are you going to find we had a proper revocation of acceptance?[116]
>
> Judge Berning: I am going to find there was a proper revocation of acceptance. I don't think the court can find any differently based upon that. And I think that will finally bring this trial to a close at least in district court.[117]

My purpose in quoting extensively from the counsels' arguments and comments of the trial judge is not to second-guess anybody's lawyering skills but to shed light on the questions that will *inevitably* arise in any case where revocation of acceptance is the sought-after remedy, and a breach is found against the remote seller; but no breach is found against the immediate seller.[118] The trial judge sought justice by allowing revocation of acceptance against the immediate seller (Pierce) and allowing indemnity against the remote seller (Schult).[119] Yet, on February 10, 1986, judgment was entered in favor of Troutmans against *both defendants* for refund of that part of the purchase price which Troutmans had paid and for incidental/consequential damages and interest.[120] On the same date, judgment was entered in favor of Pierce against Schult for complete indemnity plus attorney's fees and costs incurred by Pierce.[121] Thus, Pierce was a conduit for the imposition of Code remedies against Schult.[122]

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115. Mr. William McKechnie.

116. Transcript, supra note 29, at 645.

117. *Id.* at 645-46.

118. Supposing I were critical, I have yet to meet a trial lawyer who loses sleep over academic critics.

119. Transcript, supra note 29, at 645-46.

120. Appellate Appendix, *supra* note 46, at 115. Since the first paragraph of the judgment entered on February 10, 1986, *id.* at 119, granted revocation of acceptance and damages without naming the defendants (either Schult or Pierce), and the next paragraph awarded fees only against Schult, it is possible that the first paragraph was a joint judgment. The point is academic as Pierce was a party against whom judgment was entered and to whom indemnity was granted. Judge Berning later reduced the incidental/consequential damages award to $1500. *Id.* at 127.

121. *Id.* at 115.

122. By order dated March 10, 1986, Judge Berning reduced the incidental/consequential damages from $7000 to $1500. Appellate Appendix, *supra* note 46, at 127.

F. *TROUTMAN V. PIERCE* ON APPEAL

Schult appealed arguing, *inter alia*, that there could be no valid revocation of acceptance against Pierce because the jury had found that Pierce was not responsible for any defects that had not been remedied.[123] Logically, it would seem, if Troutmans' case against Pierce could be destroyed, the claim for indemnity would have no basis. Responding to Schult's argument, the North Dakota Supreme Court quoted section 2-608 and then sought to apply its principles to resolve the question raised by Schult.

The court stated:

> The buyer's right of revocation is not conditioned upon whether it is the seller or the manufacturer that is responsible for the nonconformity. *Under 41-02-71 (2-608), N.D.C.C., a buyer is entitled to revoke his acceptance of a unit if a "nonconformity substantially impairs its value to him," regardless of whether it is the seller or the manufacturer that is responsible for the nonconformity.* The jury found that there were substantial defects in the mobile home that substantially impaired its value to the Troutmans and constituted breaches of express and implied warranties. The jury also found that Schult and Pierce were given reasonable notice of the defects and a reasonable opportunity to remedy the defects. Thus, the trial court did not err in determining that the Troutmans had validly revoked their acceptance of the mobile home.[124]

The court read the statute's allowance of revocation for non-conformity to mean that the remedy of revocation (and presumably refund) can be used whether or not the party against whom these remedies are directly employed is liable for breach of warranty or any other breach of obligation. The remedy of revocation of acceptance was thereby detached from liability for a breach of warranty. The court focused on the concept of non-conformity to justify revocation of acceptance when the immediate seller (Pierce) *had not made any*

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123. Brief for Appellant Schult Home Corporation at 16-17, Troutman v. Pierce, Inc., 402 N.W.2d 920 (N.D. 1987). Counsel argued:

> The jury specifically found in special interrogatory 10 that none of the defects which were not remedied were the responsibility of the seller, Pierce. To find that the Troutmans could revoke their acceptance against Pierce when none of the defects which were not remedied were its responsibility leads to an irrational result.

Id. at 17.

124. 402 N.W.2d at 922-23 (emphasis added).

warranty. Thus, Pierce's liability or responsibility to take back the mobile home and to refund the purchase price,[125] as well as Pierce's immediate liability for incidental and consequential damages, was vicarious.[126] Of course, vicarious liability justified indemnity.

Consider in light of the language of the opinion the judgments which the court was sustaining: on February 10, 1986, the Clerk of District Court pursuant to the trial court's orders had entered a judgment for Troutmans against Pierce and a judgment allowing indemnity for Pierce against Schult. The latter judgment in pertinent part shows the complete picture:

> [i]t is hereby
> ORDERED, ADJUDGED AND DECREED, that judgment be entered in favor of Pierce, Inc. and against Schult Home Corporation for indemnity *in the sum of $16,756.55 which sum Pierce, Inc. was adjudged liable to Plaintiffs, Edward J. Troutman and Debra K. Troutman;* and it is
> FURTHER ORDERED, ADJUDGED AND DECREED, that judgment be entered in favor of Pierce, Inc. and against Schult Home Corporation for fees in the sum of $5,180.00, and costs in the sum of $800.10 making a total judgment in the amount of $22,736.65.[127]

At first glance, it might appear that the Supreme Court of North Dakota sustained a trial court's resolution of the privity problem because Troutmans were allowed to recover against Schult through Pierce. On reflection, however, my viewpoint is that the court's decision sustaining these judgments creates significant policy problems and is violative of the Code's remedial scheme. In the parts of this article which follow, I will first try to demonstrate the negative policy implications of the court's opinion in *Troutman v. Pierce* and will then examine *Troutman v. Pierce* in light of the intricacies of Article 2's remedial scheme.

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125. The liability for the purchase price was liability to the extent paid which the jury found to be $6,591.00. *Troutman*, 402 N.W.2d at 922. *See also infra* Appendix 2.

126. The court does not use the term "vicarious" but this seems fair in light of the jury verdict and the judgments. Of course, Mr. Brakke in arguing for indemnity had used the term "vicarious" to describe Pierce's liability on account of Schult's breaches.

127. Appellate Appendix, *supra* note 46, at 115 (emphasis added). The judgment was also entered in favor of Troutmans against Pierce and in favor of Troutmans directly against Schult for fees and costs. *Id.* at 119-20.

III. POLICY IMPLICATIONS AND TEXTUAL COMPLICATIONS ARISING FROM *TROUTMAN V. PIERCE*

A. WHY IS *TROUTMAN V. PIERCE* BAD POLICY?

In my view, *Troutman v. Pierce* is bad policy for three reasons: (1) a non-breaching party was left in a lawsuit as a conduit for employing a remedy against the breaching party; (2) a non-breaching party (immediate seller) had a judgment entered against it for a substantial sum of money and would have suffered a gross injustice but for indemnity; and (3) by implication, revocation of acceptance due to breach by a remote seller is contingent upon the immediate seller's existence and amenability to process.[128]

A non-breaching seller in privity with a complaining buyer should not be kept in a lawsuit for revocation of acceptance as a conduit for implementation of the remedy against a remote, breaching seller. Troutmans' evidence arguably raised one or more jury questions on whether or not Pierce had made and breached a warranty. Hence, summary judgment for Pierce before trial, or a directed verdict for Pierce during the trial, would have been error. However, the cases are legion in which dealers disclaim all warranties but pass on manufacturers' express warranties. This apparently was the jury's conclusion as to Pierce's role in this case. In such a case, if the immediate seller establishes grounds for dismissal as a matter of law before the case goes to the fact-finder, but the requisite defect and degree of impairment and notice are proved with respect to the remote seller, should the dealer (immediate seller) be kept in the suit as a mere conduit? The implication of the *Troutman v. Pierce* opinion is an affirmative answer to this question. Yet, the unfairness and inefficiency implied by an affirmative answer are apparent when one considers the costs, time investments and inconvenience of a lawsuit. A non-breaching party defendant should incur neither costs nor fees nor the trouble of a suit (even if indemnity is possible) when non-liability is clear as a matter of law.

It is clear that holding a non-breaching immediate seller in a suit to allow the buyer to obtain a remedy against the remote seller *through* the immediate seller undercuts substantive rights afforded to sellers by Article 2. Under Article 2, a seller is free to disclaim all implied

128. This criticism assumes that the North Dakota Supreme would not have allowed revocation of acceptance and refund apart from liability of the immediate seller in Erling v. Homera, Inc., 298 N.W.2d 478 (N.D. 1980). For a discussion of this case, see *infra* notes 141-42 and accompanying text.

warranties.[129] No seller is obliged to make any express warranty by promise, affirmation or otherwise.[130] Pursuant to section 2-312, a seller can even disclaim the implied warranty of good title.[131] Moreover, Article 2 allows a seller to limit remedies which a buyer may employ.[132]

The Code's warranties and remedies are, in a sense, "default provisions." If the parties to a sale do not negotiate specific terms different from the off-the-rack Code terms, then Article 2's warranties and remedies become part of the contract by default.[133] The fact that Code-provided warranties and remedies can be disclaimed or limited by agreement is indicative of a high level of contractual freedom permitted in sales transactions. Exercising this freedom, a seller may elect to make no warranties (perhaps selling for less) intending thereby to be free of claims or lawsuits. To allow revocation of acceptance against a party who made no warranty,[134] and hence breached no warranty, is to impose a remedy in the absence of any liability, thereby thwarting the seller's intent to run an economically sound operation. This seriously undercuts the freedom allowed to a seller under Article 2 and awards the buyer more than any reasonable buyer could expect when buying in the face of a disclaimer of implied warranties without any express warranties.

Because it tends to disturb the reasonable economic expectations of sellers and buyers, awarding any remedy in the absence of breach is simply bad policy. In *Troutman*, the court modified the agreed-upon contractual obligations by imposing a remedial role on a non-breaching intermediate party, that is, by using Pierce as a party through whom liability could be passed upstream to Schult. On the particular facts of this case, perhaps there was no injustice, or only a slight injustice, since a judgment for complete indemnity was awarded for Pierce against Schult when judgment was entered against Pierce. Nonetheless, as a matter of principle, the non-breaching seller should be dismissed when non-liability becomes clear. Holding an immediate seller in a suit merely as a

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129. *See* U.C.C. § 2-316 (1989). In a few states, implied warranties cannot be disclaimed in consumer sales. *E.g.*, MASS. GEN. LAWS ANN. ch. 106, § 2-316A (West 1990). However, even in Massachusetts a seller can disclaim all implied warranties in sale to a non-consumer buyer.

130. U.C.C. § 2-313 (1989) (allowing express warranties to be made by promise, affirmation of fact, description, sample or model).

131. U.C.C. § 2-312(2) (1989).

132. *See* U.C.C. § 2-719(1) (allowing "repair and replacement of defective parts"). This would preclude revocation of acceptance and refund unless the remedy failed of its essential purpose pursuant to section 2-719(2) of the Uniform Commercial Code or unless unconscionability were established under section 2-302.

133. The contract is the total legal obligation of the parties including the supplemental terms imposed by the Code. *See* U.C.C. § 1-201(11) (1989).

134. According to the jury in *Troutman*. *See infra* Appendix 2.

conduit for implementing a remedy against a remote seller in breach constitutes an institutionalized infringement on the freedom of contract.

While an argument rooted in freedom of contract may seem abstract, *Troutman* could easily lead to a concrete economic injustice. A non-breaching immediate seller will suffer the injustice of a judgment on the public records (in the absence of liability) and will suffer a worse injustice if indemnity against the party in breach cannot be speedily and efficiently collected. As noted earlier, the trial court in *Troutman* entered judgment against Pierce for the amount of the refund and for incidental and consequential damages.[135] Perhaps the supreme court would have decided the case differently if the record had shown that Schult was not a party from whom Pierce could gain indemnity. But, the fact remains that judgment was entered on the public record for a substantial sum against a non-breaching party.

I do not know whether or not the judgment appeared as Pierce's corporate liability in any audit or financial statement. The judgment may not have affected Pierce's credit or credit rating in any manner.[136] Nonetheless, the danger of entering judgments against non-breaching parties is obvious. Anyone who has endured a credit investigation will understand that a late payment of a nominal sum to a department store can raise a red flag for a lender. Common knowledge dictates that any judgment impairs a person's credit rating. Thus, a judgment in the absence of a breach is a species of court-inflicted economic injury, of greater or lesser severity, depending upon the size of the judgment and the size and reputation of the defendant.

Quite apart from the entry of the judgment, there is the burden of collecting, and the risk of not collecting the indemnity judgment. I am informed by counsel that Pierce collected the indemnity judgment against Schult.[137] Nonetheless, a judgment for indemnity is no more a bird in the hand than any other judgment. Collection of the judgment turns on the defendant's resources and the degree of cooperation the defendant puts forth either to pay or to allow the sale of assets to effect payment. Putting the burden of collection, and the risk of non-payment, upon the non-breaching immediate seller is unfair, especially when the judgment is not merely for return of the purchase price, but also for

135. The judgment for $8,500 attorney's fees in plaintiffs' favor ran only against Schult Home Corporation. Appellate Appendix, *supra* note 46, at 119.

136. I infer from a conversation with Pierce's counsel that Pierce, Inc. is no longer in business.

137. Telephone interview with Jon Brakke, Fargo, North Dakota, attorney for Pierce, Inc. (September 12, 1994).

incidental and consequential damages attributable *only* to the remote seller's breach.[138]

Suppose an indemnity award and its prompt collection minimizes or erases any economic injury to the immediate seller; even so, it does not follow that revocation of acceptance against the immediate seller for the sins of the remote seller makes sense. An aggrieved buyer's rights against a remote seller in breach should not be contingent upon a non-breaching immediate seller's existence or amenability to legal process. A problem inherent in the supreme court's affirmance focusing on "non-conformity" instead of liability for breach is that the aggrieved buyer's rights against the remote seller appear to be *contingent upon* the existence and amenability to suit of the immediate seller. If one assumes that revocation of acceptance can only be made against an immediate seller, it follows that the immediate seller must exist and be amenable to process for the court to impose the remedy. Assume, however, that a corporation playing the role of immediate seller is dissolved, voluntarily or involuntarily.[139] Or assume that a natural person playing the role of immediate seller moves to a foreign country and is not amenable to service of process. Should the dissolution of a corporate entity or the disappearance of a natural person (each in the position of immediate seller) preclude revocation of acceptance and refund against the breaching remote seller for want of a link in the chain of distribution?

From a policy perspective the answer is negative. Making liability for revocation of acceptance and refund contingent upon the existence and amenability to suit of an immediate seller when the remote seller is in breach results in a buyers' rights turning on the business or personal fortunes of a non-breaching party. Viewing such contingencies as conditions precedent to liability of a remote seller is unnecessary and unfair. This may have been an unarticulated assumption in *Erling v. Homera, Inc.*[140] in which the North Dakota Supreme Court sustained a trial court judgment which allowed revocation of acceptance of a mobile home and ordered refund of the purchase price by the manufacturer as well as the immediate seller.[141] If *Erling* should be read to allow

138. This was the situation in *Troutman*. Appellate Appendix, *supra* note 46, at 117-20.

139. For example, in North Dakota a corporation can be dissolved involuntarily by an action commenced by the attorney general for several reasons listed in section 10-19.1-118 of the North Dakota Century Code.

140. 298 N.W. 2d 478 (N.D. 1980).

141. Erling v. Homera, Inc., 298 N.W.2d 478, 484 (N.D. 1980). The case is strikingly similar to *Troutman v. Pierce* on its facts. Erlings purchased a mobile home from Jerry Carlson d/b/a J & J Trailer Sales in Jamestown. *Id.* at 479. The mobile home had been manufactured by Homera, Inc., a Minnesota corporation. *Id.* The mobile home developed a moisture problem. *Id.* After repeated efforts to solve the problem failed, Erlings gave notice of rescission. From records I procured from

revocation of acceptance and refund without privity,[142] it would have made sense in *Troutman* for the judgment for the purchase price and for incidental/consequential damages to have been entered in Troutmans' favor *directly* against Schult. However, in *Troutman* the necessity of Pierce's presence as an intermediate party seems to have been assumed.

Since Pierce, a corporate entity, remained viable and appeared by counsel in the suit, the problem inherent in assuming privity as a requisite for revocation of acceptance was covered up. I am not suggesting it was a deliberate "cover-up" in the sense of wrong-doing. I mean simply that events, including Pierce's appearance, suppressed a problem inherent in the notion of allowing revocation only against a seller in privity, namely: an aggrieved buyer is left dangling in the wind if the immediate seller disappears and the court precludes a direct action for revocation of acceptance and refund against the remote seller.

To summarize in light of *Troutman*, policy considerations all drive in one direction: toward allowing revocation of acceptance against a breaching remote seller when the procedural and substantive requisites of section 2-608 are met. If this had been accepted legal doctrine in North Dakota in 1983, prudent practice would have required that notice of revocation of acceptance would have been given to Schult as well as Pierce.[143] Counsel could have tried the case offering evidence of warranties and breach pertaining to both defendants, as Troutmans' counsel did at the trial. When the jury, rightly instructed, found Schult, not Pierce, liable for breach, then judgment for revocation and refund, damages, fees and costs would have been entered only against Schult. No judgment would have been entered against Pierce; rather, an order would have been entered dismissing the case against Pierce. Thus, the

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the Clerk of the District Court, Stutsmans County, it is clear that the buyers gave notice to both the immediate seller (Carlson) and the remote seller (Homera); in any event, the trial judge so found in his findings of fact and memorandum opinion. The judgment for revocation and refund was affirmed. Erling v. Homera, Inc., 298 N.W.2d 479 (N.D. 1980), but there was a remand for determination of a set-off for Erlings' use of the mobile home. Thus, while privity or the lack thereof was not at issue on the appeal, the Supreme Court of North Dakota clearly sustained a judgment for revocation and refund which ran directly against the remote as well as against the immediate seller.

142. The opinion does not expressly state that revocation of acceptance without privity is allowed. Such a conclusion would contradict the express language of Honey Hart Co. v. Cudworth, 446 N.W.2d 742 (N.D. 1989). *See supra* note 20, (citing jurisdictional views of privity requirement). Yet, the Supreme Court in fact sustained a joint judgment which included judgment for refund against the remote seller, Homera, Inc. See *supra* note 141.

143. Of course, trying to use revocation of acceptance against a remote seller was *not* accepted doctrine except in a very few jurisdictions. *See supra* note 20 (citing minority viewpoint regarding privity requirement).

non-breaching party (Pierce) would have had no remedy imposed against it[144] and the party in breach would have been directly liable to Troutmans for refund of the price and for incidental/consequential damages.

B. TEXTUAL INTEGRITY: ARE REVOCATION OF ACCEPTANCE AND REFUND OF THE PRICE ALLOWED AGAINST A REMOTE SELLER UNDER ARTICLE 2'S TEXT?

Although I believe *Troutman* is shaky on policy grounds, my main argument against the decision is that it violates Article 2's remedial scheme by tearing assunder the concepts of non-conformity and breach of warranty. The court treats non-conformity as a justification for revocation of acceptance against Pierce without recognizing that allowing revocation of acceptance *implies* that Pierce was a breaching seller which runs counter to the jury's explicit findings. Allowing revocation of acceptance against a party not in breach is inconsistent with Article 2's remedial scheme as a whole and is specifically contrary to the Code's concept of non-conformity.

To clarify my argument, it is necessary to explore several Code definitions. "Contract" is defined in section 1-201(11): "[T]he total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law."[145] The total legal obligation of a seller is greatly affected by warranties imposed by the Act.[146] A seller's total legal obligation includes warranty obligations, express or implied or both.[147] While drawing a distinction between breach of warranty and breach of contract may on occasion be useful, it is unnecessary under the foregoing definition because "contract" under the Code includes warranty obligations.

Against the Code's concept of "contract," I will examine the Code's concept of "non-conformity." "Non-conformity" under Article 2 is defined by implication from the definition of "conforming" set forth in section 2-106(2) which states: "Goods or conduct including any part of

144. Since Pierce had paid off Metropolitan Savings and Loan and had taken title to the mobile home, there exists a question of whether or not the revesting of title contemplated by section 2-401(4) in Schult would have made any sense on the facts. If either Pierce or Schult had an unjust enrichment claim, one against the other, they could have asked the court to resolve the claim under non-Code law which enters via section 1-103.

145. U.C.C. § 1-201 (11) (1989).

146. *Id.* §§ 2-313, -314, -315.

147. *Id.* §§ 2-312 to -315.

a performance are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract."[148]

It follows that non-conforming goods or conduct consists of goods or conduct *not* in accordance with obligations under the contract. Therefore, non-conforming goods are *ipso facto* at variance with the seller's contract obligations, and the variation is *necessarily* a breach of contract. This does not imply negligence or deception or an intentional breach. Breach of contract under Article 2 is no different from breach of contract outside of Article 2, and breach of warranty is a breach of contract. Warranty liability is a species of strict liability.[149] If one thing is expressly or impliedly promised and another thing is tendered, warranty liability arises from the fact of the variance between obligation and performance.

The Court of Appeals for the Eighth Circuit in *Ford Motor Credit v. Harper*[150] aptly characterized breach of warranty as a "subset" of non-conformity.[151] The court stated:

> The concept of nonconformity "includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract." Ark. Stat. Ann. 85-2-714, Comment 2. It is thus apparent that breach of warranty and nonconformity are not entirely congruent concepts; the former being a subset of the latter.[152]

That non-conformity constitutes a breach of contract is well-illustrated in *Michiana Mack, Inc. v. Allendale Rural Fire Protection District*.[153] Michiana Mack, Inc. (Michiana) sold a used fire truck to Allendale Rural Fire Protection District (Allendale).[154] Allendale bought the fire truck knowing of an overheating problem on the strength of Michiana's promise that the problem would be solved.[155] It was not. Allendale sued for damages.[156] The trial court found a non-conformity, and therefore used section 2-714(1) as a guide for devising a remedy.[157]

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148. *Id.* § 2-106(2).

149. Contract liability is strict liability. The failure to perform a promise, as opposed to intentional or negligent conduct at variance with accepted norms, establishes liability.

150. 671 F.2d 1117 (8th Cir. 1982).

151. Ford Motor Credit v. Harper, 671 F.2d 1117, 1122 (8th Cir. 1982) (applying Arkansas law).

152. *Id.*

153. 428 N.E.2d 1367 (Ind. App. 1981).

154. Michiana Mack, Inc. v. Allendale Rural Fire Protection Dis., 428 N.E.2d 1367, 1369 (Ind. App. 1981).

155. *Id.*

156. *Id.*

157. *Id.* (applying U.C.C. § 2-714 (establishing a set of remedies "for any non-conformity of tender")).

The trial court rejected section 2-714(2) which establishes a measure of damages for "breach of warranty."[158]

Finding the trial court's distinction between "non-conformity" and "breach of warranty" untenable, the appellate court quoted Official Comment 2 to section 2-714 which states in pertinent part: "[t]he 'non-conformity' referred to . . . includes not only breaches of warranties but also any failure of the seller to perform according to his obligations . . .";[159] hence, the court recognized breach of warranty, as a subset of non-conformity. The court explained more fully:

> Therefore, "non-conformity" is a term of art used to describe two broad categories of breaches, in goods *or* in conduct. "Non-conformity" is not a separate remedy. This distinction, however, does not negate the trial court's finding that there was a breach of contract. In fact, Michiana does not dispute that there was such a breach.
>
> The trial court clearly found that the fire truck was "non-conforming." *Under the facts of this case and the law of warranties, such finding of the trial court was equivalent to finding that a breach of warranty had occurred.*[160]

In both *Ford Motor Credit v. Harper* and *Michiana Mack, Inc. v. Allendale Rural Fire Protection District* the courts cited Official Comment 2 under section 2-714 for persuasive authority in explicating the meaning of "non-conformity." Section 41-02-93 of the North Dakota Century Code is the same as section 2-714 of the Uniform Commercial Code under which the cited comment appears. While the Century Code does not include a reprint of the Official Comments, the North Dakota Supreme Court has cited the Official Comments as persuasive authority.[161] It is reasonable to conclude that in North Dakota, as elsewhere, breach of warranty should be viewed as a subset of non-conformity. Non-conformity means breach. Consequently, when section 2-608 states that "[t]he buyer may revoke his acceptance of a lot

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158. *Id.* at 1371.

159. *Michiana*, 428 N.E.2d at 1370 (quoting official Comment 2 to U.C.C. § 2-714).

160. *Id.* (emphasis added). *Accord* Esquire Mobile Homes, Inc. v. Arrendale, 356 S.E.2d 250, 252 (Ga. Ct. App. 1987) (discussing Georgia's interpretation of non-conformity to be viewed as a question of quality of goods and performance of the contractual obligations).

161. *E.g.* Welken v. Conley, 252 N.W.2d 311, 315-16 (N.D. 1977) (quoting the Official Comment to section 2-608). Troutman v. Pierce, 402 N.W.2d 920, 923 (N.D. 1987) (quoting the Official Comment to section 2-714). Moreover, the author is advised by Mr. John Walstad, Code Revisor, North Dakota Legislative Council, that bills enacting the Code as positive law were prepared for enactment and adopted without the comments according to customary legislative practice. However, this does not imply that the Official Comments to the Uniform Commercial Code are unavailable as persuasive authority.

or commercial unit whose non-conformity substantially impairs its value to him . . ."[162] the word "non-conformity" does not describe a condition of the goods that can exist apart from some seller's liability for a breach. "Non-conformity" is not neutral in terms of breach; it always means there has been a breach by a seller in the chain of distribution.[163]

This conclusion brings me to the nub of the matter. Does the text of Article 2 reasonably allow revocation of acceptance against an *immediate seller* because of a *remote seller's* breach? The answer is no; nothing *in Article 2* establishes vicarious liability for any remedies, including goods-oriented remedies.[164] It is true that section 2-608 does not *literally* spell out the requirement that the seller against whom revocation of acceptance is invoked must be a seller in breach. Nonetheless, there is language in Part 7 of Article 2 (the remedial part of Article 2) which strongly implies that any defendant against whom remedies can be employed must be a party in breach.[165]

Section 2-703 is the index of seller's remedies.[166] The introductory paragraph in section 2-703, which precedes the list of available remedies, enumerates the *breaches* by a buyer which may trigger the applicability of the *remedies* by an *aggrieved* seller.[167] Moreover, Official Comment 1 to section 2-703 summarizes the purpose of the section: "This section is an index section which gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer."

The necessary nexus between breach and remedy is explicit. While the Official Comment to section 2-711 (index of buyer's remedies) is not quite so clear as the foregoing comment, the text of subsection (1) contains an enumeration of seller's breaches which precedes the list of buyer's remedies.[168] The seller against whom any remedy is employed is presumed to be a seller in breach. Finally, in section 1-106(1) which sets forth the Code's remedial philosophy, the rights of the aggrieved party

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162. U.C.C. § 2-608(1) (1989).

163. To take the converse, goods sold "AS IS" are conforming even if defective so long as good title is conveyed. Of course, even the warranty of good title can be disclaimed by specific language under section 2-312(2) of the Uniform Commercial Code.

164. Perhaps an agent could make himself liable for an undisclosed principal under general principles of agency law incorporated through section 1-103 of the Uniform Commercial Code. Nobody in *Troutman* ever suggested that Pierce was liable as Schult's agent.

165. *See* U.C.C. §§ 2-703 . -711 (1989).

166. *Id.* § 2-703, cmt. 1.

167. "Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole . . . the aggrieved seller may. . . ." U.C.C. § 2-703 (1989).

168. "Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved . . . the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid. . . ." U.C.C. § 2-711(1) (1989).

are set up against the "other party" who has *not* fully performed, the breaching party.[169] Thus, revocation of acceptance requires breach of contract by the seller against whom this remedial device is used.

The North Dakota Supreme Court did justice in *Troutman v. Pierce* by allowing Troutmans to recover against Schult *through* Pierce, but doctrinally the basis for recovery runs afoul of the Code scheme by imposing on Pierce an obligation not voluntarily assumed, and certainly not imposed from the Code. Pierce delivered what it agreed to deliver and, according to the jury, Pierce made no warranties.[170] Thus, the mobile home (even if defective) *conformed to the contract of sale between Pierce and Troutmans.* There could be no non-conformity in the contract of sale between Troutmans and Pierce based on defects in the mobile home once the jury decided that Pierce had made no warranties respecting the quality of the mobile home. The jury having

169. Section 1-106(1) of the Uniform Commercial Code provides:

> The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential nor special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

U.C.C. § 1-106 (1) (1989).

170. Troutman v. Pierce, 402 N.W.2d 920, 922 (N.D. 1987). Pierce probably made the warranty of good title under section 2-312(1) of the Uniform Commercial Code, but title was never in issue.

established the facts exculpating Pierce, it strains the text of sections 1-106(1), 2-608, and 2-711(1) to the breaking point to find Pierce a viable defendant for the remedies of revocation of acceptance and refund. In my view, when the jury answered the special interrogatories exculpating Pierce, Troutman's revocation of acceptance case collapsed, since there had been no notice and no claim for revocation against Schult.[171] Under the Code scheme, Troutmans should have been limited to damages against Schult under section 2-714(2) and section 2-715.[172] This was the course taken by a federal appellate court in *Voytovich v. Bangor Punta Operations, Inc.*[173] in which the court denied revocation against a remote seller but sustained the award for damages under section 2-714(2).[174]

171. There is authority which appears to run directly contrary to the view I am advocating. For example, in Blankenship v. Northtown Ford, Inc., 420 N.E.2d 167 (Ill. App. Ct. 1981), the buyers sought to revoke acceptance of a car on the basis of non-merchantability under section 2-314 of the Uniform Commercial Code. The trial judge entered judgment in favor of the manufacturer but against the dealer, thereby allowing buyers revocation and refund. *Id.* at 169. The dealer appealed, relying on its disclaimer of all implied warranties. *Id.* The appellate court upheld the judgment for revocation and refund on two grounds. First, the court concluded that the disclaimer did not meet the requirements of section 2-316 of the Uniform Commercial Code (despite the fact that buyers had stipulated that it did). *Id.* at 170. Second, the appellate court concluded that due to the defects in the car, "revocation of acceptance is appropriate even if the dealer has properly disclaimed all implied warranties." *Id.* Thus, it would appear that the court disconnected revocation of acceptance from breach and would allow revocation of acceptance in the absence of breach. A close reading, however, shows that the court dwelt upon the dealer's representation that this was a "new car" and thought that this carried with it minimum characteristics; hence, while the case was not so pled, it could be understood as an express warranty case. In a short and delightful law review article, Manning G. Warren III and Michelle Rowe, interpreted the opinion in *Blankenship* as justifying revocation of acceptance for breach of an express warranty. *See* Manning G. Warren III & Michelle Rowe, *The Effect of Warranty Disclaimers on Revocation of Acceptance under the Uniform Commercial Code*, 37 Ala. Law Rev. 307, 329 (1986). Warren and Rowe argue that lawyers for buyers should employ the Code's expansive definition of contract (section 1-201 (11) of the Uniform Commercial Code) and the expansive possibilities of express warranty (section 2-313 of the Uniform Commercial Code) to find "non conformities" to justify revocation of acceptance. While I think the article is true to the case law and very insightful, I would urge that in many cases the better solution is to allow revocation of acceptance and refund directly against the remote warrantor for reasons stated in this article. Finally, in at least two cases purporting to follow *Blankenship*, there is loose language which, taken literally, could allow revocation of acceptance without identifying any breach by any party. *See* Lytle v. Roto Lincoln Mercury & Subaru, 521 N.E.2d 201, 208 (Ill. App. Ct. 1988) and O'Neal Ford, Inc. v. Earley, 681 S.W.2d 414, 416 (Ark. App. Ct. 1985). The implication that non-conformity can exist without any breach of any seller's contract obligations is, in my view, plainly wrong.

172. While Troutmans had put in evidence of incidental and consequential damages under section 2-715 of the Uniform Commercial Code, there was no evidence of the value differential at the time of acceptance as required by section 2-714(2) of the Uniform Commercial Code; hence, the sustainable award would have been minimal.

173. 494 F.2d 1208 (6th Cir. 1974).

174. Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208 (6th Cir. 1974) (applying Ohio law).

IV. THE PATHWAY TO SIMPLE JUSTICE

A. AN ANALYTICALLY SOUND PATHWAY TO A JUST RESULT

It is possible under Article 2 to do justice to persons situated similarly to the Troutmans without imposing a remedy on a non-breaching party. The pathway to simple justice is to allow revocation of acceptance and refund as remedies against non-privity sellers who breach warranty obligations. In *Troutman*, assuming this principle had been established, plaintiffs' counsel could have sent the notice of revocation to both Pierce and Schult and could have pled for the remedies of revocation and refund against Pierce *and* Schult. When the jury decided for Pierce and against Schult, revocation and refund could have been enforced directly against Schult. Incidental and consequential damages could have been awarded against Schult directly. Excepting its claim for indemnity for attorney's fees and costs, Pierce could have been dismissed.

By suggesting that the best path is to abolish the privity requirement for revocation of acceptance, I am advocating for the minority position.[175] Naturally, there are many objections to this viewpoint. I suggest, however, that two common text-based objections to revocation of acceptance without privity are unsound. I will call these objections (i) the linguistic trap and (ii) the conceptual trap. I contend that it is possible to avoid both traps while remaining faithful to the language of the Article 2.

The linguistic trap is an unnecessarily restricted reading of the term "seller." Under Article 2, "'seller' means a person who sells or contracts to sell goods."[176] "A 'sale' consists in the passing of title from the seller to the buyer for a price."[177] Since Schult did not pass title to Troutmans for a price, critics will argue that Schult was not a "seller" within Article 2's definition, at least in relation to Troutmans, and therefore could not be a proper defendant in a revocation of acceptance case because section 2-608 contemplates revocation against the "seller." The problem with this line of thinking is two-fold: first, Schult did pass title to Pierce for a price and is a "seller" in the distribution chain; second, a majority of courts allows suits for damages under section 2-313 against non-privity *sellers* for breach of express warranties.[178] A minority of courts allows

175. *See supra* note 20 (citing minority-view and majority-view cases).
176. U.C.C. § 2-103 (1989).
177. *Id.* § 2-106(1).
178. WHITE & SUMMERS, *supra* note 2, § 11-7.

consumers recovery of economic loss under section 2-314 against non-privity merchant-sellers for breach of the implied warranty of merchantability.[179] Under either section 2-313 or section 2-314, only a *seller* can be liable for breach of warranty. Thus, in practice and common parlance, "seller" means more than immediate seller.[180]

Restricting the meaning of "seller" to immediate seller in section 2-608 cases and allowing "seller" to include remote sellers in section 2-313[181] or section 2-314[182] cases in which only damages are sought is manipulating the term "seller" simply to gain the desired result. The meaning of "seller" should not turn on whether the plaintiff asks for a goods-oriented remedy or merely for a damages remedy. This does not prove, of course, that "seller" in section 2-608 should embrace remote sellers; it simply establishes the Code's open-endedness or linguistic neutrality in ascribing a meaning to the term "seller" and opens the door for including non-privity sellers within the definition of "seller."

With this broader meaning of "seller" in mind, section 2-608 can be read more liberally. For example, regarding the notice of revocation, section 2-608 states: "It is not effective until the buyer notifies the seller of it."[183] Granting that in the garden variety case, this will mean notice to the immediate seller, there is no sound textual reason why this could not also mean notice to a breaching, remote seller. Likewise, section 4-401(4)'s statement that "justified revocation of acceptance revests title to goods in the seller" does not need to be restricted to the immediate seller. Title can revest in a remote seller against whom the remedy is employed. Thus, the linguistic trap is avoidable, without forfeiting integrity in interpreting the text.

There is also a conceptual trap, namely, the equating of revocation of acceptance and refund with pre-Code rescission and restitution. This is most perfectly illustrated in *Gasque v. Mooers Motor Car Co.*[184] decided by the Virgnia Supreme Court. The theory used by the court in denying revocation of acceptance against the remote seller was that revocation meant cancelling the contract (rescission) and re-establishing the status quo ante (restitution); hence, revocation of acceptance was deemed inappropriate.[185] Of course, there was no contract of sale

179. *Id.* § 11-5.

180. In the most recent draft of Revised Article 2, "seller" is defined in section 2-318 (a) & (c) to include remote sellers. *See infra* Appendix 3 (containing the draft text of U.C.C. § 2-318).

181. Express warranty cases.

182. Implied warranty of merchantability cases.

183. U.C.C. § 2-608(2) (1989).

184. 313 S.E.2d 384 (Va. 1984).

185. Gasque v. Mooers Motor Car Co., 313 S.E.2d 384, 389-90 (Va. 1984).

between the remote seller and the buyer.[186] Since there was no contract for sale, there was in the court's view, nothing to rescind; moreover, a forced exchange between a buyer and a distant seller would not have re-established the status quo ante.[187] Instead, a forced exchange between the complaining buyer and a remote seller would have by-passed the immediate seller whose position must change to re-establish the status quo ante.

The short answer is that revocation of acceptance and refund under the Code's remedial scheme are *not* merely new terms for rescission and restitution. Section 2-608, Official Comment 1 states:

> The section no longer speaks of "rescission," a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executory or executed portion of the contract. The remedy under this section is instead referred to simply as "revocation of acceptance" of goods tendered under a contract for sale. . . .[188]

Revocation of acceptance is a legal act whereby a buyer elects to reverse the acceptance which occurred pursuant to section 2-606 and seeks to revest title in a seller[189] in order to pave the way for refund and other remedies, as appropriate under the facts of the case. The underlying sales contract is not automatically cancelled, though the buyer may elect to cancel.[190] I argued earlier that there is no reason why the revesting of title cannot be a revesting in a remote seller in the distribution chain. Likewise, there is no reason why the reversal of acceptance must be tied to the immediate seller who tendered the goods. This will commonly be the case, but voiding a section 2-606 acceptance is not *of necessity* a legal act requiring the re-establishment of the status quo ante between buyer and immediate seller. Just as a buyer can seek damages in many cases against a remote warrantor, so also a buyer should be able to say in effect to a remote, breaching seller: "I don't want these goods anymore, I want my money back, and you can do with the goods as you please."

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186. *Id.* at 387.
187. *Id.* at 390.
188. U.C.C. § 2-608 cmt. 1 (1989).
189. The revesting happens automatically when the revocation is justified. U.C.C. § 2-401(4) (1989).
190. *See* U.C.C. § 2-711(1) (1989). *See also* U.C.C. § 2-106(4) (defining "cancellation").

The practical purpose of the Code's remedial scheme is to meet the expectations generated by the parties' contract.[191] If a forced exchange between a buyer and a remote seller meets this remedial goal better than any other remedial device in any given situation, it makes sense to allow it. Hence, the insistence on privity for the application of section 2-608 in tandem with section 2-711(1) runs contrary to the remedial purpose of section 1-106(1). The conceptual trap of equating revocation and refund with rescission and restitution has cramped the courts in interpreting the Code and has thereby thwarted the Code's remedial objective. The trap is avoidable by focusing on section 2-608 as a remedial device designed to operate with other buyer's remedies to protect a buyer's reasonable expectations generated by the sales contract.[192]

B. THE CASE FOR CLARIFICATION OF SECTION 2-608 BY AMENDMENT

The argument made in the foregoing pages is simply an argument that lawyers should advocate and judges should choose the minority view (revocation of acceptance without privity) over the majority view (privity required) when circumstances make this choice sensible in order to achieve the Code's remedial objective. Given the split in jurisdictions, however, as well as the split in the commentaries, a clarification in the revision of Article 2 would be most welcome. The revision is well underway with Professor Speidel of Northwestern School of Law serving as Reporter to the Revision Committee.[193]

In the most recent revised draft, the Revision Committee used language which would be helpful in solving the privity problem which has arisen under section 2-608. The proposed text of section 2-318 is attached as Appendix 3.[194] In a nutshell, the draft would extend express and implied warranties made to an immediate buyer to any remote buyer who may reasonably be expected to buy, use or be affected by the goods and who suffers damages from breach of the warranty. The rights of consumer buyers and buyers to whom an express warranty runs would include the goods-oriented remedies of rejection and revocation of

191. *See* U.C.C. § 1-106(1) (stating the purpose of the Code's remedial scheme).

192. *See* U.C.C. § 1-201(11) (defining "contract" as the totality of legal obligations created).

193. Professor Robert T. Nimmer, University of Houston, Law Center, is Reporter for Technology issues.

194. *See infra* Appendix 3. Copyright 1994 by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Reprinted with permission of the Permanent Editorial Board of the Uniform Commercial Code.

acceptance against remote sellers.[195] Adoption of this version of Revised Article 2, or some variation thereof, would lift the fog that now hovers over section 2-608 in cases where the remote seller breaches an express warranty or the implied warranty of merchantability and the immediate seller does not. A direct action for rejection or revocation of acceptance and refund of the price would be allowed.[196] If such seller within a reasonable time either refunded the price, or cured by tendering conforming goods, then no consequential damages would be allowed.[197]

The foregoing proposal, or some variation thereof, deserves support as a means of reducing the confusion surrounding the use of section 2-608.[198] It would make section 2-608 a viable remedy without inflicting injustice on a non-liable intermediate seller by holding that seller in a suit as a conduit for the use of section 2-608.[199] However, for

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195. *See* U.C.C. § 2-318(d)(1) (1989).

196. Because the criteria for rejection (section 2-601) and revocation of acceptance (section 2-608) are quite different, I am limiting my argument to revocation of acceptance. The 1994 Draft of Revised Article 2 would break down the privity requirement for both revocation of acceptance and rejection.

197. *See infra* Appendix 3 (containing reproduction of the 1994 Draft of Revised Article 2, § 2-318(d)(2)).

198. I put the question of whether or not revocation of acceptance without privity *should be allowed* to the counsel in the *Troutman* case. Mr. McKechnie thought revocation of acceptance without privity definitely should be allowed when the retailer is merely a conduit for a manufacturer's warranties. Mr. Brakke was equivocal and expressed some philosophical reservations about this approach. Mr. Peterson thought revocation of acceptance in the absence of privity should not be allowed which is, of course, the position taken by the majority of judges who have considered the question to date under the current version of Article 2. While my position parallels that of Mr. McKechnie, I think these responses are very interesting because they seem to reflect the roles each played in the case tried almost ten years ago.

199. Any proposal allowing revocation of acceptance without privity will be subject to criticisms, some well-reasoned and some not. The following hypothetical poses a problem which might occur if section 2-318 is amended in accordance with the proposal set forth in Appendix 3. Suppose Eric, the buyer in the introduction to this artcle, bought a snowmobile from a dealer on credit, took delivery, and failed to reject within a reasonable time; hence, before paying any money, Eric made a legal acceptance of the snowmobile. *See* U.C.C. § 2-606 (1989). The dealer successfully disclaimed implied warranties and made no express warranties whatever to Eric, but did pass on the manufacturer's express warranty. Suppose further that the dealer paid the manufacturer when he purchased the snowmobile for resale. Now, if Eric discovers a non-conformity that substantially impairs the value of the snowmobile to him and gives timely notice of revocation of acceptance (section 2-608) to the manufacturer based on breach of the express earranty, Eric may have a claim to incidental damages (section 2-715(1)), or even to cover or its contract-market alternative (sections 2-712 and 2-713), but Eric has no claim to a refund since he has not paid anything. But what about the dealer who breached no obligations to Eric since no warranties of quality were made? Can Eric assert the remedy of cancellation against the non-breaching dealer, or in any event refuse payment because of the remote seller's breach? I contend that Eric should be able to cancel against the non-breaching dealer (immediate seller) because of the breach of the remote seller. Otherwise, Eric must pay for something which he does not keep and seek recovery in a roundabout way from the remote seller. Thus, Eric could use the remote seller's breach as a *defense* against a claim for payment made by the dealer (immediate seller). This is analogous to allowing a consumer buyer to assert a defense arising from breach of warranty by a seller against a subsequent holder of commercial paper. *See* 16 C.F.R. § 433. While this would force the non-breaching immediate seller to seek a remedy from his upstream seller, and to that extent imposes a burden, and possibly an economic harm on the non

maximum clarification, either the text of section 2-608, or at minimum, the Official Comments, should be amended to specifically authorize revocation of acceptance in appropriate cases against a remote seller. It might additionally be desirable to consider re-naming section 2-608. Since *acceptance* is made after tender by an immediate seller to buyer, the term *revocation of acceptance* in many minds connotes a legal effect which can only involve the buyer and immediate seller. If the section were, for example, called "Return of Goods and Refund After Acceptance" it might be more easily employed against remote sellers. Thus, the linguistic and conceptual traps might be more easily avoided.

V. CONCLUSION

The title to this article implies a question: What is the cost of outrunning the law to do justice? I thereby tried to suggest that in *Troutman v. Pierce* the trial court and the North Dakota Supreme Court outran the law by using Pierce, the immediate seller, merely as a conduit, to foist liability onto the responsible party, namely, Schult, without any Code-based justification for doing so. The cost paid for this effort to accomplish justice was to hold Pierce, a defendant exculpated completely by the jury, liable for a substantial judgment, while allowing indemnity over against Schult.

For reasons set forth earlier, the cost of achieving justice for Troutmans in this circuitous manner was a slight injustice to Pierce and the sowing of some very bad jurisprudential seed. By allowing revocation of acceptance against a non-liable party, the North Dakota Supreme Court may have improvidently set the law on a course which could unnecessarily harm innocent intermediate sellers, and which would not provide sufficient remedial relief against remote sellers where intermediate sellers are dissolved or beyond the court's jurisdiction. Moreover, this course seems to conflict with the result reached in *Erling v. Homera, Inc.*[200] While the distant observer must admire the court's creative attempt to do justice in accord with the jury verdict, the analytically better path is to allow revocation of acceptance and refund without privity, either by judicial grafting or statutory clarification.

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breaching immediate seller, it is preferable to denying the buyer the right to revocation of acceptance if it best protects his expectation interest.

200. 298 N.W.2d 478 (N.D. 1980).

APPENDIX 1

(Letter of Revocation)

TO: PIERCE, Inc. (Williston lot)
3801 West Main Street
Fargo, ND 58102

PLEASE TAKE NOTICE that pursuant to Section 41-02-71 of the North Dakota Century Code, the undersigned hereby revoke the prior acceptance of the 1982 14 x 68 Schult Citation (Serial Number 182673) delivered in March of 1982 pursuant to our undated agreement, a copy of which is attached hereto and made a part hereof.

The mobile home described above is defective in the following manner:

The outside walls were installed incorrectly and do not prevent rain from seeping through the insulation and settling on the floors of the inside living area. The water seepage has already necessitated the replacement of the lower half of our inside walls on one occasion. The steps taken to date to prevent the water from coming through the outside walls have failed.

The mobile home was accepted without our knowledge or ability to determine that it was defective in this manner.

The defect was of such a nature that its existence could only be determined through exposure to bad weather. Once the existence of the defect became known, we made demands that it be corrected which has not been done to date.

The non-conformity of the mobile home is of such a nature that is substantially impairs the value of it to us. We therefore exercise our right to revoke our acceptance of the mobile home awaiting your instructions as to its disposition.

Dated: September 22, 1983.

/s/ Edward J. Troutman
/s/ Debra K. Troutman

APPENDIX 2

Verdict Form with Special Interrogatories
(Caption omitted)

Ladies and Gentlemen of the Jury:

You are instructed that under the theory of recovery alleged by the plaintiffs in this case you are to answer the following questions:

1. Do you find that the defendant Schult Home Corporation extended an express warranty to the plaintiffs?

ANSWER: __X__ Yes _____ No

2. Do you find that the defendant Pierce, Inc. extended an express warranty to the plaintiffs?

ANSWER: _____ Yes __X__ No

3. Do you find that the defendant Schult Home Corporation extended an implied warranty of merchantability to the plaintiffs?

ANSWER: __X__ Yes _____ No

4. Do you find that the defendant Pierce, Inc. extended an implied warranty of merchantability to the plaintiffs?

ANSWER: _____ Yes __X__ No

(NOTE: If your answer to all four of the above questions is "No," please notify the bailiff and return the verdict form to the Court for further proceedings.)

5. Do you find that the Schult mobile home was substantially defective?

ANSWER: __X__ Yes _____ No

6. Do you find that the defendant Schult Home Corporation was given reasonable notice of any defects in the mobile home?

ANSWER: __X__ Yes _____ No

7. Do you find that the defendant Pierce, Inc. was given reasonable notice of any defects in the mobile home?

ANSWER: __X__ Yes _____ No

8. Do you find that the defendant Schult Home Corporation was given a reasonable opportunity to remedy any defects in the mobile home?

ANSWER: __X__ Yes _____ No

9. Do you find that the defendant Pierce, Inc. was given a reasonable opportunity to remedy any defects in the mobile home?

ANSWER: __X__ Yes _____ No

(Note: If your answer to Questions 6, 7, 8 and 9 are all "No", return the verdict form to the bailiff.)

10. Are there any substantial defects in the subject mobile home not remedied which were the responsibility of the defendant, Pierce, Inc.?

ANSWER: _____ Yes ___X__ No

(NOTE: If your answer to Question Number 10 is "No", do not answer any further questions that relate to the defendant Pierce, Inc.)

10(a). Are there any substantial defects in the subject mobile home not remedied which were the responsibility of the defendant Schult Home Corporation?

ANSWER: __X__ Yes _____ No

(Note: If your answer to Question Number 10(a) is "No", do not answer any further questions that relate to the defendant Schult Home Corporation.)

11. Did any defects which are the responsibility of defendant Schult Home Corporation in the mobile home which were not remedied constitute a breach of any express warranty extended by Schult Home Corporation?

ANSWER: __X__ Yes _____ No

12. Did any defects which are the responsibility of the defendant Pierce, Inc. in the mobile home which were not remedied constitute a breach of any express warranty extended by Pierce, Inc.?

ANSWER: _____ Yes _____ No

13. Did any defects which were the responsibility of the defendant Schult Home Corporation in the mobile home which were not remedied constitute a breach of any implied warranty of merchantability extended by Schult Home Corporation?

ANSWER: __X__ Yes _____ No

14. Did any defects which were the responsibility of the defendant Pierce, Inc. in the mobile home which were not remedied constitute a breach of any implied warranty of merchantability extended by Pierce, Inc.?

ANSWER: _____ Yes _____ No

15. Did any defects in the mobile home which were not remedied substantially impair the value of the mobile home to the Troutmans?

ANSWER: __X__ Yes _____ No

16. What monies do you find the Troutmans paid on the purchase of their mobile home?

$6591

17. What incidental and consequential damages, if any, do you find that the Troutmans sustained as a consequence of any defect in their mobile home which was not remedied?

$7000

18. What is the reasonable use value, if any, received by plaintiffs in connection with their occupancy of the Schult mobile home?

$ 0

19. If damages are awarded to the plaintiffs, do you award interest?

ANSWER: __X__ Yes _____ No

If so, at what rate? (Not to exceed 6%)

6%

Dated at Minot, North Dakota, this 22 day of November, 1985.

/s/ Michael Leary
FOREMAN

APPENDIX 3

DRAFT DISCUSSED AT THE MEETING OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, JULY 29 - AUGUST 5, 1994.

SECTION 2-318. EXTENSION OF EXPRESS OR IMPLIED WARRANTIES.*

(a) A seller's express or implied warranty, made to an immediate buyer, extends to any person who may reasonably be expected to buy, use, or be affected by the goods and who is damaged by breach of the warranty. In this section, "seller" includes a manufacturer, "goods" includes a component incorporated in substantially the same condition into other goods, and "protected person" means a person to whom a warranty extends under subsection (a).

(b) Except as otherwise provided in subsection (c), the rights and remedies of a protected person against a seller for breach of warranty extended under subsection (a) are determined by the enforceable terms of the contract between the seller and the immediate buyer and this article.

(c) A buyer's rights and remedies for breach of a warranty are determined under this article, as modified by subsection (d), without regard to privity of contract or the terms of the contract between the seller and the immediate buyer if:

(1) the buyer is a consumer to whom a warranty was extended under subsection (a) and the Magnuson-Moss Warranty Act applies or the seller is a merchant under Section 2-314(a) who sold unmerchantable goods; or

(2) the buyer is a member of the public to whom an express warranty was made by the seller under Section 2-313 (c) or (d).

(d) A buyer under subsection (c) has all of the rights and remedies against a remote seller provided by this article, except as follows:

(1) To reject or revoke acceptance, notice must be given to the remote seller within a reasonable time after the buyer discovers or should have discovered the breach of warranty.

(2) Upon receipt of a timely notice of rejection or revocation of acceptance, the remote seller has a reasonable time either to refund the price paid by the buyer to the immediate seller or cure the breach by supplying goods that conform to the warranty. If the seller complies with this paragraph, the remote buyer has no further remedy against the seller, except for incidental damages under Section 2-715(a). If the remote seller fails to comply with this subsection, the buyer may claim damages for breach of warranty, including consequential damages under Section 2-715(b).

(3) Except as provided in paragraph (2), a buyer has no right to consequential damages unless expressly agreed with the remote seller.

(4) A [claim for relief] for breach of warranty extended under subsection (a) or created under Section 2-313(a)(3) accrues no earlier than the time the remote buyer discovered or should have discovered the breach.

(e) A seller may not exclude or limit the operation of this section.