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Cover Page Footnote

Mr. Monserud gratefully acknowledges the constructive criticisms received from Stan Cox and Paul Teich, colleagues at New England School of Law, as well as from Marion W. Benfield Jr., University Professor of Law at Wake Forest University School of Law, and Donald J. Rapson, Senior Vice President, Assistant General Counsel and Secretary, the CIT Group Inc., Livingston, New Jersey; Adjunct Professor of Law, New York University Law School; Lecturer-in-Law, Columbia Law School. He also acknowledges the invaluable assistance of Mark Van Valkenburgh, his research assistant at New England.

ARTICLES

ROUNDING OUT THE REMEDIAL STRUCTURE OF ARTICLE 2: THE CASE FOR A FORCED EXCHANGE BETWEEN A BUYER AND A REMOTE SELLER

*Gary Monserud**

I. INTRODUCTION

In 1992 when Cherri graduated from law school, the job market was tight so she started her own practice.[1] She needed office equipment and planned to buy it as soon as possible. She decided to purchase two word processors, software, and a laser printer from LawMart for $10,000. Although LawMart disclaimed all warranties, the manufacturer, NewTech, who also provided the software, furnished an express warranty on the whole system.

LawMart's salesman showed Cherri NewTech's written warranty before she signed the purchase order. The express warranty stated that the equipment was warranted against defects in workmanship and materials for one year from the date of delivery, and that any repairs and adjustments would be made free of charge within this one-year period. Any complaints were to be submitted to LawMart. LawMart

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1. The introduction sets forth a hypothetical situation intended to raise questions about extending the remedial rights and obligations of the Uniform Commercial Code (U.C.C.) to buyers and sellers not in contractual privity. *See* U.C.C. §§ 2-608, 2-711(1) (1977). The names used do not refer to any real persons or firms.

would make the adjustments or repairs and bill NewTech for reimbursement.

Relying on the written warranty, Cherri paid the full purchase price using the proceeds of a loan from her local bank, and took delivery of the new equipment. Shortly thereafter, Cherri discovered a problem with the printer. Some days it printed. Some days it did not. LawMart sent a repairman to Cherri's office, who attempted to fix the printer, but was unsuccessful. Additionally, the word processors proved troublesome because storage and retrieval of documents was cumbersome and confusing. Both Cherri and her secretary were computer literate, but the instructional materials made little sense. Finally, on the weekend before Cherri's first trial, her word processor destroyed a trial brief.

Cherri phoned LawMart, but her calls were not returned. In disgust, Cherri drove to LawMart's premises only to find an empty office and an "AVAILABLE FOR LEASE" sign. After Cherri made several inquiries, it became clear that LawMart was defunct. Its employees were gone and there was no hope of Cherri receiving technical help. By this time, three months had elapsed since delivery of the equipment.

Cherri studied the Uniform Commercial Code[2] (U.C.C.), and specifically recalled that hardware and software packages were covered by Article 2.[3] She further recalled the Article 2 goods-oriented remedies of rejection and revocation of acceptance.[4] Concluding that three months of use precluded rejection, Cherri considered the criteria for revocation of acceptance under section 2-608.[5] While she deliberated about remedial possibilities, her second word processor became nonfunctional. Cherri, therefore, concluded that she could establish substantial impairment of the value of the goods.[6] She decided to give notice of revocation of acceptance to NewTech and to demand refund of the purchase price. Since NewTech had made an express warranty, the demand seemed reasonable.

NewTech responded that it would allow neither revocation of acceptance nor refund. Due to LawMart's insolvency, however, it would

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2. Throughout this Article, in text and in footnotes, the Uniform Commercial Code will be referred to as the U.C.C. or the Code.

3. *See, e.g.*, Advent Systems Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991) (computer hardware and software generally covered by Article 2 of the U.C.C.).

4. *See* U.C.C. §§ 2-601 (rejection), 2-608 (revocation of acceptance).

5. While U.C.C. § 2-601 and § 2-608 each require the buyer to give notice within a reasonable time, the reasonable time for revocation of acceptance may be longer than the reasonable time for rejection. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 8-4 (3d ed. 1988).

6. Substantial impairment of the value of the goods to the buyer is a requisite for revocation of acceptance. *See* U.C.C. § 2-608.

send a representative to make any necessary adjustments or repairs. Subsequent repair efforts were ineffective. NewTech's repairman advised Cherri that this line of computer equipment had proven to be troublesome, and that making it work over a significant period of time was nearly impossible. As a result of this depressing news, Cherri decided to take legal action in an attempt to rid herself of the equipment and collect the purchase price. After an hour of legal research, Cherri discovered that in her jurisdiction revocation of acceptance and refund were permissible only against the seller in privity, Law Mart, who was now defunct. In her suit against NewTech, therefore, Cherri would be limited to an action for damages.[7]

The foregoing hypothetical situation raises a question about the application of two remedial sections of Article 2, sections 2-608 and 2-711(1).[8] The issue is whether an aggrieved buyer may invoke the remedies of revocation of acceptance and refund only against an immediate seller or whether a buyer may invoke these remedies against a remote seller who has breached a warranty of quality.[9] According to the majority view, the remedies of revocation of acceptance and refund are *not* available against remote sellers.[10] Under the majority view, therefore, Cherri is limited to a suit for damages against NewTech. Under a minority view, however, revocation of acceptance and refund *are* remedial options against remote sellers.[11] This minority view would permit Cherri to sue for a forced exchange.[12]

The minority view, which allows revocation of acceptance and refund against the remote seller,[13] is the better approach for reasons of policy and because it is consistent with the text of the Code's remedial provisions as a whole. In order to avoid injustice in cases such as Cherri's, where the remote seller breaches a warranty running to the buyer, courts should adopt the minority view. It follows that in any revision of Article 2's remedial provisions, the appropriate application of revocation of acceptance and refund should be clearly delineated.

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7. For a discussion of this majority view, see *infra* notes 28-73 and accompanying text.

8. Section 2-608 allows the revocation of acceptance of non-conforming goods. U.C.C. § 2-608. Section 2-711 is the index of buyer's remedies. *Id.* § 2-711. Subsection (1) allows for refunds following revocation of acceptance. *Id.* § 2-711(1).

9. The term "remote seller" refers to NewTech who sold the goods to LawMart. NewTech is remote because it has no privity of contract (immediate contractual connection) with Cherri in the chain of distribution.

10. *See infra* notes 28-73 and accompanying text (discussing majority-view cases).

11. *See infra* notes 74-140 and accompanying text (discussing minority-view cases).

12. A forced exchange is the revesting of title to the defective goods in the remote seller in return for the purchase price, less a set-off for seller if the buyer used the equipment to his benefit and seller proves value ascribed to this use.

13. This assumes that the remote seller has breached an express or implied warranty, or other obligation, giving rise to the requisites for revocation of acceptance under U.C.C. § 2-608.

This should avoid any split of opinions, after revision, as to the proper reach of these remedial devices.[14]

Many courts are reading Article 2 in an unnecessarily cramped manner. This is leading to unfortunate and undesirable results for litigants. The Code contains adequate sign-posts and policy directives for a freer and more flexible approach. Any revisions to Article 2 should avoid unnecessarily restrictive remedial provisions. Any revisions should make clear that Article 2's remedial provisions can accommodate growth through case law in order to meet the just and reasonable expectations of merchants and consumers in their daily affairs. This is true even if such growth through case law occasionally outruns the vision of the generation which does the statutory revising.

A revision committee working under the auspices of the American Law Institute and the National Conference of Commissioners on Uniform State Laws is in the process of revising Article 2. This article not only advocates judicial choice of the minority view, it also supports a textual clarification which will establish the minority view firmly as the proper way to implement the Code's remedial provisions. Professor Richard Speidel's[15] draft of December 21, 1993, provides for rejection and revocation of acceptance against remote sellers by amendment to U.C.C. section 2-318.[16] This article supports the proposed revision of

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14. Recognizing the dilemma, the Permanent Editorial Board Study Group, Uniform Commercial Code, Article 2, raised the following questions: "1. Should a remote buyer be afforded a right of rejection or revocation as against the remote seller? 2. Should a remote buyer be allowed to recover the price *it* paid for the goods, or should its recovery be limited to the price the remote seller received for the goods?" PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE. PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 2 PRELIMINARY REPORT 113 (Copyright 1990 by The American Law Institute and the National Conference of Commissioners on Uniform State Laws. Reprinted with permission of the Permanent Editorial Board for the Uniform Commercial Code) [hereinafter PEB PRELIMINARY REPORT].

15. Richard E. Speidel, Beatrice Kuhn Professor of Law, Northwestern University School of Law, is serving as Reporter to the Article 2 Revision Committee.

16. First, Professor Speidel's draft would extend express and implied warranties made to an immediate buyer to any remote buyer who may reasonably be expected to buy the goods and who suffers damage from breach of the warranty. Second, the buyer's rights against the remote seller explicitly include rejection and revocation. Third, the remote buyer has no claim for consequential damages unless the remote seller has otherwise agreed. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE REVISED ARTICLE 2, SALES PARTS 1-6 41-42 (Draft Dec. 21, 1993) [hereinafter REVISED ARTICLE 2]. Professor Speidel's draft of 2-318 states:

> SECTION 2-318. EXTENSION OF WARRANTIES EXPRESS OR IMPLIED.
>
> (a) A seller's express or implied warranty, made to an immediate buyer, extends to any remote buyer who may reasonably be expected to buy the goods and who suffers damage from breach of the warranty. In this section, "seller" includes a manufacturer and "goods" includes a component incorporated in substantially the same condition into other goods.
>
> (b) Except as provided in subsection (c), the rights and remedies of a remote buyer against a seller for breach of a warranty extended under subsection (a) are determined by the

section 2-318, specifically its abolition of the privity requirement for revocation of acceptance.[17]

Part II of this Article is simply descriptive. First, Part II describes representative cases in which appellate courts have denied revocation of acceptance and refund as a remedies against remote sellers.[18] Then, Part II examines representative appellate opinions where the courts

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enforceable terms of the contract between the seller and the immediate buyer and this Article.

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

(1) the remote buyer is a consumer buyer and the seller has made a written warranty to which the Magnuson-Moss Warranty Act applies;

(2) the remote buyer is a consumer buyer and the seller is a merchant under Section 2-314(1) who sold unmerchantable goods;

(3) the remote buyer enforces an express warranty made to the public under Section 2-313(a)(3).

(d) A remote buyer's rights and remedies against the seller making the warranty under subsection (c) are determined by this Article, except as follows:

(1) A warranty may be excluded and a remedy may be limited or modified by an enforceable agreement (i) between the remote buyer and such seller or (ii) between the remote buyer and an immediate seller who is an agent for such seller;

(2) Notice of rejection or revocation of acceptance must be given to such seller within a reasonable time after the remote buyer discovers or should have discovered the breach of warranty;

(3) Upon receipt of a timely notice of rejection or revocation of acceptance, such seller must have a reasonable time to cure the breach by either refunding the price paid by the remote buyer to its immediate seller or by supplying new goods that conform to the contract. If such seller cures under this subsection, the remote buyer has no further remedy against such seller;

(4) Unless otherwise agreed with such seller, the remote buyer has no right to consequential damages for breach of a warranty extended under subsection (a) or created under Section 2-313(a)(3).

(5) A claim for damages for breach of warranty with regard to accepted goods is not barred by the remote buyer's failure to give notice to such seller under Section 2-607(3)(a).

(6) A cause of action for breach of a warranty extended under subsection (a) or created under Section 2-313(a)(3) accrues when the breach is or should have been discovered by the remote buyer.

Id. § 2-318. (Copyright 1993 by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Reprinted with permission of the Permanent Editorial Board for the Uniform Commercial Code).

17. While rejection and revocation of acceptance are parallel goods-oriented remedies, the policies underlying each may not justify merging them in asking whether or not privity ought be required. After all, rejection (§ 2-601) can be made for virtually any non-conformity, but revocation of acceptance (§ 2-608) requires substantial impairment. This article, therefore, is limited to an analysis of revocation of acceptance against remote sellers. The question of rejection against remote sellers will not be addressed. Moreover, this writer would be more explicit than Professor Speidel's current draft in allowing revocation of acceptance *whenever damages would be allowed against any remote seller*, providing the procedural and substantive requisites of § 2-608 are met. Perhaps this could be done in the Official Comments to §§ 2-608 and 2-318.

18. *See infra* notes 28-73 and accompanying text.

have sustained judgments allowing revocation and refund as remedies against remote sellers.[19] Part III discusses the commentaries which are split between the minority and majority views.[20] Part IV continues with an examination of several cases where the courts have avoided adopting the minority view, but have achieved the same results as those courts which have allowed revocation of acceptance and refund without privity.[21] These cases are examined to demonstrate that judges sometimes covertly follow the minority view without disturbing the majority view by contrary holdings. Part V isolates and analyzes the main points on which the courts and commentators are divided.[22]

This Article continues in Part VI and argues that Article 2's text and Official Comments are sufficiently flexible to allow revocation of acceptance and refund against remote sellers without violating the letter or spirit of the Code.[23] In Part VII, it is asserted that applying revocation of acceptance and refund as remedial devices against remote sellers who breach warranties is conceptually sound because revocation of acceptance and refund are different from rescission and restitution, which have often been limited to parties in privity.[24] This argument considers analogous legal schemes found in the Magnuson-Moss Warranty Act, in state lemon laws, and in the civil law of Louisiana. Each of these legal schemes allows the functional equivalent of revocation of acceptance and refund without privity of contract. Finally, after considering both the policy directives contained in the Code and the practicalities of the marketplace, Part VIII argues that sound policy points toward allowing revocation of acceptance and refund against remote sellers.[25]

II. AN EXAMINATION OF THE MAJORITY AND MINORITY VIEWPOINTS ON THE ISSUE OF WHETHER REVOCATION OF ACCEPTANCE AND REFUND OF THE PURCHASE PRICE SHOULD BE REMEDIES AVAILABLE AGAINST REMOTE SELLERS

U.C.C. section 2-608[26] must be applied in connection with section

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19. *See infra* notes 74-139 and accompanying text.
20. *See infra* notes 141-73 and accompanying text.
21. *See infra* notes 175-223 and accompanying text.
22. *See infra* notes 224-58 and accompanying text.
23. *See infra* notes 259-317 and accompanying text.
24. *See infra* notes 318-430 and accompanying text.
25. *See infra* notes 431-56 and accompanying text.
26. Section 2-608 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 and it has not been seasonably cured; or

2-711(1),[27] which authorizes a refund of the price, or any part thereof paid, after an effective and proper revocation of acceptance. The case law considered below clearly shows how courts can interpret the U.C.C. remedial statutes, which are commonly used in tandem, quite differently.

A. The Majority View — Revocation of Acceptance and Refund of the Price as Remedies Against Remote Sellers Denied

In at least twelve reported cases appellate courts have held or stated in dicta that revocation of acceptance and refund are not permissible remedies against remote sellers.[28] This number includes cases in which the advocates, trial courts, and appellate courts deemed revocation of acceptance and common law rescission to be synonymous, and consequently, used these terms interchangeably. The following three cases demonstrate the importance of lack of privity (remoteness). In other words, in the cases selected, the evidence showed substantial impairment of value to the buyer, or a factual issue on this point. Additionally, the evidence showed compliance with the procedural requirements of section 2-608, or a factual issue on this point, as well as receipt of the goods without any reason to know of the defects. Lack of

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(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 (1977).

27. Section 2-711(1) states in relevant part:

(1) 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 . . . .

Id. § 2-711(1).

28. *See* Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208 (6th Cir. 1974) (applying Ohio law); Seekings v. Jimmy GMC of Tucson, Inc., 638 P.2d 210 (Ariz. 1981); Conte v. Dwan Lincoln-Mercury, Inc., 374 A.2d 144 (Conn. 1976); Volvo of Am. Corp. v. Wells, 551 S.W.2d 826 (Ky. Ct. App. 1977); Henderson v. Chrysler Corp., 477 N.W.2d 505 (Mich. App. 1991); Alberti v. Manufactured Homes, Inc., 381 S.E.2d 478 (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 (N.C. Ct. App. 1982); Cooper v. Mason, 188 S.E.2d 653 (N.C. Ct. App. 1972); Edelstein v. Toyota Motors Distrib., 422 A.2d 101 (N.J. Super. Ct. App. Div. 1980); Noice v. Paul's Marine & Camping Ctr., Inc., 451 N.E.2d 528 (Ohio Ct. App. 1982); Gasque v. Mooers Motor Car Co., Inc., 313 S.E.2d 384 (Va. 1984); Reece v. Yeager Ford Sales, Inc., 184 S.E.2d 727 (W.Va. 1971); *see also* Ayanru v. General Motors Acceptance Corp., 495 N.Y.S.2d 1018 (N.Y. Civ. Ct. 1985) (trial court memorandum opinion).

privity was, therefore, *the* bar to revocation of acceptance and refund of the price as remedies against a remote seller.

1. Voytovich v. Bangor Punta Operations, Inc.

In *Voytovich v. Bangor Punta Operations, Inc.*, the buyer (Voytovich) bought a boat manufactured by Bangor Punta Operations, Inc. (Bangor Punta) from a dealer, Zucker Marine.[29] Zucker Marine provided Voytovich with Bangor Punta's brochure which contained statements that induced Voytovich's purchase.[30] The boat subsequently proved unsuitable for use on Lake Erie.[31]

Voytovich sought to rescind the sale and receive a refund of his purchase price from Bangor Punta or from Zucker Marine.[32] Suit was filed in federal court. At the bench trial, the court found that the statements in Bangor Punta's brochure were express warranties, that these warranties had been breached as the boat did not conform to them, and that Voytovich was entitled to elect either revocation of acceptance and return of the price paid, or damages in the amount of $10,000, against Bangor Punta.[33] The judge dismissed all claims against Zucker Marine.[34]

On appeal, Bangor Punta contended that under the applicable law, Ohio's version of U.C.C. section 2-608, privity was a requisite; hence, the remedies of rescission and refund were inapplicable to non-privity manufacturers.[35] Applying Ohio law, the court agreed that under Ohio Revised Code section 1302.66, there could be no revocation of acceptance without privity.[36] The court further determined that Voytovich had no right of rescission under non-Code law which might have been used to supplement the Code's remedies via Ohio's version of section 1-103.[37]

The *Voytovich* court explained its decision as follows:

> Under Ohio law it is clear that a purchaser who relies on the express warranty of a manufacturer in purchasing goods, and suffers injury

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29. 494 F.2d 1208, 1209-10 (6th Cir. 1974) (applying Ohio law).
30. *Id.* at 1210.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1209-10.
35. *Id.* at 1210; *see also* OHIO REV. CODE ANN. § 1302.66 (Anderson 1993) (identical to U.C.C. § 2-608).
36. *Voytovich*, 494 F.2d at 1210.
37. *Id.* at 1211; *see also* OHIO REV. CODE ANN. § 1301.03. This section states: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." *Id.* (identical to U.C.C. § 1-103).

> or loss of bargain, may directly sue the manufacturer. After these cases there can be no dispute that Voytovich had a right to sue the manufacturer, and to recover damages for breach of warranty.
>
> However, we have been unable to find any case allowing a purchaser to rescind a sale against a manufacturer for breach of express warranty. No such case has been cited to us by the appellee. In our opinion, in order to be entitled to the remedy of rescission, there must be a buyer-seller relationship, and that relationship is absent in this case. Voytovich's only contractual relationship was with Zucker.[38]

The court, however, went on to sustain the $10,000 award in damages despite Bangor Punta's challenge as to the sufficiency of the evidence.[39] Voytovich was left with the defective boat and the monetary award against his remote seller.[40] The court treated rescission and revocation of acceptance as functional equivalents. While Voytovich had requested rescission and refund and the trial court had made its award on a rescission theory, the appellate court considered both section 2-608 law and common law rescission.[41] Because of the lack of precedent to support either theory, the appellate court reversed the trial court's decision with apparent reluctance.[42]

2. Conte v. Dwan Lincoln-Mercury, Inc.

Voytovich was followed by the 1976 Connecticut Supreme Court decision of *Conte v. Dwan Lincoln-Mercury, Inc.*[43] Conte bought a new car from Dwan Lincoln-Mercury (Dwan), which came with a 12 month/12,000 mile warranty from Ford Motor Company (Ford), the manufacturer.[44] After a litany of woes, Conte left the car at Dwan's garage and demanded return of the price, which was not forthcoming.[45] Conte sued Dwan and Ford seeking revocation of acceptance and refund of the purchase price, or alternatively, seeking damages.[46]

The trial judge granted motions for directed verdicts in defendants' favor on plaintiff's claim for damages, but sent the claim for revocation of acceptance to the jury.[47] The jury found that Conte had re-

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38. *Voytovich*, 494 F.2d at 1211 (citations omitted).
39. *Id.*
40. *Id.* The court applied the remedy from Ohio Revised Code § 1302.88, allowing as damages the difference between the value of the boat as warranted and the actual value with its defects as of the time of acceptance. *Id.*; *see also* OHIO REV. CODE ANN. § 1302.88 (Anderson 1993) (identical to U.C.C. § 2-714).
41. *Voytovich*, 494 F.2d at 1210-11.
42. *Id.* at 1211.
43. 374 A.2d 144 (Conn. 1976).
44. *Id.* at 146.
45. *Id.* at 147.
46. *Id.* at 145-47.
47. *Id.* at 145-46.

scinded his acceptance and awarded him return of the purchase price against both defendants.[48] Dwan appealed, asserting procedural error (lack of timely notice) as well as substantive error (no substantial impairment) which are both requisites for revocation of acceptance under Connecticut's version of U.C.C. section 2-608.[49] Finding the evidence sufficient to support the jury's implicit findings of timely notice and substantial impairment, the court sustained the judgment against Dwan.[50]

Since evidence existed to support the jury's implicit finding that Ford had breached its express warranty, Ford's only argument on appeal was its lack of privity with Conte. Relying on *Voytovich*, the court accepted Ford's argument that the non-privity buyer could neither rescind nor revoke acceptance against the manufacturer in the absence of evidence that the manufacturer had either sold or contracted to sell the car to the buyer.[51] The court reasoned that:

> Upon a careful review of the facts of this case, we are convinced that there was no evidence to support a conclusion that Dwan was the agent of Ford in the actual sale of the automobile. The statute allows revocation only against the person who sells or contracts to sell goods. Dwan was not the agent of Ford insofar as the sale of the automobile is concerned. To be entitled to the remedy of revocation, there must be a buyer-seller relationship, and that relationship was absent in this case. *See Voytovich v. Bangor Punta Operations, Inc.*, . . . holding that a buyer of a substantially nonconforming motorboat could directly sue the manufacturer for breach of warranty but only the dealer-seller could be sued for revocation. Accordingly, the trial court should have granted the defendant's motion for a directed verdict . . . or the motion for judgment notwithstanding the verdict.[52]

Hence, the court reversed and remanded for judgment in favor of Ford.[53]

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48. *Id.* at 146. The trial court apparently treated rescission as synonymous with revocation of acceptance under U.C.C. § 2-608.

49. *Id.* at 148 (interpreting CONN. GEN. STAT. ANN. § 42a-2-608 (West 1990) which is identical to U.C.C. § 2-608).

50. *Id.* at 148-49.

51. *Id.* at 149-50.

52. *Id.* at 150 (citations omitted).

53. *Id.* at 150. Conte made out better than Voytovich because Conte had a claim for the price against his immediate seller. Whether the immediate seller had an indemnity claim against Ford is not stated in the opinion.

3. Alberti v. Manufactured Homes, Inc.

A recent case following the same line of reasoning is *Alberti v. Manufactured Homes, Inc.*[54] Mr. Alberti and his wife bought a mobile home from Manufactured Homes, Inc., doing business as AAA Mobile Homes (Mobile Homes).[55] Brigadier Homes, Inc. (Brigadier) manufactured the mobile home.[56] Brigadier's representative allegedly told a Mobile Homes' salesman that the floor on this mobile home model was novadeck, a tongue-in-groove flooring which is stronger than particle board.[57] Before the sale, Mobile Homes' salesman informed Alberti that the floor was novadeck.[58]

During the course of an inspection prompted by defects in the mobile home, Alberti discovered that the floor was not novadeck, but rather ordinary particle board. Thus, Alberti gave notice of revocation of acceptance to both Mobile Homes and Brigadier.[59] Alberti subsequently negotiated a settlement with Mobile Homes. Reaching no settlement with Brigadier, Alberti sued for revocation of acceptance and refund.[60]

The jury found that Brigadier had misrepresented the flooring and that Alberti had given timely notice of revocation of acceptance.[61] The trial court entered judgment allowing revocation of acceptance, refund of the purchase price, and damages in the amount of $1500.[62] Brigadier appealed and the intermediate appellate court in North Carolina reversed the judgment against Brigadier, ruling that there could be no revocation of acceptance and refund without privity.[63]

The Supreme Court of North Carolina granted Alberti's application for discretionary review in order to consider two questions respecting privity: (1) whether the damage award against the remote seller should be allowed in the absence of privity; and (2) whether revocation of acceptance against the remote seller should be allowed in the absence of privity.[64] The court held that damages were allowable against

54. 407 S.E.2d 819 (N.C. 1991).
55. *Id.* at 820-21.
56. *Id.* at 821.
57. *Id.*
58. *Id.* at 821.
59. *Id.*
60. *Id.*; *see* N.C. GEN STAT. § 25-2-608 (1993) (this statute is identical to U.C.C. § 2-608).
61. *Alberti* 407 S.E.2d at 822.
62. *Id.* at 821-22.
63. *Id.* at 822.
64. *Id.*

the remote seller for breach of express warranty, but that revocation of acceptance and refund were *not* allowable against the remote seller.[65]

The decision turned, in part, on North Carolina's non-uniform code definition of the term "seller."[66] The court's main reason for denying revocation of acceptance and refund, however, was that these remedies did not fit the facts.[67] The court characterized revocation of acceptance and refund wherein the buyer gives up title to the goods in return for the price paid as "a type of exchange uniquely suited to situations involving parties in direct contractual [privity]."[68] The court's view is captured in the following words:

> These remedial procedures [revocation of acceptance and refund] are not well suited to situations where the parties do not deal directly with each other. Where there is no direct dealing between the parties, revocation of acceptance would not restore the status quo ante; it would, instead, require a manufacturer to refund a purchase price it had not received in exchange for a product it did not sell to the revoking party.[69]

The court, therefore, found that the remedies of revocation of acceptance and refund were inappropriate in the absence of privity.[70]

4. Summary

The foregoing cases are representative of the majority's interpretation of the interaction of section 2-608 with section 2-711(1). While many courts have become comfortable with direct damage actions against remote sellers, especially in cases involving breaches of express warranties,[71] these courts remain wary of ordering a forced exchange. In these majority-view jurisdictions, the hypothetical buyer from the introduction, Cherri, must retain the defective equipment and will be relegated to an action for damages against the remote seller,

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65. *Id.* at 826-27. Several courts follow the same pattern of allowing damages for a buyer against a remote seller for breach of warranty while denying revocation of acceptance and refund. *See, e.g.*, Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208 (6th Cir. 1974); Henderson v. Chrysler Corp., 477 N.W.2d 505 (Mich. Ct. App. 1991); Edelstein v. Toyota Motors Distrib., 422 A.2d 101 (N.J. Super. Ct. App. Div. 1980).

66. "Seller" means a person who sells or contracts to sell goods. N.C. GEN. STAT. § 25-2-103(1)(d) (1993). "Any manufacturer of self-propelled motor vehicles, as defined in G.S. 20-4.01 is also a 'seller' with respect to buyers of its product to whom it makes an express warranty, notwithstanding any lack of privity between them, for purposes of all rights and remedies available to buyers under this Article." *Id.*; see also *infra* notes 259-317 where the *Alberti* decision is discussed in greater detail in my argument for a broad reading of the term "seller."

67. *Alberti*, 407 S.E.2d at 822.

68. *Id.* at 824.

69. *Id.*

70. *Id.*

71. *See, e.g.*, Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208 (6th Cir. 1974).

NewTech.[72] Cherri bears the burden of disposing of the defective equipment for whatever value she may obtain. This view does not favor an aggrieved buyer such as Cherri when the immediate seller is either bankrupt or has successfully disclaimed all warranties.[73]

B. The Minority View — Revocation of Acceptance and Refund of the Price as Remedies Against Remote Sellers Allowed.

Several courts have rejected the majority view and have sustained judgments allowing revocation of acceptance and refund against remote sellers.[74] These cases are most easily understood as policy-based decisions. The courts tended to sympathize with long-suffering buyers who wanted to rid themselves of defective goods in exchange for the purchase price.[75] Usually, they were unable to revoke acceptance and gain a refund from their immediate sellers because their immediate sellers were insolvent or had made effective disclaimers.[76] Their plight led the courts to allow forced exchanges with the remote sellers.

1. Durfee v. Rod Baxter Imports, Inc.

Durfee v. Rod Baxter Imports, Inc., is the seminal case allowing revocation of acceptance and refund without privity of contract.[77] Durfee purchased a Saab automobile from Horvath Motors, a Saab dealer, which had bought the car from Saab-Scania, the American distributor.[78] The dealer passed on to Durfee, Saab-Scania's twelve month express warranty.[79] After a series of problems and many fruitless repair attempts, Durfee sued Saab-Scania and Rod Baxter Imports, Inc. (Rod Baxter), demanding rescission and return of the purchase price, which he had paid in full upon taking delivery.[80]

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72. She would need to offer proof of damages under U.C.C. § 2-714(2) and § 2-715, if possible.

73. U.C.C. § 2-316 (1977). Section 2-316 provides the mechanism for disclaimers of implied warranties. *Id.*

74. *See* Ford Motor Credit Co. v. Harper, 671 F.2d 1117 (8th Cir. 1982) (applying Arkansas law); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1978); Volkswagen of Am., Inc., v. Novak, 418 So. 2d 801 (Miss. 1982); Royal Lincoln-Mercury Sales, Inc. v. Wallace, 415 So. 2d 1024 (Miss. 1982); Ventura v. Ford Motor Corp., 433 A.2d 801 (N.J. Super. Ct. App. Div. 1981); Gochey v. Bombardier, Inc., 572 A.2d 921 (Vt. 1990); *see also* Smith v. Navistar Int'l Transp. Corp., 714 F. Supp. 303 (N.D. Ill. 1989) (dicta).

75. *See, e.g.*, cases cited *supra* note 74.

76. A possible exception is *Gochey*, wherein the court allowed revocation of acceptance and refund against the remote seller without mention of whether or not relief was available against the immediate seller. For a discussion of *Gochey*, see *infra* notes 122-38 and accompanying text.

77. 262 N.W.2d 349 (Minn. 1977).

78. *Id.* at 351.

79. *Id.*

80. *Id.* at 351-52. Rod Baxter was the successor to Horvath Motors. *Id.*

The trial court found that Saab-Scania had breached its express warranty, but denied rescission.[81] The court awarded $600 in damages.[82] Durfee appealed arguing that the facts justified a finding of substantial impairment of the car's value to him and that he was entitled to revocation of acceptance, cancellation of the sale, and return of the purchase price.[83] This was, of course, an argument grounded in the requisites of Minnesota's version of U.C.C. section 2-608.[84] The Supreme Court of Minnesota determined, as a matter of law, that the combined effect of several breaches of warranty established substantial impairment of the value of the car to Durfee.[85] Therefore, the court held that Durfee was entitled to revocation of acceptance and refund from Saab-Scania unless the lack of privity barred such a result.[86]

The court noted that counsel for Saab-Scania had admitted at oral argument that Rod Baxter's continued existence was doubtful.[87] The court further noted that Minnesota precedent allowed damages against remote sellers for breach of express or implied warranty.[88] This put the court in a quandary. Should it require Durfee to live with his Saab[89] and an award for damages, or should it order a forced exchange against Saab-Scania, the remote, solvent seller, who had breached an express warranty?[90]

After quoting Minnesota's version of U.C.C. section 1-106(1)[91] as a declaration of the Code's remedial policy, the court decided to allow

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81. *Id.* at 352.

82. *Id.* While the Minnesota Supreme Court characterized the trial court's action as denial of "rescission," it immediately moved on to consider the requisites of Minnesota's version of U.C.C. § 2-608 without making any explicit distinction between rescission and revocation of acceptance. *Id.* (considering MINN. STAT. ANN. § 336.2-608 (West 1966) which is identical to U.S.C. § 2-608).

83. *Id.*

84. *Id.* at 353; *see* MINN. STAT. ANN. § 336.2-608.

85. *Durfee*, 262 N.W.2d at 355.

86. *Id.* at 357-58.

87. The court specifically stated:

> Defendant Saab-Scania suggests that it cannot be liable because, as the distributor of the Saab, it had no direct contractual relationship with plaintiff. If this is the case, plaintiff may well be left without relief, for Saab-Scania was unable to assure us at oral argument of the continued existence of Rod Baxter.

Id. at 357 (footnote omitted).

88. *Id.*

89. The car had been parked in a garage for many months preceding trial, hence, Durfee was without his car. *Id.* at 352.

90. *Id.*

91. Minnesota Statutes § 336.1-106(1) 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.

revocation of acceptance in the absence of privity and set forth its rationale as follows:

> We think liberal administration does not envision forcing a consumer to keep a car which is sufficiently defective so as to justify his returning it and then requiring him to sue the distributor for damages merely because the dealer is insolvent or no longer in business. The distributor of the automobile, who profits indirectly from retail sales, must take responsibility for the solvency of its dealers when its warranty is breached. A consumer cannot be expected to foresee the demise of local dealerships; instead he is entitled to rely on the distributor who induced him to buy the automobile. The lack of privity between the parties does not relieve Saab-Scania of liability.
>
> Plaintiff is entitled to recover the purchase price and $116.30 incidental damages upon tender of the Saab to defendants.[92]

The court decided in Durfee's favor, thus allowing revocation of acceptance and refund against a remote seller.[93]

Within the domain of section 2-608 jurisprudence, the *Durfee* decision broke new ground in much the same manner as did Judge Cardozo's decision in *MacPherson v. Buick Motor Company*[94] in the wider domain of negligence law. In each case, the situation of the plaintiff before the court and concerns about persons similarly situated caused the courts to cast off privity as a bar to appropriate relief. While *MacPherson* involved personal injury and *Durfee* involved economic loss, the court in each case sought to fasten liability onto a defendant reasonably expected to assume responsibility for manufacture of an acceptable car.[95]

2. Ford Motor Credit Co. v. Harper

In *Ford Motor Credit Co. v. Harper*,[96] the United States Court of Appeals for the Eighth Circuit extended the *Durfee* ruling to facts involving a farmer-buyer and breach of implied warranties by a remote seller.[97] After shopping around for a tractor capable of working his sticky soil during wet seasons, Harper bought a Ford tractor from his local machinery dealer, Tri-County.[98] In the sales agreement, Tri-

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MINN. STAT. ANN. § 336.1-106(1) (West 1966) (identical to U.C.C. § 1-106(1)).

92. 262 N.W.2d at 357-58.

93. *Id.*

94. 111 N.E. 1050 (N.Y. 1916).

95. *See id.* at 1055; *Durfee*, 262 N.W.2d at 357-58.

96. 671 F.2d 1117 (8th Cir. 1982) (applying ARK. CODE ANN. § 4-2-608 (Michie 1991) which is identical to U.C.C. § 2-608).

97. *Id.* at 1122-24. The court found non-conformities beyond implied warranties because of failure to service the tractor correctly. *Id.* at 1124.

98. *Id.* at 1119.

County and Ford Motor Company purported to disclaim all implied and express warranties.[99] Harper decided on a Ford tractor mainly because Tri-County was located close to his farm.[100] As a result, Harper thought that he could easily get any necessary repair work done.[101]

Harper made a down payment through trade-ins and financed the balance with Ford Motor Credit Company (Ford Credit) which took a security interest in the new tractor.[102] Harper then experienced repeated mechanical problems which neither Tri-County's mechanics nor Ford Motor Company's representatives could repair.[103] Consequently, Harper withheld an installment payment from Ford Credit.[104] Ford Credit threatened foreclosure.[105] Harper, in turn, demanded prompt repair or replacement.[106] Hearing nothing, Harper eventually gave notice of revocation of acceptance.[107]

Ford Credit sued Harper to replevy the tractor and other equipment.[108] Harper sued Ford Motor Company and Tri-County for revocation of acceptance and refund of the purchase price.[109] The trial court found the disclaimer in the sales agreement ineffective under Arkansas' version of U.C.C. section 2-316.[110] Because the disclaimer was ineffective, the implied warranty of merchantability under Arkansas Code section 4-2-314, and an implied warranty of fitness for a particular purpose under Arkansas Code section 4-2-315 became binding on Tri-County and Ford Motor Company.[111] The trial judge found material breaches of the implied warranties by both Tri-County and Ford Motor and ordered cancellation of the sales contract. The trial judge, therefore, held Tri-County and Ford Motor Company jointly liable for return of the purchase price.[112]

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99. *Id.* at 1122 n.7.
100. *Id.* at 1119.
101. *Id.*
102. *Id.*
103. *Id.* at 1119-20.
104. *Id.* at 1121.
105. *Id.*
106. *Id.*
107. *Id.* at 1120-21.
108. *Id.*
109. *Id.*
110. *Id.* at 1121. The trial judge thought the disclaimer language was not conspicuous and therefore did not meet the requirements of Arkansas' version of section 2-316(2) and the Eighth Circuit judges were of the same mind. *Id.* at 1122 n.7. Arkansas' version of 2-316, which is identical to U.C.C. § 2-316, is codified at ARK. CODE ANN. § 4-2-316 (Michie 1991).
111. ARKANSAS CODE ANN. §§ 4-2-314, -315. These statutes are identical to U.C.C. §§ 2-314, -315.
112. *Harper*, 671 F.2d at 1121. The judge did not need to order return of the tractor since Harper had left it at Tri-County's yard. *Id.* at 1119. Harper also willingly gave up the disc he had purchased to pull with the new tractor. *Id.* at 1121.

On appeal, the appellate court sustained the trial judge's findings which satisfied the procedural and substantive requisites of Arkansas' version of U.C.C. section 2-608.[113] This left the question of whether Ford Motor Company, as a remote seller, could be liable for return of Harper's downpayment.[114] As in *Durfee*, this was an important issue since the dealer had gone out of business.[115] The court reasoned:

> [A]ppellants claim that only seller may be held liable for return of the price once buyer is held to have justifiably revoked acceptance of nonconforming goods. Although the Code eliminates the defense of privity in suits for damages for breaches of warranties, it is silent as to revocation of acceptance. Adopting appellants' position, however, would effectively deprive Harper of any relief, because it was disclosed at trial that Tri-County is no longer in business. Such a result is contrary to the Code's mandate to administer its remedies liberally. We therefore uphold the lower's court's determination that Ford Motor be held jointly and severally liable with Tri-County for return of Harper's downpayment.[116]

Following *Durfee*, the court, therefore, held Ford Motor Company liable for return of the price paid in the wake of Harper's appropriate and effective revocation of acceptance.[117]

It is evident that the Eighth Circuit, following Arkansas law, trod an analytical path like the path taken by the Minnesota Supreme Court in *Durfee*.[118] In *Harper* the court was faced with a situation where either the buyer would remain liable for the remainder of the price and be burdened with disposition of the defective tractor, or the privity bar to revocation of acceptance and refund had to fall.[119] The court allowed revocation of acceptance and refund without privity by relying upon the Code's directive in section 1-106(1) that remedies shall be liberally administered.[120] Moreover, the *Harper* court relied

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113. *Id.* at 1122. The appellate court sustained the trial court's judgment, noting more than factory defects which would constitute breaches of warranties. The appellate court included lack of adequate service as part of the breach of warranty which aggravated Harper's problems. *Id.* at 1124. The appellate court considered breach of warranty to be a subset of the larger category of non-conformity. *Id.* at 1122. With the combination of breaches of warranties and other non-conformities, the court determined that there was enough evidence of substantial impairment. *Id.* at 1123-24. Additionally, the court found that the notice of revocation was timely. *Id.* at 1124-25.

114. *Id.* at 1125.

115. *Id.* at 1126.

116. *Id.* (citations omitted).

117. *Id.*

118. Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 351 (Minn. 1978). In *Durfee*, however, the buyer had paid the whole purchase price.

119. *Harper*, 671 F.2d at 1121. Tri-County claimed to have repaired the Ford tractor after Harper gave notice of revocation, but by this time Harper had bought a different tractor, hence, even if the repairs made the tractor serviceable, Harper had no use for it. *Id.*

120. *Id.* at 1126.

upon implied warranties and non-conformities to the service requirements of the sales agreement, thereby extending the principle of *Durfee*.[121]

3. Gochey v. Bombardier, Inc.

The Vermont Supreme Court followed the *Durfee-Harper* line of analysis in *Gochey v. Bombardier, Inc.*[122] Gochey bought a new snowmobile from Race and Custom Sports Center (Custom Sports), a dealer for the manufacturer of the snowmobiles, Bombardier, Inc.[123] Bombardier, through Custom Sports, made an express limited warranty by which it promised repair or replacement of defective components, materials, or workmanship at no charge to the buyer.[124]

Serious problems with the snowmobile developed. Both Custom Sports' and Bombardier's representatives made the necessary repairs.[125] Fearing problems might continue after expiration of the express warranty, Gochey requested that the warranty be extended.[126] When Bombardier declined, Gochey gave notice of revocation of acceptance and demanded a refund of the purchase price.[127] When Bombardier refused, Gochey sued Bombardier for revocation of acceptance and refund under Article 2 and the Magnuson-Moss Warranty Act.[128]

After a bench trial, the judge found Bombardier liable for breach of express and implied warranties.[129] The judge further found that Custom Sports was Bombardier's agent. Consequently, Gochey was in privity with Bombardier, the manufacturer. Based on this reasoning, the trial judge allowed revocation of acceptance and ordered refund of the price.[130] Implicit in this ruling was the requirement of privity for revocation of acceptance.[131]

Bombardier appealed, raising an argument that the evidence was insufficient to make Custom Sports its agent.[132] The underlying assumption was that revocation of acceptance and refund were not reme-

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121. *Id.* at 1125-26.
122. 572 A.2d 921 (Vt. 1990).
123. *Id.* at 922.
124. *Id.* Inferentially, this was a twelve month warranty. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* The Magnuson-Moss Warranty Act (Magnuson-Moss) is codified at 15 U.S.C. §§ 2301-12 (1988). Magnuson-Moss authorizes a cause of action in state or federal court when breach of a warranty to a consumer is alleged. *Id.* § 2310(d). Vermont's version of Article 2 is codified at VT. STAT. ANN. tit. 9A, §§ 2-101 to -725 (1966).
129. *Gochey*, 572 A.2d at 922.
130. *Id.*
131. *Id.*
132. *Id.*

dies available against a remote seller who made only a limited warranty.[133] The Vermont Supreme Court did *not* sustain the trial judge's finding of an agency relationship.[134] Acknowledging that Magnuson-Moss furnishes a remedy equivalent to revocation of acceptance (section 2-608) and refund (section 2-711(1)) only in cases where a seller has breached a full warranty,[135] and further acknowledging the contrary line of authorities,[136] the Vermont Supreme Court nonetheless decided to allow revocation of acceptance and refund against Bombardier despite the lack of contractual privity.[137]

The court's rationale was expressed as follows:

> We hold that revocation is available as a remedy against a manufacturer whose product comes with an express warranty that is passed on to the consumer by the seller at the time of the sale, and which product later proves to have substantial defects that continue to exist after a reasonable number of repair attempts . . . .
>
> The argument that allowing such a remedy prevents the actual parties to the sale from being restored to their former positions cannot override the fact that the manufacturer breached its warranty to the ultimate consumer. When the manufacturer's defect results in revocation by the consumer, the manufacturer must assume the liability it incurred when it warranted the product to the ultimate consumer.[138]

The opinion does not state whether Custom Sports breached, or even made, any warranties. Thus, the court did not predicate revocation of acceptance and refund upon the insolvency of the immediate seller as in *Durfee* and *Harper*. Rather, the Vermont Supreme Court rounded out the remedial structure of Article 2 by allowing revocation and refund where they seemed appropriate remedies for breach of warranty by the remote seller.[139] As in *Durfee* and *Harper*, the *Gochey* court

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133. *Id.* at 922-23.

134. *Id.* at 925.

135. *Id.* at 922. The Vermont Supreme Court cited 15 U.S.C. § 2304(a)(4) whereby, for breach of a full warranty, the warrantor must allow the consumer to elect a refund or a replacement of a product that is defective or malfunctions after a reasonable number of repair attempts.

136. *Id.* at 923.

137. *Id.* at 923-24. The court followed Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977); Volkswagen of Am., Inc. v. Novak, 418 So. 2d 801 (Miss. 1982); Ventura v. Ford Motor Corp., 433 A.2d 801 (N.J. Super. Ct. App. Div. 1981); *see also Gochey*, 572 A.2d at 923-24. In *Ventura* the New Jersey court decided to create a "rescission-type remedy" under state law to supplement Magnuson-Moss remedies in cases of limited warranties. *Ventura*, 433 A.2d at 812. The Vermont Supreme Court did the same thing in *Gochey* but was not as explicit as the New Jersey court about the relationship between Magnuson-Moss and the court's own remedial craftsmanship. *Gochey*, 572 A.2d at 923-24. The Vermont Supreme Court also cited favorably Volvo of America Corp. v. Wells, 551 S.W.2d 826 (Ky. Ct. App. 1977). *Id.* at 924.

138. *Id.* at 923-24.

139. *Id.* at 923. Though the trial court relied upon express and implied warranties, the appellate court's holding may be limited to breach of express warranties. *See id.* On close reading,

seemed concerned about a policy that would allow a remote warrantor to escape from the most appropriate remedy for the aggrieved buyer.

4. Summary

In the foregoing cases, which are representative of the minority viewpoint, concern for the optimal remedial result is dominant. The courts emphasized the remedial objective of section 1-106(1). Taking into account the warranties made by the remote sellers, the plight of the buyers, and the Code's remedial objective, the silence of section 2-608 on the privity issue did not prove troublesome. The decisions do not manifest any frontal attacks on the majority viewpoint. Rather, in an effort to do justice within the Code's remedial scheme, the minority passes over the majority's reservations about revocation and refund without privity.

Under this line of cases, Cherri[140] would fare quite well. Assuming she could prove that she accepted the office equipment without any knowledge of the defects due to their nature or seller's assurances, and that the defects substantially impaired the value of the equipment to her, and assuming further that her notice was timely, she should get a full refund from NewTech for breach of its express warranty. She would be able to give up the goods, and title thereto, in return for the refund. She could then use the refund to buy new equipment or to pay off her note to the bank.

III. COMMENTATORS FOR AND AGAINST REVOCATION OF ACCEPTANCE WITHOUT PRIVITY OF CONTRACT: THE EXPERTS DIVIDED

Virtually every treatise and hornbook on sales law takes a position on the privity question, namely, whether or not revocation of acceptance and refund are available as remedies against a remote seller. Those favoring the majority view generally make a text-based argument for their position against revocation of acceptance and refund without privity.[141] Those favoring the minority view generally make a policy-based argument in support of their position in favor of revocation of acceptance and refund as remedies against remote sellers.[142]

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however, the court states that its holding pertains "[to] a manufacturer whose product comes with an express warranty." *Id.*

140. Cherri is the hypothetical buyer from the introduction.

141. See *supra* notes 28-73 and accompanying text for a discussion of cases within the majority view.

142. See *supra* notes 74-139 and accompanying text for a discussion of cases within the minority view.

Most of the commentaries only spend two or three pages on the issue. A brief survey of the main commentators follows.

A. *Commentators Opposing Revocation of Acceptance and Refund as Remedies Against Remote Sellers*

Acknowledging the contrary cases, Professors White and Summers recommend that the courts follow the majority viewpoint.[143] They base their position mainly on the fact that section 2-608 twice uses the word "seller" which is defined in section 2-103(1)(d) as "a person who sells or contracts to sell goods."[144] Since manufacturers or distributors not in privity with the buyer do not "sell to the buyer," White and Summers do not regard them as "sellers" within the meaning of that term in section 2-608.[145] Consequently, they contend that revocation should be limited in its application to immediate sellers, that is, sellers in contractual privity with revoking buyers.[146]

Professors White and Summers are critical of the result in *Ford Motor Credit Co. v. Harper* in which the Eighth Circuit upheld revocation and refund against the remote seller.[147] Since Ford Motor Company was not a "seller," White and Summers declare that the decision was not authorized by the Code.[148] Their criticism is confusing, however, because they state that "[a]bsent warranty liability between the manufacturer and the seller, we would not go so far as the court in this case."[149] This seems to imply that Harper's right to revoke acceptance and get a refund from a remote seller should turn on whether or not the remote seller breached a warranty to its immediate buyer.[150] Why the ultimate buyer's rights should turn on the immediate seller's rights against *its* seller is not self-evident if an obligation running to the buyer from the remote seller is breached. White and Summers may mean that when the immediate seller would have a right of reimbursement against its seller, a direct action may be allowed to promote judicial efficiency.[151] In the alternative, they may mean that buyer's rights are

143. WHITE & SUMMERS, *supra* note 5, § 8-4.

144. WHITE & SUMMERS, *supra* note 5, § 8-4.

145. WHITE & SUMMERS, *supra* note 5, § 8-4.

146. WHITE & SUMMERS, *supra* note 5, § 8-4. Their position is thus anchored in the text of section 2-608.

147. WHITE & SUMMERS, *supra* note 5, § 8-4; see also *supra* notes 96-117 and accompanying text for a discussion of *Ford Motor Credit Co. v. Harper*.

148. WHITE & SUMMERS, *supra* note 5, § 8-4.

149. WHITE & SUMMERS, *supra* note 5, § 8-4.

150. WHITE & SUMMERS, *supra* note 5, § 8-4.

151. In other words, where the buyer can revoke against his immediate seller and the immediate seller can successfully sue for indemnity against the manufacturer (remote from the buyer), a direct action by the buyer against the manufacturer would be a short-cut to the source, thus obviating the need for two suits or a suit with a third party claim. This does not take into account

derivative of rights established in the earlier sale by the remote seller to *its* immediate buyer. In any event, White and Summers are skeptical of the minority viewpoint mainly because it seems to be outside the language of section 2-608.[152]

The commentary of Ronald Anderson, Esquire, also strongly criticizes the minority position claiming that it confuses principles of product liability law with the contract principles which are implicit in section 2-608.[153] He argues that "[r]evocation of acceptance by definition requires and pre-supposes a [relationship of contractual] privity."[154] Anderson strongly opposes the position taken by this Article.

> Turning now to the revocation of acceptance, consider first that the acceptance is in substance a communication by the buyer that the contract by which he has purchased the goods has been performed by the seller because the goods delivered by the seller conform to the contract. When the buyer revokes acceptance, he communicates to the seller that the latter's contract has not been performed because the goods were not conforming. How can a nonprivity plaintiff complain to the remote manufacturer that the manufacturer has not performed his contract duty to deliver goods to the buyer when by hypothesis there is no contract between the defendant and the plaintiff? Obviously, the only one under a contract duty to the buyer is the seller who sold the goods to the buyer and a revocation of acceptance directed at the remote manufacturer who has no contract duty to deliver anything to the plaintiff buyer is meaningless.[155]

Anderson's position, therefore, dovetails with the position taken by Professors White and Summers. Revocation without contractual privity is made to appear nonsensical.

Likewise, Professors Hillman, McDonnell and Nickles support the majority approach in their treatise.[156] They take a dim view of *Durfee* and its progeny and write disparagingly of opinions which ignore the "seller" requirement of section 2-608.[157] In their view, revocation of

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the situation where the immediate seller successfully disclaims all warranties and the buyer's only claim for breach lies against a remote seller.

152. In their 1993 supplement, White and Summers further state:

> In general we indorse the narrow interpretation. Rejection and revocation are to restore the plaintiff to the position he was in before the contract was made. We see no reason why a purchaser from a local seller should be able to thrust the product back on a remote manufacturer and so achieve more than the status quo ante.

WHITE & SUMMERS, *supra* note 5, § 8-4 (Supp. 1993).

153. 4 RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE § 2-608:10 (3d. ed. 1983).

154. *Id.*

155. *Id.*

156. ROBERT A. HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE ¶ 8.02[3] (1985).

157. *Id.*

acceptance is inextricably tied to a seller in privity and any results to the contrary represent a regrettable perversion of section 2-608.[158] Joined with White, Summers, and Anderson, these authorities favoring the majority view seem powerful indeed.

B. Commentators Supporting Revocation of Acceptance and Refund as Remedies Against Remote Sellers

The minority view by which a buyer can revoke acceptance and gain a refund of the price from a remote seller when the procedural and substantive requisites of section 2-608 are met is supported by consumer advocates. The minority view also has its champions within the legal academic community.

Professor George Wallach commented favorably on *Durfee* in the early 1980s.[159] He stated:

> It is impossible to forecast whether this decision [*Durfee*] will be followed, or how far its reasoning will be extended. There does not appear to be any reason, other than an accident of history, for privity of contract to have survived as a contract defense when the buyer seeks to return the goods, but to have largely disappeared in breach of warranty actions. If the defense of privity is no longer considered a desirable one in one case, it ought not to be in the other.[160]

In Professor Wallach's 1989 supplement, he applauded the progress which the minority viewpoint had made in cases such as *Ford Motor Credit Co. v. Harper*.[161] Professor Wallach stated:

> In most, if not all of these cases, the manufacturer would be the party who would ultimately bear responsibility for the defective goods. Forcing the buyer to revoke against his seller who would then have to seek indemnity from the manufacturer is not only a waste of time and energy, but a policy which serves no apparent purpose.[162]

Noting that in many cases a remote seller will eventually be liable because of an indemnity claim made by an immediate seller after loss to

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158. *Id.* In describing the case of Ventura v. Ford Motor Co., 433 A.2d 801 (N.J. Super. Ct. App. Div. 1981), by selective use of quotation marks, the authors tend to mock the analysis regarding privity as a relic and find revocation against the remote seller consistent with the more common purpose of using U.C.C. § 2-608 against the immediate seller. Thus, their criticisms of the minority position are disparaging.

159. GEORGE WALLACH, THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE ¶ 9.02[6] (1981). For a discussion of *Durfee*, see *supra* notes 77-93 and accompanying text.

160. WALLACH, *supra* note 159, ¶ 9.02[6].

161. WALLACH, *supra* note 159, ¶ 9.02[6] (Supp. 1989). For a discussion of *Ford Motor Credit Co. v. Harper*, see *supra* notes 96-117 and accompanying text.

162. WALLACH, *supra* note 159, ¶ 9.02[6] (Supp. 1989).

a buyer, Professor Wallach declared the *Durfee-Harper* trend desirable.

The revised edition of Professor Wallach's text, written in conjunction with Professor William Henning, continues to support the minority view and emphasizes policy concerns.[163] Professors Wallach and Henning appear to concede that the revocation of acceptance and refund without privity are not *directly* authorized by the Code; however, the Code does not proscribe these remedies either.[164] Their argument for allowing revocation of acceptance and refund against remote sellers rests mainly on policy grounds.[165]

Professor Barkley Clark and Christopher Smith, Esquire,[166] also favor *Durfee* and its progeny. In 1984 when their volume was first published, Clark and Smith declared that the cracking of the citadel of privity in relation to revocation of acceptance was a development "consistent with the language and purposes of the Article 2 warranty scheme."[167] They have continued to argue, in their annual supplements, against the wisdom of decisions denying revocation of acceptance and refund for lack of privity.[168] They have criticized courts that allow damage claims against remote sellers yet deem revocation of acceptance to be conceptually separate from "breach of warranty" and cut it off as an allowable remedy.[169]

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163. WILLIAM HENNING & GEORGE WALLACH, THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE ¶ 9.02 [6] (1992).

164. *Id.* A trend is developing in favor of permitting rejection and revocation against remote parties, although there are too few cases to predict whether the trend will continue. *See supra* notes 74-139 and accompanying text. The result, while not directly authorized by the Code, is a desirable one. In most, if not all of these cases, the manufacturer would be the party who would ultimately bear responsibility for the defective goods. Forcing the buyer to revoke against the seller and then seek indemnity against the manufacturer is not only a waste of time and effort, but a policy that serves no constructive purpose. In those cases in which there is no warranty liability running from the manufacturer to the seller, however, the courts should continue to be cautious and insist on the presence of an agency relationship between the manufacturer and the seller or an express warranty running from the manufacturer to the buyer. HENNING & WALLACH, *supra* note 163, ¶ 9.02[6].

If the limitations expressed in the last sentence had been adhered to in *Harper*, the Eighth Circuit would have had no basis upon which to find the remote seller (Ford) liable for the price. It will therefore be argued that breach of implied warranties as well as express warranties should be grounds for revocation against a remote seller. *See infra* notes 96-117 and accompanying text.

165. HENNING & WALLACH, *supra* note 163, ¶ 9.02[6].

166. BARKLEY CLARK & CHRISTOPHER SMITH, THE LAW OF PRODUCT WARRANTIES ¶ 10.03[3][c] (1984).

167. *Id.*

168. *Id.* ¶ 10.03[3][c] (Supp. 1989) (writing a strong protest against Gasque v. Mooers Motor Car Co., 313 S.E.2d 384 (Va. 1984)).

169. *Id.* This criticism of the majority view is especially effective and will be addressed *infra*, notes 318-430 and accompanying text.

Finally, the National Consumer Law Center[170] favors revocation of acceptance and refund without privity.[171] Its writers have noted with disapproval that courts have tended to view revocation of acceptance as the functional equivalent of common law rescission, and consequently, have side-stepped the fundamental question of public policy.[172] Writing for the National Consumer Law Center, Rosemarin and Sheldon state:

> The question is one of policy: is it fair to require the manufacturer to return the purchase price to the consumer when the manufacturer never received the consumer's money in the first place? On the other hand, is it fair to deprive an injured and innocent consumer of recovery of the purchase price for a worthless product when the manufacturer indirectly benefitted from the retail sale? As the policies here are similar to those surrounding the privity issue in general, it can be anticipated that many courts will ultimately allow the remedy against the manufacturer.[173]

The National Consumer Law Center, therefore, views the difference between the minority and majority viewpoints exclusively in terms of public policy.

C. *Summary*

The commentators and the courts have gone both ways on the privity issue which has arisen in connection with section 2-608. Commentators favoring revocation of acceptance and refund without privity tend to dwell on public policy concerns while asserting that their positions are sustained by, or at minimum consistent with, the remedial scheme of Article 2. Commentators opposing revocation of acceptance and refund without privity generally avoid public policy concerns and dwell on Article 2's text. They tend to equate revocation of acceptance with common law rescission. In reading the commentators' views, one has the feeling that the proponents of the opposing viewpoints pass each other as traveler's going in opposite directions with scarcely an acknowledgment that the other might have sound reasons for picking an opposite destination. In the rare instances, when there is acknowledgment of the opposite viewpoint, each side dismisses the other without any in-depth analysis, or recognition of strength in the other's argument.

Each side has defended worthwhile interests; yet, the main concepts and values involved in the clash remain largely unexplored. Iso-

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170. The National Consumer Law Center is located at 11 Beacon Street, Boston, Massachusetts 02108.

171. YVONNE W. ROSMARIN & JONATHAN SHELDON, SALES OF GOODS AND SERVICES § 19.2.4 (2d ed. 1989).

172. *Id.*

173. *Id.*

lating and clarifying the propositions upon which the battle should be joined is a task which must be accomplished before advocating a resolution of the conflict. In advance of defining the issues, however, there are more cases which upon examination can further illuminate the nature of the controversy.[174]

IV. CIRCUMVENTING THE PRIVITY ISSUE IN SECTION 2-608: COURTS ALLOW ACTIONS AGAINST REMOTE SELLERS RESULTING IN REFUNDS WITHOUT EXPLICITLY BREAKING DOWN THE PRIVITY BARRIER

While a majority of courts favor the *Voytovich* approach,[175] and only a minority favor the *Durfee* approach,[176] case counting can be misleading. It can be misleading if one fails to recognize that courts have employed a variety of doctrines to make revocation of acceptance and refund viable buyer's remedies without embracing the minority viewpoint. These cases may indicate dissatisfaction with the majority viewpoint. These cases quite definitely reveal that barring revocation and refund without privity has led to straining and twisting of related doctrines to reach just results.

A. *Revocation of Acceptance and Refund Based on Agency Theory*

The simplest way to justify revocation of acceptance by a buyer against a manufacturer or distributor when there is a dealer between the manufacturer or distributor and the buyer is to find an agency relationship between the dealer and the more remote party.[177] If the buyer establishes that his or her dealer was an agent of the remote seller, then the *remote* seller (principal) becomes an *immediate* seller and the privity issue vanishes.[178] This was the basis of the trial court's decision in *Gochey v. Bombardier, Inc.*[179]

An Oregon court of appeals closed the privity gap in this manner in *Gaha v. Taylor-Johnson Dodge, Inc.*[180] despite the fact that in an earlier case, *Clark v. Ford Motor Co.*,[181] the same court had held that there could be no revocation of acceptance in the absence of privity. The *Gaha* court sustained a judgment allowing revocation of acceptance against a motor home manufacturer which had sold the mobile

174. For a discussion of these cases, see *infra* notes 180-221 and accompanying text.

175. *See supra* notes and 28-73 accompanying text.

176. *See supra* notes 74-139 and accompanying text.

177. *See, e.g.*, Gochey v. Bombardier, Inc., 572 A.2d 921, 922 (Vt. 1990).

178. *See id.*

179. *Id.*; *see also supra* notes 122-38 and accompanying text.

180. 632 P.2d 483 (Or. Ct. App. 1981).

181. 612 P.2d 316 (Or. Ct. App. 1980). The court pointed out that there was no evidence that the dealer was an agent of Ford Motor Company in the legal sense of agency and held that as a matter of law revocation of acceptance was not allowable in the absence of privity. *Id.* at 319.

home through its dealer.[182] At trial, the jury decided that the dealer was the manufacturer's agent.[183] Upholding the judgment, the appellate court stated that "[t]he evidence here, taken as a whole, permits inferences that those factors [referring to the requisites for agency] existed and presented a jury question as to the dealer's agency relationship with Champion [manufacturer]."[184] Thus, the privity problem was overcome by letting the jury make an inference of agency. Similarly, in *Costa v. Volkswagen of America, Inc.*, the Vermont Supreme Court sustained a finding of an agency relationship in a revocation of acceptance case against a car distributor.[185]

Clearly, if the evidence reasonably permits an inference of an agency relationship between a manufacturer and a dealer, lack of privity cannot bar revocation of acceptance and refund. The buyer has, in fact, bought directly from the principal/manufacturer and has a right of revocation of acceptance and refund against such party who is no longer remote, but through the agency relationship, is an immediate seller. The proper use of agency theory will, accordingly, solve what may appear to be privity problems in connection with section 2-608.

A problem arises, however, if courts deem it necessary to finesse agency theory to circumvent the privity issue.[186] Additionally, even with clear and proper instructions, a sympathetic jury may remove the privity barrier, allowing a court to adhere to the majority view of section 2-608, while allowing revocation of acceptance and refund against a manufacturer. Judicial finesse or jury nullification may be fine for an occasional fortunate buyer, but these techniques leave the law open to uneven results on similar facts. Incontrovertibly, in most reported revocation of acceptance cases involving car sales, the manufacturer or dis-

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182. 632 P.2d at 484.

183. *Id.* at 486-87.

184. *Id.* at 486.

185. 551 A.2d 1196 (Vt. 1988). Plaintiff George Costa purchased a car from Hyannis Porsche-Audi, Inc. (dealer) franchised by Volkswagen of America. *Id.* at 1197. The trial judge allowed the jury to consider whether or not the dealer was Volkswagen of America's agent and the jury found affirmatively, making revocation against the dealer revocation against its principal. *Id.* at 1197 n.1.

Sustaining the jury's determination, the Supreme Court of Vermont stated:

> It is clear that — based on the trial court's instructions relevant to agency (to which defendant failed to object) — the jury could, and in fact did, find the requisite relationship between VWoA and the dealership. As such, plaintiff need not show privity of contract between himself and VWoA so long as such privity exists between him and Hyannis Porsche-Audi, of which there is no question. This is the law of the case.

Id. at 1198 n.1. In both *Gaha* and *Costa*, the principles of agency paved the way to revocation of acceptance and refund. The National Consumer Law Center recommends trying to amass evidence to create an issue about agency. *See* ROSMARIN & SHELDON, *supra* note 171, § 19.2.4.

186. For example, by allowing a finding of agency on customer's testimony that he thought the dealer was the manufacturer's agent.

tributor has been able to persuade the court that its dealer was *not* its agent.[187]

It is remarkable that a Ford dealer is an agent when a jury is allowed to decide,[188] and not an agent when the court answers the question.[189] The fact that the requisites for agency status have been found in very few cases points toward the desirability of reconsidering the privity issue under section 2-608.[190] In any event, cases where dealers are found to be agents of manufacturers indicate the existence of some discontent with the privity barrier raised by the majority view of section 2-608. Courts and jurors have strained to bridge the privity gap, thinking this was necessary to do justice for an unfortunate buyer. Such cases should be taken into account when deliberating about the proper reach of section 2-608 for they cast some doubt upon the soundness of the policy implicit in the majority line of cases.

B. *Revocation of Acceptance Against a Party in Privity for Breach by a Remote Seller*

In *Troutman v. Pierce, Inc.*, the Supreme Court of North Dakota dealt with the privity problem by allowing revocation and refund as remedies against a dealer who did not breach a warranty.[191] The remedy was premised on breach of warranties by the manufacturer (remote seller).[192] The plaintiffs, the Troutmans, bought their mobile home which was manufactured by Schult, from Pierce, Inc., the dealer.[193] After inordinate problems with water seepage and leakage, the Troutmans gave notice of revocation of acceptance to Pierce and Schult.[194] Their notice being unsuccessful, the Troutmans sued both Pierce and Schult seeking revocation of acceptance under North Dakota's version

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187. *See, e.g.*, Conte v. Dwan Lincoln-Mercury, Inc., 374 A.2d 144 (Conn. 1976) (finding that there was no evidence to support the conclusion that the dealer was the agent of the manufacturer).

188. *See, e.g., Costa*, 551 A.2d at 1198 n.1 (jury finding of agency relationship removes burden on plaintiff to prove privity of contract); *Gaha*, 632 P.2d at 486-87 (jury finding dealer was manufacturer's agent).

189. *See, e.g.*, Clark v. Ford Motor Co., 612 P.2d 316 (Or. Ct. App. 1980) (finding that there was no evidence that the dealer was an agent of the manufacturer in the legal sense of agency and holding that, as a matter of law, revocation of acceptance was not allowable in absence of privity).

190. U.C.C. § 2-608 (1977). Theoretically, one could try to rewrite agency law to attack the same problem. This seems like taking a battalion after a sniper. Moreover, there could be unforeseen collateral consequences. The privity problem addressed in this article is the problem which arises under U.C.C. § 2-608. This section can be more expeditiously fixed than agency law.

191. 402 N.W.2d 920 (N.D. 1987).

192. *Id.* at 923.

193. *Id.* at 921.

194. *Id.*

of U.C.C. section 2-608.[195] Pierce cross-claimed against Schult for indemnity.[196]

The jury found that Schult, the remote seller, *not* Pierce who was the immediate seller, had breached express and implied warranties, thereby substantially impairing the value of the mobile home to the buyers.[197] The trial judge allowed revocation of acceptance and refund against Pierce although he had not breached any warranty. The judge then allowed Pierce's indemnity claim against Schult who *had breached* its warranties.[198] Economically, the result was approximately the same as if the court had allowed revocation of acceptance and a refund in the absence of privity.[199]

On appeal, Schult argued that the revocation of acceptance underlying Pierce's indemnity claim was unjustified because Pierce had not breached any warranties.[200] The Supreme Court of North Dakota sustained the judgments, stating that a buyer is allowed to revoke acceptance "whether it is the seller or the manufacturer that is responsible for the non-conformity."[201] Thus, revocation of acceptance against the dealer was appropriate and effective when the remote seller's breach furnished the factual basis for the revocation of acceptance and refund.[202]

The manner in which the court attained the result in *Troutman*, however, is problematic because Pierce ended up with a judgment against it even though it breached no warranties.[203] Simply allowing a direct action for revocation for acceptance and refund by the Troutmans against Schult would seem more fair and efficient. For now, one should simply accept the result and the reasoning and inquire about its significance. Is this case not evidence of a court straining to get the right result without breaking down the privity barrier? *Troutman*

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195. *Id.* at 922.; *see* N.D. CENT. CODE § 25-2-608 (1986) (identical to U.C.C. § 2-608 (1977)).

196. *Troutman*, 402 N.W.2d at 922.

197. *Id.*

198. *Id.*

199. This does not consider attorney fees which the dealer in all probability was required to pay.

200. Schult asserted that the trial court erred in determining that the Troutmans had validly revoked their acceptance of the mobile home because the jury found that Pierce was not responsible for any of the unremedied defects. *Id.*

201. *Id.* at 923.

202. *Id.* at 924. Since the dealer's indemnity claim was successful, the result was probably correct.

203. *Id.* at 922. Hence, revocation of acceptance was severed from any theory of liability and left dangling for a buyer to use against an immediate seller who had no liability for any breach. The common sense of the result should not obscure the questionable nature of the approach used to get the result.

shows a weakness inherent in the majority viewpoint, namely, that it cuts off revocation of acceptance even when it is the remedy best-suited to the facts on any occasion where the immediate seller has made valid disclaimers. While the North Dakota court did not explicitly follow either the majority or minority approach on the privity requirement under section 2-608, the court was evidently unprepared to accept the proposition that revocation of acceptance should be precluded for lack of privity between the buyer and the party in breach.

In an analogous case, *Freeman v. Hubco Leasing, Inc.*, the Supreme Court of Georgia decided that revocation of acceptance against a lessor was justified due to breaches of warranty by a non-privity supplier.[204] There was no explicit finding of an agency relationship between the supplier and the lessor.[205] As in *Troutman*, the lack of privity between the breaching warrantor and the buyer did not preclude revocation of acceptance. Revocation of acceptance, however, was allowed *only* against the seller in privity.[206] Again, legal doctrine was strained to obtain what appears to be a just result.

C. *Revocation of Acceptance and Refund Without Relying Upon Section 2-608*

In *Gauthier v. Mayo*, a Michigan appellate court sustained a trial court's judgment allowing the remedies of revocation of acceptance and refund against a remote seller of a modular home without justifying the result under Michigan's version of section 2-608.[207] The Gauthiers bought a modular home manufactured by Wickes Corporation from Mayo, a Wickes dealer.[208] Mayo erected the home on the Gauthiers' property.[209] When the mobile home proved uninhabitable due to manu-

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204. 324 S.E.2d 462 (Ga. 1985).

205. *Id.* at 468.

206. *Id.* at 470. The fact that the supplier and lessor were related companies influenced the court. It stated:

> Regarding the revocation of acceptance, OCGA Sec. 11-2-608, we decide only with respect to leases that where, as here, the lessor makes no warranty and has no obligation to make necessary repairs to the leased vehicle, the lessee is obligated to make all necessary repairs to the leased vehicle, the selling dealer is obligated to the lessee to repair manufacturer's defects, and the dealer defaults on that obligation, the lessee may revoke acceptance as against the lessor where the dealer and lessor have the same stockholders, directors and officers.

Id.

207. 258 N.W.2d 748, 749 (Mich. Ct. App. 1977); *see* MICH. COMP. LAWS § 440.2608 (1967) (identical to U.C.C. § 2-608 (1977)).

208. *Gauthier*, 258 N.W.2d at 749.

209. *Id.*

facturing defects attributable to Wickes, the remote seller, the Gauthiers sued Wickes seeking a refund of their purchase price.[210]

The trial court, relying on Michigan's version of section 2-608, ordered Wickes to remove the home from the Gauthiers' property and to return the Gauthiers' purchase price with interest.[211] Wickes appealed.[212] The appellate court noted that under Michigan precedent a buyer may bring a direct action for damages due to economic loss against a remote seller.[213] In such a case damages are calculated by subtracting salvage value from the purchase price.[214] Since the trial court had reached a "substantially equivalent result" by awarding the purchase price and requiring that Wickes remove the modular home,[215] the court let the judgment stand as "not inconsistent with substantial justice."[216] The court's ruling afforded the same result as would have been attained by breaking down the privity requirement of section 2-608. It accomplished this, however, without explicitly taking on the privity issue.

In *Johnson v. General Motors Corp.*, the Supreme Court of Kansas also allowed revocation of acceptance and refund as remedies against a remote seller without confronting the privity issue under Kansas' version of U.C.C. section 2-608.[217] Johnson bought a pickup truck, manufactured by General Motors, from Ed Roberts Chevrolet, the dealer.[218] Two months after delivery, Johnson gave General Motors notice of revocation of acceptance due to significant, unresolved problems with the pickup.[219] The trial court allowed the revocation and refund.[220]

While the Kansas Supreme Court made a detailed analysis of the issues raised by the parties on appeal, it does not appear that the absence of privity between Johnson and General Motors ever came up. The issue was never addressed. Therefore, the judgment for revocation of acceptance and refund without privity was affirmed.[221] If the court or counsel assumed an agency relationship between General Motors

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210. *Id.*
211. *Id.*; *see* MICH. COMP. LAWS § 440.2608.
212. *Gauthier*, 258 N.W.2d at 749.
213. *Id.*
214. *Id.* at 750.
215. *Id.*
216. *Id.*
217. 668 P.2d 139 (Kan. 1983); KAN. STAT. ANN. § 84-2-608 (1983) (identical to U.C.C. § 2-608)
218. *Johnson*, 668 P.2d at 141.
219. *Id.*
220. *Id.*
221. *Id.* at 147. The court required adjustments of the set-off and adjustments for the buyer's prejudgment interest but it affirmed revocation of acceptance. *Id.*

and its dealer, it was an unstated assumption. Perhaps everyone bypassed the privity issue under section 2-608 on the assumption that lack of privity was not a bar to relief.

D. *Summary*

From the foregoing cases, three conclusions can be drawn. First, any discussion of the majority-minority division described in Part II does not tell the whole story respecting judicial responses to plaintiffs seeking refund of the price from remote sellers. Second, agency law furnishes a method of circumventing the privity requirement in some cases. Third, some courts may allow revocation of acceptance against the immediate seller for the remote seller's breach,[222] or may overlook the privity issue to avoid disturbing a trial court result that seems just.[223]

These cases raise a warning about the wisdom of the majority interpretation of section 2-608. If the statutory law is so cramped that judges and juries are circumventing it to gain just results, the law should be re-examined, revised, or interpreted differently, so long as this can be done consistently and with integrity under the statute as it is presently written. Revocation of acceptance and refund should be permissible under the current text, but assuredly, any revision should clarify this matter so that neither courts nor counsel need to engage in mental gymnastics to gain justice in sales transactions.

V. WHY DO THE CASES AND COMMENTATORS DIFFER? AN ANALYSIS OF THE MAIN POINTS OF DIFFERENCE BETWEEN COURTS AND COMMENTATORS FAVORING AND OPPOSING REVOCATION OF ACCEPTANCE AND REFUND WITHOUT PRIVITY

In ferreting out the main differences between the majority and minority views by analyzing the appellate opinions, one can conclude that these main differences fall into three categories. First, courts disagree on the meaning of the word "seller" which appears twice in section 2-608.[224] Second, courts disagree on the goal to be achieved by a successful revocation of acceptance.[225] Specifically, the courts differ as to whether revocation of acceptance and refund are a means to restore the status quo ante or whether these remedies are part of a grander remedial scheme. Third, courts disagree about the policy implications of al-

222. *See, e.g.*, Troutman v. Pierce, Inc., 402 N.W.2d 920 (N.D. 1987).

223. *See, e.g.*, *Johnson*, 668 P.2d at 147; Gauthier v. Mayo, 258 N.W.2d 748, 750 (Mich. Ct. App. 1977).

224. *See* U.C.C. § 2-608 (1977).

225. *See infra* notes 241-52 and accompanying text.

lowing revocation of acceptance against remote sellers. These differences are discussed below.

A. Does "Seller" Mean "Immediate Seller" or Can the Term Include "Remote Sellers?"

The word "seller" appears in section 2-608, subsections (1)(b) and (2).[226] The term is first used in describing the conditions under which acceptance must have occurred before revocation of acceptance will be allowed.[227] Revocation of acceptance requires that acceptance was made either on the assumption that the non-conformity would be cured or without discovery of the non-conformity.[228] Pursuant to subsection (1)(b), the *seller's* assurances which induce acceptance[229] without discovery of a non-conformity can be the equivalent of difficulty of discovery.[230] Pursuant to subsection (2), the effectiveness of a revocation of acceptance is contingent upon the buyer's notice to the *seller*.[231] Thus, the term "seller" is woven into the substantive and procedural requirements for a successful revocation of acceptance.[232]

According to section 2-103(1)(d), a "seller" is a "person who sells or contracts to sell goods."[233] The term "seller" is inextricably linked to Article 2's definition of "sale," which section 1-106(1) defines as "the passing of title from the seller to the buyer for a price."[234] Thus, a "seller" is a person who passes title to goods to a buyer who pays the purchase price in return.

The majority approach[235] focuses upon the definition of "seller" to sustain the conclusion that privity is a requirement for revocation of acceptance under section 2-608. Generally in these cases, the complaining buyer had paid the *immediate* seller, had taken title from the *immediate* seller, and had neither paid money to, nor taken title from a remote seller.[236] These courts, therefore, summarily concluded that allowing revocation of acceptance and refund against any seller not in privity would run afoul of section 2-608's plain meaning.

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226. U.C.C. § 2-608(1)(b), (2).
227. *Id.* § 2-608 (1)(b).
228. *Id.* § 2-608(1)(a), (b).
229. *Id.* § 2-608(1)(b).
230. *Id.*
231. *Id.* § 2-608(2).
232. *Id.* § 2-608(1)(b), (2).
233. *Id.* § 2-103(1)(d).
234. *Id.* § 1-106(1).
235. The majority approach is exemplified by Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208 (6th Cir. 1974); Conte v. Dwan Lincoln-Mercury, Inc., 374 A.2d 144 (Conn. 1976); and Alberti v. Manufactured Homes, Inc., 407 S.E.2d 821 (N.C. 1991).
236. *See supra* notes 29-70 and accompanying text.

Some of the minority-view courts emphasize that the disappointed buyer would have a direct action for *damages* against the *remote seller*.[237] Moreover, the warranty sections under which suit would be brought for damages state that the warranties of quality are made by *sellers*.[238] In *Gochey v. Bombardier, Inc.*,[239] the court emphasized the *direct contractual obligation* running from the remote seller to the buyer when the remote seller makes an express warranty on the goods.[240] Thus, under the minority approach, the broader meaning ascribed to the term "seller" in the damages cases is by implication carried over into section 2-608 when an aggrieved buyer seeks to obtain a revocation of acceptance followed by a refund under section 2-711(1).

A court, faced with a claimant who wants revocation of acceptance against a remote seller, must decide on the meaning of the term "seller." Either the meaning is confined to the immediate seller who passes title to the goods to the buyer or it is not. It will be argued in Part VI that courts allowing the broader meaning better effectuate the purposes behind Article 2's remedial scheme than do courts adhering to the majority approach.

B. Does Revocation of Acceptance Cancel the Contract and Result in Restoration of the Status Quo Ante or Does It Assist the Court in Protecting the Reasonable Expectations of the Buyer as if the Contract had been Fully Performed?

There is genuine and widespread conceptual confusion about the result of a timely and justified notice of revocation of acceptance. Courts disagree, or are very vague, about what really should happen when sections 2-608 and 2-711(1) are used in tandem. The majority courts invariably commingle the concepts of revocation of acceptance and rescission of contract. Often a plaintiff sues for rescission, and the trial court, or the appellate court, interprets the complaint as requesting revocation of acceptance under section 2-608 thereby bringing the case within the scope of the Code's remedial provisions.[241] Nonetheless, when the courts in the majority-view jurisdictions interpret the plead-

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237. Ford Motor Credit Co. v. Harper, 671 F.2d 1117 (8th Cir. 1982); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1978).

238. *See* U.C.C. §§ 2-313, -314, -315.

239. 572 A.2d 921 (Vt. 1990).

240. For a discussion of *Gochey*, see *supra* notes 122-38 and accompanying text.

241. *See, e.g.*, Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208 (6th Cir. 1974); Henderson v. Chrysler Corp., 477 N.W.2d 505 (Mich. Ct. App. 1991).

ings as requests for relief under section 2-608, the nature of the relief sought is viewed as restitutionary or restorative.[242]

For example, in *Gasque v. Mooers Motor Car Co., Inc.*,[243] the Supreme Court of Virginia sustained a trial court's denial of revocation of acceptance against a remote seller and declared that Virginia's version of U.C.C. section 2-608 is "conceptually inapplicable to any persons other than the parties to the contract of sale sought to be rescinded."[244] The *Gasque* court reasoned that successful revocation of acceptance *cancels* the underlying contract and "as fairly as possible, returns the contracting parties to the status quo ante."[245] It is fair to conclude that under the majority view, represented by *Gasque*, revocation of acceptance and refund are deemed to be modern labels for rescission and restitution. Since returning the goods to and obtaining a refund from a remote seller is something different than restoration of the status quo ante because the immediate seller is left out, these courts conclude that applying section 2-608 against remote sellers makes no sense.[246] On this point, several commentators forcefully concur.[247]

In the minority-view jurisdictions, one does not find direct conflict with the foregoing view; rather, the minority courts tend to put the emphasis on Article 2's remedial scheme as a whole.[248] In these jurisdictions, judges have no problem with approving a forced exchange whereby the buyer gets money and the remote seller gets title to the goods when this seems to be the appropriate remedy under the facts.[249] These courts do not *expressly* contradict the theory that the function of section 2-608 in combination with its remedial companion, section 2-711(1), is restorative. They *impliedly* determine that damages alone are inadequate, and therefore employ sections 2-608 and 2-711(1) under the Code's mandate that remedies "shall be liberally administered."[250] When revocation of acceptance and refund seem right in accordance with the philosophy of liberal remedial administration, the minority-view courts simply employ these remedies without analyzing

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242. *See, e.g.*, Seekings v. Jimmy GMC of Tucson, Inc., 638 P.2d 210 (Ariz. 1981); Gasque v. Mooers Motor Car Co., Inc., 313 S.E.2d 384 (Va. 1984).

243. 313 S.E.2d 384 (Va. 1984).

244. *Id.* at 390; *see* VA. CODE ANN. § 8.2-608 (Michie 1991) (identical to U.C.C. § 2-608).

245. *Gasque*, 313 S.E.2d at 390.

246. See *supra* notes 28-73 for a discussion of cases adopting this viewpoint.

247. *See, e.g.*, ANDERSON, *supra* note 153, § 608:10; HILLMAN ET AL., *supra* note 156, § 8.02(3).

248. *See, e.g.*, Ford Motor Credit Co. v. Harper, 671 F.2d 1117, 1126 (8th Cir. 1982); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 357 (Minn. 1978).

249. See *supra* note 76 for cases adopting the minority viewpoint.

250. *See Harper*, 671 F.2d at 1126; *Durfee*, 262 N.W.2d at 357.

the restitutionary theory of section 2-608 which has been explicitly mandated in the majority cases.[251]

A court taking on the privity question under section 2-608 must decide: Is revocation of acceptance necessarily restorative in nature, and consequently, conceptually tied to persons in privity, or is it reasonable to view revocation of acceptance and refund as rightly effecting a remedial goal beyond restoration of the status quo ante? It will be argued in Part VII that the majority has taken a fundamentally incorrect approach by equating revocation of acceptance and refund with rescission and restitution.[252] Revocation of acceptance and refund are parts of a grander scheme, the object of which is protection of the aggrieved party's expectancy interest. In the protection of the expectancy interest, revocation of acceptance and refund against a remote seller are sensible remedies and are sometimes essential to achieve the Code's remedial objective.

C. Is Allowing Revocation and Refund Against Remote Sellers Bad Policy?

The main differences between the majority and minority viewpoints lie in their perceptions of what are the best policies toward buyers and sellers. *Durfee*, *Harper*, and their progeny are pro-buyer cases.[253] These courts viewed the remote seller as a profit-maker in a situation where the hapless buyer was left with an insolvent immediate seller and, at best, an action for damages against the remote seller. Despite patience and good faith cooperation, each buyer remained in possession of a complex machine which simply did not work.[254] These courts, in allowing revocation of acceptance and refund, sympathized with the buyer and allowed the appropriate remedy consciously setting the stage for frustrated buyers in like situations in the future. Courts allowing revocation of acceptance and refund against remote sellers tend to quote section 1-106(1)'s language that remedies shall be liberally administered as a justification for helping the buyers rid themselves of their goods.[255]

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251. See *supra* notes 74-139 and accompanying text for cases employing this method.

252. See *infra* notes 318-430 and accompanying text.

253. *See, e.g.*, Ford Motor Credit Co. v. Harper, 671 F.2d 1117 (8th Cir. 1982); Durfee v. Rod Baxter Imports,Inc., 262 N.W.2d 349 (Minn. 1977). For a discussion of *Harper* and *Durfee*, see *supra* notes 77-117 and accompanying text.

254. *See Harper*, 671 F.2d at 1120; *Durfee*, 262 N.W.2d at 352.

255. *See, e.g., Durfee*, 262 N.W.2d at 357-58. The court stated:

> We think liberal administration does not envision forcing a consumer to keep a car which is sufficiently defective so as to justify his returning it and then requiring him to sue the distributor for damages merely because the dealer is insolvent or no longer in business. The

Voytovich, *Conte*, and their progeny are less focused on policy concerns than on the text of Article 2.[256] The courts deciding these cases generally acknowledged a buyer's right to damages against a remote seller for breach of warranty in their respective jurisdictions.[257] These courts, however, showed no particular concern with the aggrieved buyer's plight. Any injustice in permitting the remote seller in breach of a warranty to defeat revocation of acceptance and refund by wielding the privity doctrine as a defense is neither discerned nor expressed. While the majority-view courts have not used the term *caveat emptor* to justify their decisions, its spirit is alive in their opinions.[258]

Thus, in summary, policy concerns have caused the minority-view courts to evade a restrictive 2-608 jurisprudence. The text of section 2-608 and the Code's definition of "seller" have restrained a majority of courts, which have not opined at any length about policy concerns one way or another. The majority of courts have manifested little, if any, concern for buyers left in possession of unusable goods. A court deliberating about the privity question under section 2-608 must decide: Is Article 2's remedial scheme complete without revocation of acceptance and refund against remote sellers, or is the objective of the remedial scheme thwarted without such remedies against remote sellers? It will be argued in Part VIII that the objective stated in section 1-106(1) is thwarted without a mechanism whereby a buyer can exchange defective goods for a full refund from a remote seller and that section 2-608, in combination with section 2-711, furnishes an appropriate mechanism. Any revision of Article 2's remedial scheme should establish and clarify the minority approach and thus allow revocation of acceptance and refund against remote sellers.

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distributor of the automobile, who profits indirectly from retail sales, must take responsibility for the solvency of its dealers when its warranty is breached.

Id.

256. *See* Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208 (6th Cir. 1974); Conte v. Dwan Lincoln-Mercury, Inc., 374 A.2d 144 (Conn. 1976).

257. *See, e.g.*, *Voytovich*, 494 F.2d at 1211. The court in *Voytovich* stated:

> Under Ohio law it is clear that a purchaser who relies on the express warranty of a manufacturer in purchasing goods, and suffers injury or loss of bargain, may directly sue the manufacturer. After these cases there can be no dispute that Voytovich had a right to sue the manufacturer, and to recover damages for breach of express warranty.

Id. (citing Rogers v. Toni Home Permanent Co., 147 N.E.2d 612 (Ohio 1958), and Inglis v. American Motors Corp., 209 N.E.2d 583 (Ohio 1965)).

258. *See, e.g., supra* notes 29-70 and accompanying text (discussing majority-view cases).

VI. AN ARGUMENT FROM THE TEXT: WHERE THE TERM "SELLER" APPEARS IN SECTION 2-608, IT CAN REASONABLY BE CONSTRUED TO INCLUDE REMOTE SELLERS

A. *Article 2 is Linguistically Neutral on the Meaning of "Seller"*

Regarding Article 2's treatment of the privity question, the Eighth Circuit stated that: "it is silent as to revocation of acceptance."[259] Moreover, neither section 2-608 nor its Official Comment furnishes a precise meaning of the term "seller," which appears twice in the section: once referring to the designated person against whom revocation of acceptance is employed, and once referring to the person to whom notice of revocation of acceptance must be given. Simply focusing upon the term "seller" in section 2-608 does not answer the privity question posed in this article unless one approaches section 2-608 with the preconceived notion that "seller" of necessity means "seller in privity" or "immediate seller."

The introductory clause of section 2-103, in which "seller" is defined begins with the words "unless the context otherwise requires."[260] The definitions which follow, therefore, are subject to the principle that context may vary the meaning of the terms. Furthermore, since a "seller" is "a person who sells or contracts to sell goods"[261] and a sale "consists in the passing of title from the seller to the buyer for a price,"[262] it is apparent that in any distribution chain involving more than two persons, some persons are functionally both buyers and sellers, according to the most narrow of viewpoints.

In the opening hypothetical situation, Cherri is a buyer, that is, a person "who buys or contracts to buy goods."[263] LawMart, from whom she took title and to whom she paid the price, was her seller. LawMart was also a "buyer" under Section 2-103(1)(a), and clearly bought from its seller, NewTech. It is self-evident that the remote seller, NewTech, was a seller, having passed title to the office equipment to LawMart for a price. The only question is whether or not the designation "seller" is appropriate when rights of a non-privity buyer are being asserted.

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259. Ford Motor Credit Co. v. Harper, 671 F.2d 1117, 1126 (8th Cir. 1982). "Although the Code eliminates the defense of privity in suits for damages for breaches of warranties, it is silent as to revocation of acceptance." *Id.* (citing ARK. CODE ANN. §§ 85-2-318.1, -318.2, -318.3 (renumbered as §§ 4-86-101, -102 (Michie 1991)).

260. U.C.C. § 2-103(1)(d) (1977). The section, with its introductory phrase, reads: "In this Article unless the context otherwise requires . . . (d) 'Seller' means a person who sells or contracts to sell goods." *Id.*

261. *Id.*

262. *Id.* § 2-106(1).

263. The U.C.C. defines "buyer" as follows: "In this Article unless the context otherwise requires . . . (a) 'Buyer' means a person who buys or contracts to buy goods." *Id.* § 2-103(1)(a).

Given the introductory words to section 2-103, the appropriate use of "seller" under section 2-608 is an open question which should be decided in context according to the Code's overall purposes.

B. Where "Seller" Appears in Sections 2-313 and 2-314, It is Commonly Construed as Including Remote Sellers

One reason for revocation of acceptance and refund without privity was set forth by the Supreme Court of Minnesota.[264] The court reasoned that, under Minnesota law, *damages* were allowable for breach of warranties without privity between plaintiff and defendant.[265] Denying revocation of acceptance and refund, therefore, was viewed as an arbitrary restriction on available remedies where the remote seller's *liability* was clear. In *Voytovich* and *Alberti*, the courts, holding to the majority view that privity is required for revocation and refund, stated that *damages* could be claimed against remote sellers;[266] yet somehow, the judges concluded that the availability of revocation of acceptance and refund was dependent upon contractual privity.[267] This view requires serious scrutiny.

The express warranties provision of U.C.C. section 2-313 begins with the words: "Express warranties by the *seller* are created as follows . . . ."[268] The U.C.C. section on the implied warranty of merchantability, section 2-314, opens with this sentence: "Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the *seller* is a

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264. Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1978).

265. *Id.* The Minnesota Supreme Court stated:

> If plaintiff had sued Saab-Scania for breach of either express warranty or implied warranty, the absence of privity would not bar the suit despite the language of the pertinent Code sections. We see no reason why the result should differ merely because plaintiff has chosen to revoke his acceptance instead of suing for breach of warranty.

Id. at 357 (citations omitted).

266. Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208, 1211 (6th Cir. 1974); Alberti v. Manufacturer Homes, Inc., 407 S.E.2d 819, 825 (N.C. 1991). In *Alberti* the Supreme Court of North Carolina was very explicit about the linguistic flexibility required to allow damages actions against remote sellers. The *Alberti* court stated:

> Though at first blush use of the terms "buyer" and "seller" in N.C.G.S. Sec. 25-2-313 seems to restrict the warranty remedy to parties who are in a direct contractual relationship, as in the case of revocation of acceptance, the official comment to this particular statute indicates otherwise . . . . Thus, the words "buyer" and "seller" as used in N.C.G.S. Sec. 25-2-313 are not intended to be restrictive; they are shorthand descriptions of the most common situation which give [sic] rise to warranties and 'offer useful guidance in dealing with further cases as they arise.' Consistent with Comment 2 our case law has recognized that a direct contractual relationship in the sale of the product itself is not a prerequisite to recovery for breach of express warranty against the manufacturer.

407 S.E.2d at 825 (citations omitted).

267. *See Voytovich*, 494 F.2d at 1211; *Alberti*, 407 S.E.2d at 825.

268. U.C.C. § 2-313 (1977) (emphasis added).

merchant with respect to goods of that kind."[269] It is evident that in any cases wherein a suit for damages is allowed by a non-privity buyer under either section 2-313 or section 2-314,[270] the word "seller" is being applied to designate a seller not in privity with the plaintiff-buyer. Moreover, the breakdown of vertical privity under these warranty sections is generally not dependent upon a state's version of section 2-318, which provides for seller's liability beyond immediate buyers in designated situations.[271] The breakdown of the privity requirement is accomplished simply by expanding the meaning of "seller."

The importance of section 2-318 in breaking down the privity barrier should not be over-estimated for two reasons. First, section 2-318's alternatives are designed to solve the problem of horizontal privity, not vertical privity.[272] Second, except for Alternative C, the impact of section 2-318 is limited to cases involving injuries to a person.[273] The fact that section 2-318 leans toward the abolition of the privity requirement, in some cases, should not, therefore, obscure the plain fact that "seller" in the warranty sections is applied to remote sellers whenever actions for economic loss are allowed against non-privity defendants who were sellers in the distribution chain. In short, the expansion of the term

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269. *Id.* § 2-314 (emphasis added); *see also id.* § 2-315 (implied warranty of fitness for a particular purpose). The text of § 2-315 opens with the words: "Where the seller . . . ." *Id.*

270. Suits against a remote seller under U.C.C. § 2-315 will be rare because of the elements of proof required by that section. *See id.* It is possible, however, that a buyer might approach a remote seller, that the remote seller might know that the buyer is relying on his skill to select the goods, and that the buyer might indeed rely; yet, the sale might be made through a dealer. *See id.*

271. *Id.* § 2-318. This section provides:

Alternative A.

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

Alternative B.

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

Alternative C.

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. As amended in 1966.

Id.

272. *Id.* § 2-318 cmt. 2.

273. *Id.* § 2-318 cmt. 3.

"seller" under the warranty sections of the U.C.C. has outrun the statutory alternatives of section 2-318.

In states where revocation of acceptance and refund are denied for lack of privity, and where damages for breach of warranty are allowed without privity, "seller" has a double meaning. In these jurisdictions, "seller" may mean either immediate or remote seller under sections 2-313 and 2-314,[274] but means only the immediate seller under section 2-608. The broad meaning has as much grounding in both the text of section 2-608 and the case law as does the narrow meaning if one takes the damages cases against remote sellers seriously.

Reading "seller" to embrace remote sellers accords with Official Comment 2 to section 2-313 which states as follows:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as a contract for sale, the warranty sections of this article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract . . . . The provisions of section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.[275]

This article will return later to the above mentioned policies of the Code. For now, it is sufficient to recognize that resolution of the privity issue within warranty law was left explicitly to the case law. Judicial precedent has established that in many jurisdictions non-privity buyers may bring breach of warranty actions for economic losses under Section 2-313 and 2-314.[276] In these jurisdictions, cutting off revocation of acceptance and refund is arbitrary if it is predicated only on a restrictive meaning ascribed to the term "seller."[277]

C. The Meaning of "Seller" Should Not Turn on Buyer's Prayer for Relief

This section of the article will examine two cases in which the Supreme Court of Mississippi and the Supreme Court of North Carolina sought to establish the meaning of the word "seller" under section 2-

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274. Possibly remote seller under U.C.C. § 2-315.

275. U.C.C. § 2-313 cmt. 2.

276. WHITE & SUMMERS, *supra* note 5, § 11-7 (citing cases allowing direct action against sellers based on express warranties; this is the majority rule), §§ 11-5, 11-6 (citing cases allowing direct action against remote sellers for direct and, in some cases, for consequential economic losses for breach of implied warranties; this is the minority rule).

277. *See* WHITE & SUMMERS, *supra* note 5, at §§ 11-5, 11-6, 11-7.

608 for their respective jurisdictions.[278] In each case, the court considered the meaning of the term "seller" not only for revocation of acceptance cases, but also for suits wherein a plaintiff-buyer seeks damages.[279] Because each state had non-uniform Code amendments, each court was extraordinarily thorough in consideration of the relevant statutory provisions.[280] The two courts came to opposite conclusions about the meaning of "seller" under section 2-608.[281] Arguably, the Mississippi decision is the better of the two, inasmuch as it held that "seller" has the same meaning under both the warranty sections and section 2-608.[282] Conversely, the North Carolina decision indefensibly gives "seller" different meanings, depending on which part of plaintiff's prayer for relief is under review.[283]

In *Volkswagen of America v. Novak*, the Supreme Court of Mississippi affirmed a decision allowing revocation of acceptance against a remote seller.[284] The Novaks bought a Volkswagen station wagon from a dealer, John Hinkle, Inc. (Hinkle) to which MAC Sales, Inc. (MAC) succeeded.[285] After many woes, and after Volkswagen's refusal to furnish a new car in exchange for the one Novaks claimed was defective, the Novaks gave notice of revocation of acceptance to Hinkle, MAC, and Volkswagen of America, Inc., the manufacturer.[286] The Novaks then left the car at MAC's lot.[287]

Since no refund was forthcoming, the Novaks sued Hinkle, MAC, and Volkswagen and demanded revocation of acceptance and refund of their purchase price.[288] The trial court directed verdicts for Hinkle and MAC and let the case against Volkswagen go to the jury.[289] The jury awarded the Novaks revocation of acceptance and refund as well as incidental and consequential damages.[290]

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278. Volkswagen of Am. v. Novak, 418 So. 2d 801 (Miss. 1982); Alberti v. Manufactured Homes, Inc., 407 S.E.2d 819 (N.C. 1991).

279. *Novak*, 418 So. 2d at 804 n.1; *Alberti*, 407 S.E.2d at 823-25.

280. *Novak*, 418 So. 2d at 803-04; *Alberti*, 407 S.E.2d at 823-25.

281. *Novak*, 418 So. 2d at 804; *Alberti*, 407 S.E.2d at 824-25.

282. *Novak*, 418 So. 2d at 804. The *Novak* court considered the remote seller (Volkswagen of America) to be a "seller" under section 2-608 by building upon Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 80 (Tex. 1977) wherein "seller" was given an expansive meaning in a case where damages were claimed. *See infra* notes 296-301 (discussing *Nobility Homes*).

283. *Alberti*, 407 S.E.2d at 824-25.

284. 418 So. 2d 801 (Miss. 1982).

285. *Id.* at 802.

286. *Id.* at 802-03.

287. *Id.* at 803.

288. *Id.*

289. *Id.*

290. *Id.*

On Volkswagen's appeal to the Supreme Court of Mississippi the main issue was whether or not Mississippi's version of the U.C.C. allowed revocation of acceptance against a non-privity manufacturer.[291] The appeal turned in part on a non-uniform statutory provision adopted by the Mississippi legislature which stated: "In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action."[292]

Volkswagen argued that this statutory provision did not abolish the privity requirement for revocation of acceptance because under Mississippi's version of U.C.C. section 2-608, revocation of acceptance is only allowable against a "seller." Moreover, Volkswagen argued that as a non-privity manufacturer, it was not the seller since the dealer had passed title to the car to the Novaks in exchange for the purchase price.[293] In this context, the Supreme Court of Mississippi addressed the meaning of "seller" as defined in Mississippi's version of section 2-103(1)(d) and determined that "seller" embraced Volkswagen, the remote seller in the distribution chain.[294] The judgment allowing revocation of acceptance and refund against Volkswagen was sustained.[295]

Justifying its result, the *Novak* Court quoted from *Nobility Homes of Texas, Inc. v. Shivers*,[296] in which the Texas Supreme Court stated:

> Under the terms of the Code, a manufacturer may also be a seller. The Code does not limit its definition of seller to the immediate seller of a product. Instead, the Code defines a seller as 'a person who sells or contracts to sell goods;' . . . consequently, Nobility Homes [non-privity manufacturer] is a seller under the Code.[297]

The Supreme Court of Texas explicitly stated that the non-privity seller fits the Code's definition of seller.[298] In quoting from this decision, the Mississippi Supreme Court was apparently comfortable in applying the same flexible view of "seller" under its version of section 2-608.[299] Thus, while the non-uniform amendment faced the privity bar-

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291. *Id.; see* MISS. CODE ANN. § 75-2-608 (1981) (identical to U.C.C. § 2-608).
292. *Id.* (citing MISS. CODE ANN. § 11-7-20 (1981)).
293. *Id.*
294. *Id.* at 804.
295. *Id.* at 805.
296. 557 S.W.2d 77 (Tex. 1977).
297. *Id.* at 80. *Nobility Homes* did not involve revocation of acceptance. It involved a suit under Texas' version of U.C.C. section 2-314 for economic loss suffered as a result of defects in a mobile home. *Id.* at 78.
298. *Id.* at 80.
299. *Novak*, 418 So. 2d at 804 n.1.

rier, it was the court's statutory analysis that stretched the coverage of "seller."[300] This stands in sharp contrast to cases where "seller" includes remote seller when damages are sought but only means immediate seller when revocation and refund are sought.[301]

In *Alberti v. Manufactured Homes, Inc.*, the plaintiffs (Alberti) sought to revoke acceptance against Brigadier Homes, Inc., the manufacturer of their defective mobile home.[302] Alternatively, Alberti sought damages.[303] The Supreme Court of North Carolina considered the issue of whether or not Alberti could revoke acceptance against the non-privity manufacturer.[304] The court held that revocation of acceptance without privity was not allowable, justifying its decision in part by reading the word "seller" in North Carolina's version of U.C.C. section 2-608 to mean only immediate seller.[305]

The reasoning by which the court came to the conclusion that seller under section 2-608 means immediate seller is illuminating. North Carolina's legislature had enacted a non-uniform definition of "seller" which stated:

> "Seller" is a person who sells or contracts to sell goods. Any manufacturer of self-propelled motor vehicles, as defined in G.S. 20-4.01 is also a "seller" with respect to buyers of its product to whom it makes an express warranty, notwithstanding any lack of privity between them, for purposes of all rights and remedies available to buyers under this Article.[306]

Applying the Latin maxim *expressio unius est exclusio alterius*,[307] the Supreme Court of North Carolina concluded that by making manufacturers of self-propelled vehicles "sellers" in the absence of privity, the legislature had evinced an intent to restrict the meaning of "seller" to sellers in privity in transactions not involving self-propelled motor vehicles.[308] Since the Alberti's mobile home was not self-propelled, they could not revoke acceptance in the absence of privity.[309] The reasoning appears persuasive in light of the non-uniform statute on which the holding turns.

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300. *Id.*
301. *See, e.g.*, Alberti v. Manufactured Homes, Inc., 407 S.E.2d 819 (N.C. 1991).
302. *Id.* at 821. See also *supra* notes 54-70 for a discussion of *Alberti*.
303. *Alberti*, 407 S.E.2d at 821.
304. *Id.* at 822.
305. *Id.* at 824; *see* N.C. GEN. STAT. § 25-2-608 (1993).
306. *Alberti*, 407 S.E.2d at 823 (citing N.C. GEN. STAT. § 25-2-103(1)(d)).
307. "A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).
308. *Alberti*, 407 S.E.2d at 822.
309. *Id.* at 824.

Of special interest in *Alberti*, however, is the court's discussion of the buyers' action for *damages* for breach of express warranty. Having decided that "seller" meant immediate seller under North Carolina General Statutes section 25-2-608, the court went on to allow an action for damages against the manufacturer for breach of express warranty under North Carolina General Statutes section 25-2-313. That section contains the word "seller" in reference to the person making the warranty;[310] hence, the Latin maxim *expressio unius est exclusio alterius* was employed to limit the meaning of "seller" under section 25-2-608 but not with regard to "seller" where it appears in section 25-2-313. Certainly, the Albertis' mobile home did not become self-propelled when they argued their damage claim as opposed to their claim for revocation of acceptance and refund. Thus, even with the non-uniform definition of "seller" the double meaning persisted because the court took a restrictive view of section 25-2-608 and a liberal view of sections 25-2-313 and 25-2-314.[311]

There is no justification in the Official Code, or in the non-uniform North Carolina statute, for the meaning of the term "seller" being dependent upon the type of relief sought by a buyer.[312] It is hard to understand the basis for a broad meaning of "seller" when damages are sought and a narrow meaning when revocation of acceptance and refund are sought, unless one assumes that courts feel compelled to restrict their application of the term "seller" to immediate sellers when revocation of acceptance and refund are sought.[313] It can be reasonably inferred that the confusion over the meaning of "seller" is not derived from the definition contained in section 2-103(1)(d). Rather, the difference in definitions manifests an underlying presupposition about the application of sections 2-608 and 2-711(1). Courts are imposing their views of the applicability of these sections upon the meaning of "seller."

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310. *Id.* at 825; N.C. GEN. STAT. § 25-2-313 (identical to U.C.C § 2-313). The court's rationale for each meaning ascribed to the term "seller" must have been policy based; otherwise, the court would have uniformly construed the non-statutory amendment to the definition of "seller."

311. *Alberti*, 407 S.E.2d at 825.

312. Regarding the *Alberti* case, it is not contended that the narrow meaning ascribed to the term "seller" was wrong in view of the non-uniform statutory amendment. Further, it is not contended that there was no justification apart from policy for an expanded meaning of "seller" under the non-uniform amendment when focus shifted from revocation of acceptance to damages.

313. This is precisely the reasoning of the North Carolina Supreme Court. *See Alberti*, 407 S.E.2d at 824.

D. Breach of Warranty Can be Grounds for Revocation of Acceptance and Refund of the Price

Confusion surrounding the meaning of the term "seller" in section 2-608 has its roots in a deeper confusion about breach of warranty as it relates to section 2-608. The text of section 2-608 clearly states that revocation of acceptance must be based on non-conformity.[314] The text does not explicitly state that revocation of acceptance can be based on breach of warranty. While breach of warranty and non-conformity "are not entirely congruent concepts," breach of warranty is nonetheless embraced by the broader concept of non-conformity.[315] According to section 2-106(2), goods are conforming when "they are in accordance with the obligations under the contract."[316] Obligations under the contract include warranty obligations. Breach of warranty is a "subset of [non-conformity],"[317] and can, therefore, be the basis for revocation of acceptance as well as the basis for an action for damages.

When the term "seller" under sections 2-313 or 2-314 includes remote sellers for actions where damages are sought and excludes remote sellers in actions where revocation of acceptance and refund are sought, "seller" unjustifiably has different meanings dependent entirely on the remedy which the buyer seeks. This inconsistency is indefensible once it is recognized that suits for revocation of acceptance and refund, as well as suits for damages, may both be based on breach of express or implied warranty.

The foregoing examination of the statutory language, comments, and case law as they bear on the meaning of the term "seller" does not, of course, prove the case for revocation of acceptance against remote sellers. It does, however, establish that "seller" is an open-ended term and, for reasons of remedial policy, *can embrace remote sellers* as it has in actions for damages under sections 2-313 and 2-314. The main question, therefore, is whether or not the Code's remedial policy points toward or away from allowing revocation of acceptance and refund against remote sellers.

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314. *See* U.C.C. § 2-106(2) (1977) (defining "conforming").

315. Ford Motor Credit Company v. Harper, 671 F.2d 1117, 1122 (8th Cir. 1982). 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. Section 85-2-714, Comment 2. It is thus apparent that breach of warranty and non-conformity are not entirely congruent concepts; the former being a subset of the latter.

Id.

316. U.C.C. § 2-106(2).

317. *Harper*, 671 F.2d at 1120.

VII. Revocation of Acceptance and Refund are Appropriate Remedial Devices to Apply Against Remote Sellers in Pursuit of the Code's Remedial Purpose

The decisions of courts which have denied revocation of acceptance against remote sellers commonly contain language declaring that revocation of acceptance is conceptually inappropriate against any person other than an immediate seller. An example is *Gasque v. Mooers Motor Car Co.*,[318] in which the Supreme Court of Virginia stated in *dicta*:

> This remedy lies only against a seller of goods, not against a remote manufacturer. This is so because the remedy, where successful, cancels a contract of sale, restores both title to and possession of the goods to the seller, restores the purchase price to the buyer, and as fairly as possible, returns the parties to the *status quo ante*. The remote manufacturer, having no part in the sales transaction, has no role to play in such a restoration of former positions.[319]

The court declared Virginia's version of section 2-608 "conceptually inapplicable to any persons other than the parties to the contract of sale sought to be rescinded."[320] The court's view is predicated upon the assumption that revocation of acceptance and refund are the Code's equivalents of rescission and restitution, the object of which is the cancellation of a contract and the restoration of the status quo ante.[321]

In *Alberti*, the North Carolina Supreme Court similarly characterized revocation of acceptance and refund as "remedial procedures not well suited to situations where the parties do not deal directly with each other."[322] Applying these remedies against a remote manufacturer "would not restore the *status quo ante*; it would, instead, require a manufacturer to refund a purchase price it had not received . . . ."[323]

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318. 313 S.E.2d 384 (Va. 1984).

319. *Id.* at 390.

320. *Id; see* VA. CODE ANN. § 8.2-608 (Michie 1991) (identical to U.C.C. § 2-608).

321. *Gasque*, 313 S.E.2d at 390.

322. 407 S.E.2d 819, 824 (N.C. 1991). The court's complete statement was as follows:

> [A]n examination of the consequences resulting from revocation of acceptance leads us to believe that the legislature did not intend the remedy to be available against a remote manufacturer. Return of the purchase price to the buyer, and as is often the case, return of the goods to the seller is a type of exchange uniquely suited to situations involving parties in direct contractual relationships and is intended to effectuate restoration of the *status quo ante* to these parties. These remedial devices are not well suited to situations where the parties do not deal directly with each other. Where there is no direct dealing between the parties, revocation of acceptance would not restore the *status quo ante*; it would, instead, require a manufacturer to refund a purchase price it had not received in exchange for a product it did not sell to the revoking party.

Id. (citations omitted).

323. *Id.*

Again, revocation of acceptance and refund were treated as equivalents of rescission and restitution; consequently, the use of revocation and refund as remedies against remote sellers was dismissed as inappropriate.[324]

This Part of the Article will argue that these courts are wrong in their characterizations of revocation of acceptance under section 2-608 and refund under section 2-711(1) as restorative remedies. On the contrary, revocation of acceptance and refund are part of a cluster of remedies designed to protect the aggrieved party's expectation interest.

A. The Code's Remedial Goal is the Protection of an Aggrieved Party's Expectation Interest

According to modern remedial theory, three interests, or a combination thereof, can be protected in contract cases. These interests include the expectation interest, the reliance interest, and the restitution interest.[325] The expectation interest is the promisee's interest "in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed."[326] In section 1-106(1), the Code's drafters adopted the expectation interest as the objective of the Code's remedial scheme.[327] The Code's main remedial objective is *not* restoration of the status quo ante.[328] Further, the Code's stated objective is future-oriented. It commonly involves calculations based upon a hypothetical situation, namely, what would have happened if the party in breach had performed in full. Section 2-608 is one component of a cluster of remedies designed to effect this result.[329]

Section 2-711(1) introduces the buyer's remedies.[330] According to the text of section 2-711(1), refund of as much of the purchase price as has been paid may follow revocation of acceptance. In addition, the

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324. *Id.*

325. RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981).

326. *Id.* § 344(a).

327. Section 1-106(1) states:

> The remedies provided in 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 or 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) (1977).

328. There are specific provisions of the Code which embody the objective of restoring the status quo ante. *See, e.g., id.* § 2-718(2) (restitution for breaching buyer). This, however, is an exception to the overall scheme which is protection of both parties expectancies.

329. U.C.C. § 2-711 catalogues the buyer's remedies, and in subsection (1) specifically refers to revocation of acceptance. *See id.* § 2-711.

330. Section 2-711(1) provides:

> (1) 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, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel

aggrieved buyer may cover and collect the difference between the cover price and the contract price under section 2-712.[331] Alternatively, the aggrieved buyer may get a refund of the purchase price paid, forego cover, and collect the difference between the market price and the contract price pursuant to section 2-713.[332] The latter remedy is, of course, a hypothetical cover because the aggrieved buyer presumably could have purchased goods at the market price prevailing when buyer learned of seller's breach.

Consider a simple example without the privity issue to illustrate the application of revocation of acceptance and refund in conjunction with other remedies. Suppose a buyer contracts to purchase a truck for $20,000, taking delivery three months in the future. Assume the seller delivers a truck on the stipulated date and buyer accepts. Soon the buyer discovers that the truck has a hidden defect which substantially impairs its value to him. Buyer then gives notice of revocation of acceptance under section 2-608. The buyer checks the market and finds that comparable trucks of the same make sell for $22,000 due to an inflationary burst in the ninety days between the time of contracting and delivery.

Combining sections 2-608 and 2-711(1), the buyer, upon offering sufficient proof of substantial impairment, is entitled to return of the $20,000 purchase price plus $2,000. The $2,000 represents the difference between market price and contract price at the time the buyer learned of the breach.[333] Alternatively, if the buyer covered by making a reasonable substitute purchase within a reasonable time, the buyer

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and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2-713).

Id. § 2-711(1).

331. U.C.C. § 2-712(1) states: "After a breach within the preceding section the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller." *Id.* § 2-712(1).

332. U.C.C. § 2-713(1) states:

Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of seller's breach.

Id. § 2-713(1).

333. *See id.* Additionally, there is a breach of warranty on tender of defective, non-conforming goods. *See id.* § 2-725(2). It is possible, however, that the buyer may learn of the breach later, for example, when the non-conformities are discovered. In this hypothetical situation, it will be assumed there is a constant $22,000 price from acceptance through discovery of substantial impairment.

should collect the refund of the price plus the difference between the cover purchase price and the contract price.[334] In this manner, the Code protects the aggrieved buyer's expectation interest, that is, his interest in being put in as good a position as if the seller had fully performed by delivering a truck without defects. Furthermore, in proper cases, reaching this goal would require a court to resort to section 2-715 which allows consequential and incidental damages.[335]

It is apparent that in the context of section 2-711(1) and related Code sections, revocation of acceptance is not *simply* a vehicle for restoring the status quo ante. Quite the contrary, revocation of acceptance under section 2-608 is meant to operate along with the other remedial sections to accomplish the more ambitious objective of fulfilling the aggrieved buyer's reasonable expectations. It thus becomes apparent that equating revocation of acceptance and refund with rescission and restitution is error. This error underlies the majority-view decisions. The minority-view courts have not fallen into the same conceptual trap.

B. Revocation of Acceptance Under Section 2-608 Does Not Cancel the Underlying Contract; Rather, It Simply Yields Title to the Goods to the Person From Whom Refund is Sought

Returning once more to *Gasque v. Mooers Motor Car Co.*,[336] the Virginia Supreme Court found that revocation of acceptance "where successful, cancels a contract of sale."[337] In other words, revocation *automatically* cancels the underlying contract. This conclusion runs afoul of section 2-711(1) which plainly states that after a successful revocation of acceptance a buyer *may cancel*, but whether or not the buyer has done so, the buyer may collect damages.[338] Thus, a buyer who rightly revokes acceptance has the option to cancel the contract and thereby put an end to the underlying contract or sale. Nowhere does the Code state that cancellation automatically occurs when a buyer successfully revokes acceptance.

Leaving the underlying contract intact, the aggrieved buyer can voluntarily accept cure. For example, the buyer may accept cure by replacement.[339] A few courts have even allowed cure as a matter of

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334. *See id.* § 2-712(1).

335. *See id.* § 2-715. For example, the purchase of a new truck might require services of an agent, or the loss of use of the truck might constitute consequential damages.

336. 313 S.E.2d 384 (Va. 1984).

337. *Id.* at 390.

338. U.C.C. § 2-711(1). Under § 2-106(4), cancellation "occurs when either party puts an end to the contract for breach by the other." *Id.* § 2-106(4).

339. A buyer may not want the goods and may simply want a new good.

right after revocation of acceptance.[340] This makes no sense if revocation of acceptance automatically annuls the underlying contract. According to the Code's plain text, however, revocation of acceptance does not cancel the underlying contract even though "revocation" sounds like "rescission." Rather than rescinding the underlying contract of sale, revocation of acceptance causes an automatic relinquishment of title to the defective goods.[341] Thus, the automatic legal consequence of a proper revocation of acceptance under section 2-608 is revesting of title to the defective goods in the seller against whom revocation of acceptance is invoked.

Combining the refund afforded by section 2-711(1) and the revesting of title under section 2-401(4), one sees that the Code's remedial scheme provides for a forced exchange: the price paid in return for the defective goods. This forced exchange partly, or wholly, serves to protect the aggrieved's buyer's expectancy interest, depending on the market conditions under which the buyer can acquire replacement goods. The courts which equate revocation of acceptance with rescission of contract are equating revocation of acceptance and cancellation and assume that what follows from cancellation must, of necessity, be restorative or restitutionary in nature. This unjustified assumption has limited the use of section 2-608 to situations where restoration of the status quo ante is achievable.

Quite possibly, this confusion was anticipated by the Code drafters. The Official Comment to section 2-608 may have been an attempt to guard against the strangling effect of using the terms rescission and revocation of acceptance synonymously. The Official Comment states, in relevant part:

> [T]he buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him. The non-alternative character of the two remedies is stressed by the terms used in the present section. The section no longer speaks in terms 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 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 and involves no suggestion of "election" of any sort.[342]

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340. *See* HENNING & WALLACH, *supra* note 163, ¶ 9.02[7].

341. U.C.C. § 2-401(4) further states: "A rejection or other refusal by the buyer to retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a 'sale'." U.C.C. § 2-401(4).

342. U.C.C. § 2-608 cmt. 1.

While this comment is not crystal clear, it seems apparent that the drafters recognized that the term "rescission" was inappropriate for the remedial device provided under section 2-608.[343] It is abundantly clear, however, that when section 2-608's procedural and substantive requisites are met, the buyer yields title to the goods to the seller against whom revocation is directed. It is equally clear that revocation of acceptance does not cancel the underlying contract for sale.

C. The Forced Exchange of Goods for the Price Paid is a Workable Remedial Mechanism When Applied Against Remote Sellers

Assuming that revocation of acceptance and refund are allowable remedies against remote sellers under section 2-608 and related sections, a question remains: Is such a remedial mechanism workable in practical terms? One must ask (1) whether forcing a remote seller to pay a price not received from the remote buyer is sensible, and (2) whether it is practical to force the defective goods upon a remote seller. In attempting to answer these questions one must take into account conceptual difficulties evident in the majority-view opinions as well as matters of public policy.[344] At this point it is necessary to address the concepts involved in using revocation of acceptance and refund as remedies against remote sellers.

Since tender is made to a buyer by an immediate seller, and acceptance follows tender, it might strike one as strange to apply revocation of acceptance against any person who did not make the tender. In other words, if revocation of acceptance rescinds acceptance and not the underlying contract, it makes sense that title to the goods should revert to the immediate seller whose tender preceded acceptance. This may, indeed, have been the situation envisioned by the drafters. Nonetheless, once it becomes clear that revocation of acceptance operates, along with refund, as part of a cluster of Article 2 buyers' remedies designed to protect the aggrieved buyer's expectation interest, the question of using the forced exchange against remote sellers must be considered.

Since this mechanism of forced exchange is commonly used outside of Article 2, it seems appropriate to investigate its application. The investigation has led to the following arguments which are arguments by analogy. The forced exchange against remote parties has been used in three situations: (1) cases arising under the Federal Trade Commission Improvement Act (Magnuson-Moss); (2) cases arising

343. "Recission" was inappropriate because it could refer either to giving up of title to the goods, or to abrogation of the underlying contract.

344. Matters of policy will be discussed infra notes 431-56.

under the so-called lemon laws; and (3) cases arising under the Civil Code of Louisiana. Each will be discussed in turn.

1. An Argument by Analogy Based Upon the Magnuson-Moss Warranty Act.

In 1976 Congress enacted the Magnuson-Moss Warranty Act (Magnuson-Moss) to prevent deception, to improve the adequacy of information available to consumers, and to improve competition in marketing consumer products.[345] Under Magnuson-Moss, persons who make written warranties[346] on consumer products are designated as "warrantors."[347] Any written warranty on a consumer product triggers the applicability of Magnuson-Moss, whether the parties intend it or not.[348] Sellers of goods who make express written warranties under section 2-313 of Article 2 are, therefore, always warrantors under Magnuson-Moss. The category of Magnuson-Moss warrantors includes some persons who have not made express warranties under section 2-313.[349] To be a warrantor under Magnuson-Moss, privity with the buyer is *not* required.[350] This is because warrantors include "suppliers" who make written warranties, and by definition, "[t]he term 'supplier' means any person engaged in the business of making a consumer product directly or indirectly available to consumers."[351]

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345. 15 U.S.C. §§ 2301-2312 (1988). "Consumer product" is defined as follows:

> The term 'consumer product' means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

Id. § 2301(1).

346. The term 'written warranty' means:

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

Id. § 2301(6).

347. "The term 'warrantor' means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty." *Id.* § 2301(5).

348. *Id.* §§ 2302-2303.

349. *Id.* § 2301(5); U.C.C. § 2-131 (1977). This is because a service contract is also a written warranty under Magnuson-Moss.

350. 15 U.S.C. § 2301(5).

351. *Id.* § 2301(4).

Under Magnuson-Moss, warrantors must label written warranties as either "limited warranties" or "full warranties."[352] When a warrantor makes a full warranty under Magnuson-Moss, any attempted disclaimer of implied warranties arising under state law is void.[353] When a warrantor makes a limited warranty, any attempted disclaimer of implied warranties arising under state law is void.[354] Under a limited warranty, however, the *duration* of any implied warranty may be limited to the *term* of the written warranty of reasonable duration.[355] Consequently, if a seller makes an express warranty under section 2-313 of the Code, which is also a written warranty under Magnuson-Moss, he is precluded from disclaiming state-created implied warranties.[356] Yet, the seller can limit the duration of these implied warranties to the term of the express warranty if the term is reasonable and the warranty is designated as limited.[357]

For breach of a *full warranty*, Magnuson-Moss specifically allows a consumer to elect replacement or refund from the warrantor who made the full warranty without regard to privity if the warrantor does not repair a defect or correct a malfunction within a reasonable number of attempts.[358] Hence, the consumer is given the functional equivalent of revocation of acceptance and refund of the purchase price against *any warrantor* without regard to privity in the distribution chain. Magnuson-Moss does not specifically allow this remedy for breach of a limited warranty but explicitly allows "damages and other legal and equitable relief" without limiting these remedies to buyers in privity.[359] Hence, Magnuson-Moss has considerably enhanced con-

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352. *Id.* § 2303.

353. *Id.* §§ 2304(a)(2), 2308(a), 2308(c).

354. *Id.* § 2308(b).

355. *Id.*

356. The seller is precluded from disclaiming warranties of both merchantability under U.C.C. § 2-314 and fitness for particular purpose under U.C.C. § 2-315. *Id.*

357. *Id.*

358. *Id.* § 2304(a)(4). The pertinent statutory language states:

> In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—
>
> (4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such products, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be).

Id.

359. *Id.* § 2310(d)(1). The relevant statutory language states:

> [A] consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title, or under a written warranty, implied warranty or service contract, may bring suit for damages and other legal and equitable relief—
>
> (A) in any court of competent jurisdiction in any State or the District of Columbia; or
>
> (B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

Id.

sumer rights by eliminating the privity requirement in suits brought for breach of full or limited warranties.

This is well illustrated by case law. In *Szajna v. General Motors Corp.*, the Supreme Court of Illinois applied Magnuson-Moss in conjunction with the Illinois version of section 2-314.[360] The plaintiff asserted, *inter alia*, that General Motors, the remote seller, had breached its implied warranty of merchantability by selling a Pontiac Ventura with a Chevette engine.[361] Since the suit involved neither personal injury nor property damage, Illinois law required privity for a breach of warranty claim, and accordingly, the trial court dismissed the claim.[362] The Illinois intermediate appellate court affirmed the dismissal.[363] Because there was a written warranty, the Illinois Supreme Court applied Magnuson-Moss and held: (1) that Magnuson-Moss precluded disclaimer of state-created implied warranties during the term of the express limited warranty; and (2) that the plaintiff had a direct action against General Motors as a warrantor.[364] Thus, the state law privity requirement was overridden by federal law.[365]

In *Ventura v. Ford Motor Corp.*, a New Jersey appellate court applied Magnuson-Moss to the privity question implicit in New Jersey's version of U.C.C. section 2-608.[366] Ventura purchased a new car from Marino Auto Sales, Inc. (Marino), an authorized Ford dealer.[367] The car repeatedly stalled.[368] Marino and Ford specialists repeatedly, but unsuccessfully, attempted to solve this problem.[369] Frus-

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360. 503 N.E.2d 760 (Ill. 1986); *see* ILL. ANN. STAT. ch. 810, para. 5/2-314 (Smith-Hurd 1993) (identical to U.C.C. § 2-314).

361. *Szajna*, 503 N.E.2d at 761. In addition to the count alleging breach of the implied warranty of merchantability, Szajna claimed breach of an express warranty (§ 2-313) and fraud. *Id.*

362. *Id.* at 762.

363. *Id.* at 761.

364. *Id.* at 769-70. It should be noted that the applicability of Magnuson-Moss was the justification for breaking down the privity requirement. The court declined to abolish the privity requirement of state law in cases of implied warranty involving economic loss. *Id.* at 767.

365. The Illinois Supreme Court did not discuss whether or not revocation of acceptance would be allowed; rather, the discussion treated the complaint as one wherein economic loss was sought. Interestingly, Szajna had pled alternatively for damages under Illinois' version of U.C.C. § 2-714, or revocation of acceptance under Illinois' version of U.C.C. § 2-608. *Id.* at 762. The court did not take up the question of whether the remedy sought would make a difference in the privity issue under Magnuson-Moss.

366. 433 A.2d 801 (N.J. Super. Ct. App. Div. 1981); *see* N.J. STAT. ANN. § 12A:2-608 (West 1962) (identical to U.C.C. § 2-608).

367. *Ventura*, 433 A.2d at 804.

368. *Id.*

369. *Id.*

trated, Mr. Ventura left the car at Marino's place of business and filed suit against Ford and Marino, seeking damages.[370]

As the trial began, Marino's attorney was unavailable.[371] The trial court, therefore, heard only the case against Ford.[372] The trial court concluded that Ventura had failed to prove damages, but nonetheless allowed him to *rescind* the purchase from Marino and ordered Marino to refund the purchase price because of Ford's breach of warranty.[373] Additionally, the trial judge awarded attorney's fees against Ford in favor of Ventura pursuant to Magnuson-Moss.[374] The trial court probably assumed that rescission required privity. There would have been no other reason to award rescission as a remedy against the dealer on account of the manufacturer's breach.[375] When Ventura's case against Marino came to trial, Marino's lawyer stipulated that the rescission order previously entered was proper and undertook to prove a right of indemnity from Ford.[376] In its defense, Ford argued that rescission against Marino was unjustified; hence, there was no basis for the indemnity claim.[377] The trial court, however, allowed indemnity in favor of Marino against Ford.[378]

Ford appealed, arguing that the rescission order which underlay Marino's indemnity claim was improper.[379] The Appellate Division affirmed.[380] In so doing, the court wrote an opinion, based upon Magnuson-Moss, which put a significant judicial gloss on Article 2's remedies of revocation of acceptance and refund. The opinion offers powerful support for the minority approach of revocation of acceptance and refund without privity.[381]

The court noted that in the purchase order, signed by Ventura, Marino had disclaimed all warranties except the express warranty originating from Ford.[382] Yet, Marino, in the same purchase order, had agreed "to promptly perform and fulfill all terms and conditions of the owner service policy" which Ford had issued and had promised to carry

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370. *Id.* at 804-05.
371. *Id.* at 805.
372. *Id.*
373. *Id.* at 805-06. The trial judge based his decision alternatively on breach of implied warranties or strict liability. *Id.*
374. *Id.*
375. *Cf.* Troutman v. Pierce, Inc., 402 N.W.2d 920 (N.D.1987), discussed *supra* notes 191-202 and accompanying text.
376. *Ventura*, 433 A.2d at 805.
377. *Id.* at 805.
378. *Id.* at 804.
379. *Id.* at 805.
380. *Id.*
381. *Id.* at 808-13.
382. *Id.* at 807.

out through Marino.[383] The court focused upon Marino's express promise to carry out Ford's promises of service and decided that Marino had thereby made an express warranty within Magnuson-Moss.[384] Having found that Marino had made an express warranty within Magnuson-Moss, it followed logically that Marino's attempted disclaimer of implied warranties was void.[385] Therefore, Marino was liable for all breaches of warranty the trial court found in the case against Ford.[386] Accordingly, Ventura had a right to revoke acceptance against Marino under New Jersey's version of section 2-608.[387]

The court could have stopped at this point because it had decided enough to sustain the trial judge's decision. The court went further, however, addressing the issue of whether or not Ventura had a right to recover his purchase price directly from Ford because of Ford's breaches of express and implied warranties.[388] The court began its analytical process by stating that if Ford had made a full warranty, then under Magnuson-Moss, Ventura would have had a statutory right to a refund.[389] Ford's warranty was a limited warranty and Ventura was, therefore, relegated to legal and equitable remedies available under state law.[390]

The court held that Ventura was entitled to a "rescission-type remedy" against Ford.[391] The court thereby equated the remedies

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383. *Id.* at 809.

384. The court stated:

> For the purpose of this appeal we are satisfied that the dealer's undertaking in paragraph 7 constitutes a written warranty within the meaning of 15 U.S.C.A. Sec. 2301(6)(B). Accordingly, having furnished a written warranty to the consumer, the dealer as a supplier may not "disclaim or modify [except to limit in duration] any implied warranty to a consumer . . . ." The result of this analysis is to invalidate the attempted disclaimer by the dealer of the implied warranties of merchantability and fitness.

Id. at 810.

385. *Id.*

386. *Id.*

387. "Marino Auto was liable to plaintiff for the breach thereof as found by the trial judge, and plaintiff could timely revoke his acceptance of the automobile and claim a refund of his purchase price." *Id.*; *see* N.J. STAT. ANN. § 12A:2-608 (West 1962).

388. *Ventura*, 433 A.2d at 811. Since this line of analysis was not essential to deciding the case, one wonders whether the court pressed on purely for pedagogical purposes. If this was the case, the lesson was not lost on practicing lawyers. *See, e.g.*, Gochey v. Bombardier, Inc., 572 A.2d 921 (Vt. 1990).

389. The *Ventura* court stated: "If the warranty were a full warranty plaintiff would have been entitled to a refund of the purchase price under the Magnuson-Moss Warranty Act. Since Ford's warranty was a limited warranty we must look to state law to determine plaintiff's right to damages or other legal and equitable relief." *Ventura*, 433 A.2d at 811.

390. *Id.* The court had very little legal precedent allowing revocation of acceptance to guide its decision. *Durfee* was the only case which allowed revocation of acceptance at the time *Ventura* was decided. *See* Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977); *see also supra* notes 77-93 and accompanying text (discussion of the *Durfee* case).

391. *Ventura*, 433 A.2d at 812.

available for breach of full warranties and limited warranties when the case involves substantial impairment. By analogizing to the Magnuson-Moss remedies available for breach of full warranties, the *Ventura* court accomplished the same result for breach of limited warranties as did the Minnesota Supreme Court in *Durfee* and the Court of Appeals for the Eighth Circuit in *Harper*. In exchange for defective goods, the buyer received a refund from the remote seller. Although the *Ventura* court did not explicitly broaden section 2-608, it did create an alternative to section 2-608 in cases involving consumer goods and breach of a limited Magnuson-Moss warranty by a remote seller.

Citing *Durfee*, the court explained its reasoning as follows:

> We are dealing with the breach of an express contractual obligation. Nothing prevents us from granting an adequate remedy under state law for that breach of contract, including rescission when appropriate. Under state law the right to revoke acceptance for defects substantially impairing the value of the product and to receive a refund of the purchase price are rights available to a buyer against a seller in privity. Where the manufacturer gives a warranty to induce the sale it is consistent to allow the same type of remedy as against that manufacturer. Only the privity concept, which is frequently viewed as a relic these days, has interfered with a rescission-type remedy against the manufacturer of goods not purchased directly from the manufacturer. If we focus on the fact that the warranty creates a direct contractual obligation to the buyer, the reason for allowing the same remedy that is available against a direct seller becomes clear. Although the manufacturer intended to limit the remedy to repair and replacement of defective parts, the failure of that remedy and the consequent breach of the implied warranty of merchantability which accompanied the limited warranty by virtue of the Magnuson Moss Warranty Act, make a rescission-type remedy appropriate when revocation of acceptance is justified.[392]

Thus, *Ventura* was more than an extension of *Durfee* because the court did not state that section 2-608 reaches non-privity sellers. The court reasoned that since federal law breaks down the privity barrier for breach of full warranties, the court could accomplish the same result for breach of state-created warranties. The end result is the same as in *Durfee*. In analyzing *Ventura*, it is not suggested that greater use of Magnuson-Moss will always achieve the same result as *Durfee* where consumer goods are sold. Rather, it is urged that the forced exchange of purchase price in return for the goods applied against a remote seller is a workable remedy under Magnuson-Moss. Congress specifically provided for it in the case of full warranties[393] and a New Jersey appellate

392. *Id.* at 811-12 (citations omitted).

393. 15 U.S.C. § 2304 (1988).

court allowed it in a case involving a limited warranty.[394] The concept of the remedial exchange involving parties who lack privity, therefore, should not be viewed as strange or alien to American commercial law.

If one wants to attack the *concept* of return and refund as remedies against remote parties, the attack should be launched against Congress because Congress put this remedy into Magnuson-Moss for breach of full warranties. On the other hand, if return and refund are sometimes justified as remedies against remote sellers for breach of express or implied warranties, it is unnecessarily restrictive to confine these remedies to cases falling under Magnuson-Moss. The open-ended texture of Article 2 enables a court to follow the minority approach in allowing revocation and refund without privity in appropriate cases. This reasoning would enable a court to take a *Ventura*-type case and, instead of inventing a "rescission-type remedy," the case could be resolved under sections 2-608 and 2-711(1). Analogizing to the Magnuson-Moss concepts would be more important in cases wherein consumer goods were not involved.[395] More fundamentally, Magnuson-Moss and cases decided thereunder, undercut the majority-view's reasoning which states that the forced exchange is conceptually inapplicable to parties not in privity.[396]

2. State Lemon Laws Furnish an Appropriate Analogy

Because Magnuson-Moss did not fulfill the hopes of many consumer advocates, they turned their efforts to the state legislatures.[397] Starting with Connecticut in 1982,[398] so-called lemon laws swept the country.[399] The main thrust of the lemon laws is to give new car buyers more rights than those provided by Article 2. Lemon laws have broken down the privity barrier in situations in which a buyer seeks to return a defective car to a nonprivity manufacturer for a refund.[400]

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394. *Ventura*, 433 A.2d at 811.

395. In the introductory hypothetical situation, Cherri was in business and will not qualify as a consumer. It is extremely doubtful that her printer and word processors would qualify as consumer goods. Thus, she could not invoke Magnuson-Moss. She would, however, be able to use U.C.C. § 2-608 against the remote seller if the Magnuson-Moss analogy is used to break down the privity barrier.

396. *See, e.g.*, Gasque v. Mooers Motor Car Co., Inc., 313 S.E.2d 384 (Va. 1984); *see also supra* notes 243-47 and accompanying text (discussing this case).

397. HENNING & WALLACH, *supra* note 163, ¶ 11.14[1][g]. Professors Henning and Wallach fault the Federal Trade Commission for not promoting the Act and contend that its complexity inhibits its use by lawyers. *Id.*

398. CONN. GEN. STAT. ANN. § 42-179 (Supp. 1993).

399. *See* Robert D. Honigman, *The New "Lemon Laws": Expanding UCC Remedies*, 17 UCC L.J. 116, 117 (1984) (outlining the growth of the lemon laws).

400. *See, e.g.*, CONN. GEN. STAT. ANN. § 42-179(c). The statute provides:

In order to scrutinize the operation of a lemon law more closely, it is helpful to focus on the lemon law enacted by the West Virginia legislature in 1984.[401] In pertinent part, the statute states:

> (a) If the non-conformity results in substantial impairment to the use or market value of the new motor vehicle and the manufacturer has not replaced the new motor vehicle pursuant to the provisions of section three [46A-6A-3] of this article, or if the nonconformity exists after a reasonable number of attempts to conform the new motor vehicle to the applicable express warranties, the consumer shall have a cause of action against the manufacturer in the circuit court . . . .
> (b) In any action under this section, the consumer may be awarded all or any portion of the following:
> (1) Revocation of acceptance and refund of the purchase price, including, but not limited to, sales tax, license and registration fees, and other reasonable expenses incurred for the purchase of the new motor vehicle, or if there be no such revocation of acceptance, damages for diminished value of the motor vehicle . . . .[402]

This particular lemon law gives new car buyers in West Virginia the right to revoke acceptance and gain a refund of the price, not only when defects substantially impair the value of the car to the buyer, but also when a reasonable number of repair attempts to correct lesser nonconformities are unsuccessful.[403] More importantly, the legislature abolished the privity requirement for damages and for revocation of acceptance and refund, thereby allowing the buyer to by-pass the local dealer.[404] The result is a forced exchange which accomplishes the same result as was achieved under applicable state versions of U.C.C. section 2-608 in *Harper* and *Durfee*.[405]

> If the manufacturer, or its agents or authorized dealers are unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any defect or conditions which substantially impairs the use and value of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer shall replace the motor vehicle with a new motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the full purchase price, including all collateral charges, less a reasonable allowance for the consumer's use of the vehicle. No authorized dealer shall be held liable by the manufacturer for any refunds or vehicle replacements in the absence of evidence indicating that dealership repairs have been carried out in a manner inconsistent with the manufacturer's instructions.

Id.

401. W. VA. CODE §§ 46A-6A-1 to -9 (Supp. 1993).

402. *Id.* § 46A-6A-4(b)(1). It is apparent that the West Virginia legislature tailored its lemon law to track §§ 2-608, 2-711, and 2-714 of U.C.C. Article 2.

403. In this sense, West Virginia's lemon law tracks Magnuson-Moss. *See* 15 U.S.C. § 2304(a)(4) (1988).

404. W. VA. CODE § 46A-6A-1, -9.

405. *See* Ford Motor Credit Co. v. Harper, 671 F.2d 1117 (8th Cir. 1987); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977).

This statute was applied in *Adams v. Nissan Motor Corp.*[406] Adams purchased a truck made by Nissan Motor Corporation (Nissan) from a dealer, Derald Rollyson, Inc. Additionally, Adams obtained both a standard express warranty and a service contract ("Security Plus Agreement") from Nissan.[407] When Nissan was unable to conform the truck to its warranties, Adams sued for revocation of acceptance and refund of the purchase price as well as for damages.[408] The jury determined that the truck's non-conformity substantially impaired its value to the buyers and awarded revocation of acceptance and a refund of the purchase price along with incidental damages.[409] On appeal, the Supreme Court of West Virginia affirmed the judgment.[410] Thus, under the lemon law, the buyers were able to rid themselves of their faulty vehicle in return for the purchase price.

Central to the operation of lemon laws against remote sellers is the mechanism of a forced exchange. While the forced exchange against a remote seller may seem strange if conceived of simply as a restatement of rescission and restitution, it fits well with the cluster of other remedies offered by the lemon laws.[411] Alleged conceptual difficulties with revocation of acceptance against remote sellers seem to vanish when the task is undertaken legislatively. While this may point toward the desirability of legislative clarification of section 2-608 in the revision of Article 2, it should also encourage courts to adopt the minority approach when appropriate, even before any legislative change occurs.[412]

3. An Argument by Analogy Based on the Civil Law of Louisiana.

Louisiana law allows a cause of action known as "redhibition."[413] Redhibition allows a buyer to return defective goods and obtain a full refund if the defect is so significant that the buyer would not have pur-

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406. 387 S.E.2d 288 (W.Va. 1989).

407. The "Security Plus Agreement" was deemed not to be a warranty under the West Virginia lemon law. *Id.* at 293-94.

408. *Id.* at 289-90.

409. *Id.* at 290.

410. *Id.* at 296. This was an award against Nissan, the remote seller.

411. The court noted that the lemon law and Magnuson-Moss are similar. *Id.* at 291-92. The court stated: "Lemon law statutes appear to be direct descendants of 15 U.S.C.A. Sec. 2304, requiring full refund or free replacement if the product continues to malfunction after a failed attempt at repair." *Id.* at 292 n.8.

412. Had this been done in the 1970s, the lemon laws would probably not have been necessary. One can plausibly argue that an overly restrictive construction of U.C.C. § 2-608 in new car cases was a primary reason for the explosion of lemon laws.

413. In the Louisiana Civil Code, "redhibition" is defined as follows:

> Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice.

LA. CIV. CODE ANN. art. 2520 (West 1973).

chased the goods had the defect been known.[414] If one assumes that the degree of defect required for this action is the approximate equivalent of substantial impairment of value of the goods to the buyer,[415] then the parallel between redhibition and revocation of acceptance is apparent.

Redhibition is not limited to a seller in privity with the plaintiff-buyer. The Louisiana Supreme Court clearly established this rule in *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*[416] The car which the buyer claimed was defective had been manufactured in Germany.[417] The domestic distributor, Mercedes-Benz of N.A. (M.B.N.A.), sold the car to Cookie's Auto Sales, Inc., a dealer who sold it to the corporate buyer, Media Production Consultants, Inc. (Media).[418] Media sued the dealer and M.B.N.A. seeking avoidance of the sale and return of the purchase price.[419] The trial court allowed judgment for the purchase price against the dealer, but not M.B.N.A.[420] Unfortunately for Media, the judgment was worthless because the dealer went out of business. Media, therefore, appealed claiming it ought to receive the purchase price from M.B.N.A., a solvent party with whom it had no privity of contract.[421] The intermediate Louisiana court affirmed the trial court, thereby denying relief to Media.[422]

On appeal to the Supreme Court of Louisiana, M.B.N.A. argued that in the absence of privity it was not liable for a refund of the purchase price.[423] Stating that refund is available as a remedy against a remote seller for breach of an express or implied warranty, the court held that M.B.N.A. was "solidarily liable with Cookie's Auto Sales,

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414. *See* Robert Weinstein, Comment, *The Nature of the Redhibitory Action*, 4 TUL. L. REV. 433 (1930); 4 TUL. L. REV. 627 (1930); *see also* Sidney D. Fazio, Comment, *A Comparison of Redhibition in Louisiana and the Uniform Commercial Code*, 19 LA. L. REV. 165 (1958). This argument, based upon Louisiana civil law, was inspired by Note, *Uniform Commercial Code: Buyers of Nonconforming Goods Who Revoke Acceptance Under Section 2-608 May Recover the Purchase Price from a Remote Supplier Despite Lack of Privity of Contract*, 63 MINN. L. REV. 665 (1979).

415. This assumption is reasonable although there is no case law or commentary on the point. "Substantial impairment" certainly means, at minimum, a material non-conformity; it is reasonable to assume that a material non-conformity would have caused the buyer not to buy had the non-conformity been known.

416. 262 So. 2d 377 (La. 1972).

417. *Id.* at 378.

418. *Id.* at 379.

419. *See* Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., 247 So. 2d 266 (La. Ct. App. 1971).

420. *Id.* at 267.

421. *Media Prod. Consultants, Inc.*, 262 So. 2d at 380.

422. *Id.*

423. *Id.* at 381.

Inc. [dealer] for the price of the automobile and other allowable expenses."[424] Thus, the remote seller was liable for the purchase price.[425]

In *Rey v. Cuccia*, the buyer sought to regain the purchase price of a motor home which allegedly had a redhibitory defect.[426] While the trial and intermediate appellate courts thought the evidence was insufficient to establish a redhibitory defect, the Supreme Court of Louisiana disagreed.[427] Moreover, the court rejected the nonprivity manufacturer's argument against liability for the purchase price and left no doubts about the liability of remote sellers in Louisiana. The court stated:

> [W]e find no merit to the manufacturer's contention that it could not be held liable directly to the buyer for a redhibitory defect existing at the time it sold the vehicle to Cuccia [immediate seller]. In so contending, the manufacturer relies upon the lack of privity between it and the ultimate buyer . . . .
>
> When the sale is annulled for a redhibitory defect resulting from the original manufacture, the purchaser can recover the pecuniary loss resulting from the unusable thing sold from the manufacturer as well as the seller.[428]

Lest there be any doubt about the extent of the manufacturer's liability, the court entered judgment against both the dealer and the manufacturer for the purchase price.[429] There is nothing in the opinion, as there was in *Media*, indicating that the dealer was insolvent. The redhibitory action resulting in a judgment for the return of the price against the remote seller was not contingent upon the immediate seller's insolvency. Thus, the law under Louisiana's Civil Code has evolved in the same direction as the minority approach under section 2-608 allowing revocation of acceptance and refund without privity when substantial impairment is tied to a breach of an obligation of the remote seller.[430]

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424. *Id.*

425. The case did not turn on U.C.C. § 2-608. Rather, civil law accomplished the objective of a forced exchange between buyer and remote seller.

426. 298 So. 2d 840 (La. 1974).

427. *Id.*

428. *Id.* at 845 (citation omitted).

429. *Id.* at 847.

430. In Gochey v. Bombardier, Inc., 572 A.2d 921 (Vt. 1990), the Supreme Court of Vermont allowed revocation of acceptance against the manufacturer without mentioning insolvency of the dealer, or any other reason for the action against the remote seller apart from breach of a contractual obligation. *See supra* notes 122-39 and accompanying text (discussing this case).

4. Summary.

Several of the courts adhering to the majority approach have characterized revocation of acceptance and refund as remedies appropriate only to immediate buyers and sellers but inappropriate for use by buyers against remote sellers. While this attitude is not shared by the minority, it has prevented the confluence of section 2-608 and section 2-711(1) in many cases involving remote sellers. In the fifteen years since *Durfee* was decided, the majority and minority viewpoints seem to have hardened. There is no sign that either judicially created stream will soon dry up.

While these conflicting viewpoints were developing, three separate bodies of law evolved in which the privity barrier to return and refund was abolished. In Magnuson-Moss, Congress abolished the privity barrier, in cases involving breach of a full warranty, and allowed a buyer to obtain a refund from a remote seller when the buyer yields title to the warrantor. In *Ventura*, a New Jersey appellate court extended this remedy to breach of limited warranties. Under state lemon laws, the privity barrier to revocation of acceptance and refund has also fallen. Finally, in Louisiana, where the civil-law heritage is controlling, the functional equivalent of revocation of acceptance and refund without privity is allowed against remote sellers under the action designated as redhibition. If common-law lawyers regard the forced exchange between a buyer and a remote seller allowed by these three bodies of law as a strange additive to a pure stream, it must be said that the additive is neither lethal, nor even distasteful once one grows accustomed to it. If one recognizes that the Code's remedial objective is the same as the remedial objective implicit in these comparable remedial schemes, namely, the protection of the buyer's expectation interest, revocation of acceptance and refund against remote sellers becomes not only plausible but essential to round out Article 2's remedial scheme.

VIII. POLICY ANALYSIS: REVOCATION OF ACCEPTANCE AND REFUND APPLIED AGAINST REMOTE SELLERS ESTABLISHES A REASONABLE BALANCE OF BURDENS AND BENEFITS

If one assumes that the text of section 2-608 and related sections allows revocation of acceptance without privity, or that a legislative change which specifically allows revocation of acceptance without privity will shortly be proposed in a revised Article 2, there still remains a question concerning the desirability of this remedial device. The fact that Magnuson-Moss, lemon laws, and the law of Louisiana allow equivalent results on competing theories does not establish that the results are more desirable than limiting disappointed buyers to actions

for damages.[431] The following pages are an attempt to establish strong policy-based reasons for allowing revocation of acceptance and refund without privity.

A. The Burdens and Risks of Re-selling Defective Goods, and the Risk of Increase in the Price of Substitute Goods, Should be on the Seller, Not on the Innocent Buyer

Compare the remedies allowable under sections 2-608 and 2-711(1) with the damages allowable under section 2-714(2). Suppose a man pays $25,000 for a new car, takes delivery, and by failure to reject within a reasonable time, makes an acceptance under section 2-606.[432] Within weeks, the car's transmission ceases to function, the paint fades, the exhaust pipe falls off, and the engine stalls at every intersection. The dealer's mechanics replace the exhaust pipe, touch up the paint, and fix the transmission, but the stalling continues despite repeated repair efforts. Other annoying problems also develop. The buyer hires an independent auto mechanic to examine the car. This mechanic tells the buyer that he has a "lemon" and that he can expect continuing problems as the car was poorly made. Meanwhile, the dealer goes into bankruptcy and the manufacturer's representatives do not return the buyer's phone calls.

Assuming that the buyer can prove breach of an express or implied warranty made by the manufacturer, the basic remedial options would be damages under section 2-714(2) or revocation of acceptance and refund under sections 2-608 and 2-711(1), if privity is not required. First, consider the damages formula. Section 2-714(2) states that the measure of damages for breach of a warranty is the difference "between the value of the goods accepted and the value they would

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431. This position assumes, of course, that the plaintiff proves the procedural and substantive prerequisites (including substantial impairment of the value to the buyer). The purpose of Part VIII is to point out the reasons why revocation of acceptance and refund should be available as alternatives to an action for damages when remote sellers breach warranties under Article 2.

432. According to U.C.C. § 2-606(1):

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful against the seller it is an acceptance only if ratified by him.

U.C.C. § 2-606(1) (1977).

have had if they had been as warranted . . . ."[433] The time for the measurement of damages is the time when the buyer accepted the goods.[434] Suppose the buyer who paid $25,000 can show by expert testimony that at the time of acceptance, the car would have been worth $25,000 if it had been as warranted, but in fact was only worth $20,000 due to the defects. Buyer is entitled to $5,000 as a monetary award and may also prove incidental or consequential damages under section 2-715.

Buyer now has $5,000 and a defective car.[435] If the buyer wants a new car, he must sell the defective car without making himself liable for breach of any warranty to the new buyer. Adding the resale proceeds to the $5,000 award, he must then try to replace the car which proved defective. If the buyer sells the old car for $20,000 or more, the proceeds of resale and the $5,000 received as damages should enable the buyer to acquire a new car as a substitute for the defective car if the price has not increased. If the resale is anything less than $20,000, or if the price has not increased, the buyer cannot acquire the car for which he originally bargained without a loss.

Assuming a good outcome, the buyer will sell the old car for $20,000 and, before the market has changed, purchase a good substitute for $25,000 or less. The buyer, however, will have no claim for the market difference if the price of a new car, comparable to his old one, has gone up by the time a substitute purchase is made.[436] Thus, whenever the disappointed buyer really wants *to get rid of the defective car and wants to acquire a replacement*, a satisfactory result assumes both timely collection of damages based on the formula in section 2-714(2) and a timely resale of the defective goods at a price which, when combined with the damages, equals the price paid for substitute car. These assumptions, however, are not realistic.

Even with the most favorable of assumptions, the burden of disposition and the risk of an unfavorable disposition of the defective goods is on the buyer. If the buyer is an ordinary consumer, he may have no ready access to a favorable market for resale of the car. More impor-

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433. *Id.* § 2-714(2). "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." *Id.*

434. *Id.*

435. This assumes settlement or a speedy trial. In fact, any damages award may be years in coming.

436. "Cover" damages or damages under U.C.C. § 2-713 may follow rejection or revocation of acceptance, but cannot follow damages under U.C.C. § 2-714(2) which presumes that the aggrieved buyer keeps the goods. This may not be a correct presumption when want of privity is the only reason for a buyer receiving damages instead of revocation and refund.

tantly, he commonly has no equipment, staff, or time to rehabilitate the defective car for resale. He will probably not only have to hire someone to fix up the car, he may also need to pay a fee for reselling the car in order to get a decent price. Even if these costs are collectible as incidental damages in litigation,[437] the buyer must incur these costs and carry them for a considerable time in the hope of a future award. To these considerations must be added the buyer's time for the making of repairs and resale, which can be considerable.

Now, consider instead revocation of acceptance and refund, assuming again that the car's purchase price was $25,000. If the buyer can establish that he accepted the car without knowledge of the defects and that the ensuing defects substantially impair the car's value to him, then he has a rightful claim for the full purchase price in exchange for the car. Even if the buyer needs expert testimony to prove substantial impairment of the car's value to him due to the defects, he is spared the trouble and expense of proving the value differential under section 2-714(2). More importantly, he is spared the burden and risk of loss or liability in re-selling a used car. The manufacturer, or a dealer for the manufacturer, not only has market access and resources for rehabilitating a defective car, but also has resources for selling a used car, and without the same difficulties which an ordinary buyer would encounter.

With a full refund in hand, the buyer can go into the market and purchase a substitute car thereby fulfilling his reasonable expectations with a minimum of trouble and expense. Moreover, if the price of the model sought has gone up in the meantime, section 2-711(1), with its cross-references to sections 2-712 and 2-713, makes it possible for the buyer to recapture as damages the increase in price he needs to pay for a replacement car.[438] If the cost of the car has increased from $25,000 to $27,500, the buyer should receive a refund, and any increase in price due to inflation provided the buyer covers within a reasonable time.[439] It is self-evident that in many situations using section 2-608, in conjunction with section 2-711(1) or other sections better achieves the objective of putting the buyer into the position he would have been in if the warranty had not been breached than does a damage award under section 2-714(2). The damages formula only works well when defects

437. According to U.C.C. § 2-715(1): "Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expenses incident to the delay or other breach." *Id.* § 2-715(1). Thus, given the last clause, there might be a claim for incidental damages even though cover was not technically accomplished.

438. *Id.* § 2-711(1).

439. This remedy is unavailable under section 2-714(2). *See id.* § 2-714(2).

do not substantially impair the car's value, and hence, the buyer is content to keep it and receive damages for minor defects. Thus, the goal of section 1-106(1) is often better served by revocation of acceptance and refund than by application of the damages formula from section 2-714(2). Damages are not always a reasonable or fair equivalent because the risk and burden of disposition of defective goods remain on the buyer. Additionally, the buyer is squeezed out of any claim for the inflationary increase when the formula of section 2-714(2) is applied. Moreover, the justification for using section 2-608 and its companion sections is in no way reduced when the breaches complained of are breaches by a remote seller.

B. Allowing Revocation of Acceptance and Refund as Remedies Against a Remote Seller Spares the Buyer the Psychic Pain of Having Defective Goods and Avoids Exposing the Buyer to Dangers Attributable to Defects

The psychic pain[440] which results from making a bad purchase is generally not compensable, yet nobody who has been burned by a bad bargain on a major item doubts the reality of this pain. Living with a car that stalls, a mobile home that leaks, or an office machine that will not function causes enormous frustration. Since psychic pain is not compensable, the aggrieved buyer never achieves the full expectation of the bargain by monetary damages alone. If the only solvent party liable for breach of warranty to a buyer is a remote seller and revocation of acceptance and refund are denied, the buyer is precluded from attaining the remedies that best satisfy his expectation interest.

If revocation of acceptance and refund are allowed, the frustration of dealing with defective goods is not eliminated, but it does cease when the goods are forced back upon a seller in breach in return for the purchase price. Hence, the duration of psychic pain is greatly reduced when revocation of acceptance and refund are allowed and the buyer is enabled to make a satisfactory substitute purchase. In the typical automobile case, a buyer who successfully revokes and gains a full refund from a manufacturer may actually take some small pleasure in shopping for a replacement car. Consequently, the goal of section 1-106(1) is better achieved by revocation of acceptance and refund than by damages alone.

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440. Professors White and Summers use the term "psychic cost" in discussing the aggravation which a buyer experiences after receipt of a non-conforming good, especially when attempts to cure repeatedly fail. WHITE & SUMMERS, *supra* note 5, § 8-3. This Article uses "psychic pain" to describe the frustration, helplessness, and anger that a buyer often experiences on receipt of non-conforming goods for which the buyer has paid good money. Anyone who has purchased a car that will not run, or a household appliance that will not work, can relate to this kind of pain.

It is interesting to note in this context that Article 2 explicitly recognizes a contracting party's right to the security of his expectation interest. Section 2-609 states, in relevant part: "A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired."[441] Buyers bargain for performance, not for a right to a suit for damages, and security of performance is an important feature of a bargain.[442] If a seller's breach results in substantial impairment of the goods' value to the buyer, the security of the performance has long since been lost, but the insecurity experienced is greatly augmented when the remedies are curtailed on account of a privity barrier.

A reduction in frustration and a diminution in immediate danger could result from allowing revocation of acceptance and refund against remote sellers in some cases. Consider major consumer items installed in millions of homes which, if defective, can cause grave dangers: gas furnaces can explode, dishwashers can leak or burn, electrical wires can give shocks, and sewer pipes can leak noxious materials. Prior to an actual injury occurring, a products liability suit will not lie. If consumers who have breach of warranty claims on such items cannot gain revocation of acceptance and refund, and only damages are allowed, then the defective goods will more likely remain in place while the consumer applies any monies received as an award or settlement to maintenance and repairs.

Suppose a buyer has purchased a barrel of pesticides which is subsequently determined to be environmentally dangerous due to a defect in the formula used for manufacture. An aggrieved buyer should not bear the risk of either disposition or storage. It would be a wise public policy to motivate buyers to seek revocation of acceptance and return of the defective goods before consequential damages arise. Moreover, in such cases a manufacturer will generally be much more capable of making a safe disposal of the goods than would a retailer for whom the offending good may be one of thousands. Of course, under the majority view of section 2-608, nothing presently precludes buyers from demanding revocation of acceptance and refund against immediate sellers if they are liable for a breach. Yet, in cases of dealer insolvency and in

441. U.C.C. § 2-609(1).

442. The Official Comment states:

> The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain.

cases where immediate sellers effectively disclaim all warranties, the only party liable for breach will be a remote seller, usually a manufacturer or distributor of the goods.

In many societal settings there is a further reason to allow revocation of acceptance and refund against remote sellers because community loyalties bind buyers to local merchants. A buyer, especially a consumer-buyer, may suffer an injustice of consequence rather than offend a long-time family friend or fellow church-goer who is the immediate seller. The buyer's expectation is that the manufacturer or distributor should stand behind the product. Without the right of revocation of acceptance and refund against remote sellers, buyers will keep possession of non-conforming goods whose use or storage may pose a risk of harm, or in any event, whose value is less than expected.

Consider further, public and private construction projects where contractors and subcontractors annually incorporate billions of dollars worth of goods into structures. Lumber, bricks, steel, and glass generally are wrought into the work and lose their identity. Consequently, revocation of acceptance as to these goods is neither possible under section 2-608 nor practical without destruction.[443] On the other hand, goods such as heating and air-handling equipment, lighting fixtures, floor coverings, and communications equipment often retain their identity, and are readily severable from completed construction projects. If defects in such goods substantially impair the value of the goods to the structure's owner, revocation of acceptance and full refund should be possible, but only if the supplier or subcontractor has made a warranty running to the owner/buyer.

In construction projects, however, the party in privity who delivers the goods is usually a general contractor and, if the service component is predominant, the principal contract is not deemed an Article 2 contract for the sale of goods.[444] Hence, the buyer's rights against its contractor in privity will be governed by general contract law. Revocation of acceptance will be barred unless the buyer can circumvent the privity requirement and make a legal demand for revocation of acceptance and refund against a non-privity Article 2 seller who sold the defective goods to the contractor or subcontractor.

As in the foregoing examples with homeowners, there is not only a reduction of frustration, but also an increase in safety if there is a read-

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443. Article 2 would not cover a general construction contract which would be deemed primarily a contract for services, but a supply contract will commonly be a transaction in goods and, thus, come under Article 2. *See id.* § 2-102. Thus, warranties may run from a supplier or subcontractor to an owner. When such items lose their identity in a structure, however, the requisites for revocation of acceptance under U.C.C. § 2-608 will no longer be provable.

444. *See, e.g.*, Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370 (Mass. 1980).

ily available mechanism for the disposition of faulty goods in return for the purchase price, so that replacement acquisitions can be made. The majority approach to section 2-608 is justification for many suppliers to rest easy once goods are sold through a contractor or subcontractor. The privity bar, of necessity, creates problems for the buyers who must make do with damages for defective goods regardless of the severity of the defects. The majority-view remedial scheme does not accomplish the remedial objective of section 1-106(1) in the commercial context any better than in the consumer context.

C. The Forced Exchange of Defective Goods for the Buyer's Full Price is Not an Unreasonable Burden for a Remote Seller

Lawyers cognizant of sellers' concerns may ask whether or not allowing revocation of acceptance and refund without privity creates an unfair exposure for sellers. First, remote sellers may be geographically more remote from the ultimate buyers than are the immediate sellers. Second, the logistics of a forced exchange between a buyer and a remote seller may be more troublesome and costly than a forced exchange between a buyer and his immediate seller. Finally, the buyer's price may be more than the seller received from its buyer. For example, a distributor may sell a piece of farm equipment for $40,000 to a dealer who then may sell it to a farmer for $50,000. If the farmer is allowed to revoke acceptance and gain a refund from the distributor, the remote seller, a full refund will be $50,000, the buyer's full purchase price. This requires the remote seller to hand over $10,000 in excess of its gross receipts on the sale. Given such assumptions, one must consider whether or not the breakdown of the privity barrier ought to be accompanied by some limitations. After all, courts adhering to the majority view have expressed reservations not only about the workability of revocation of acceptance without privity but also the policy behind revocation of acceptance and refund applied against remote sellers. For example, a Michigan appellate court, in *Henderson v. Chrysler Corp.*, maintained the majority view over a dissent and stated: "The extension of a contractual obligation as set forth in the dissenting opinion [revocation of acceptance without privity] could have widespread effect on a number of manufacturers in various fields."[445] The court, therefore, did not want to broaden sellers' liabilities.[446]

The point of view herein adopted is that no special limitations need accompany the proposed breakdown in privity under section 2-608 ex-

445. 477 N.W.2d 505, 508 (Mich. Ct. App. 1991).
446. *Id.*

cept for preclusion of consequential damages under section 2-715(2).[447] This viewpoint rests on three bases. First, section 2-608 has stringent limits on revocation of acceptance. Second, only a remote seller who has passed title for a price and who is contractually liable to the remote buyer for breach of warranty or other obligation can rightly be exposed to revocation of acceptance and a demand for refund. Third, if a remote seller pays more than he received from his buyer, he should have a claim against his buyer to recoup any excess over the price originally received. Since the latter point is not part of section 2-608's text, it would take creative use of non-Code principles to achieve a just result. If a remote seller makes a full refund, however, it is equitable that an immediate seller should not keep any profit from the transaction.

The procedural and substantive requirements for an effective and rightful revocation of acceptance under section 2-608 are stringent.[448] The buyer must prove that he accepted the goods without discovery of the defects due to either the difficulty of discovery or the seller's assurances, or alternatively, that the buyer knew of the defects at the time of acceptance but reasonably relied on the seller's prospective cure.[449] If this burden is met, the buyer must prove *substantial impairment of the value of the goods to him.*[450] This is akin to *material breach*; mere non-conformity is not sufficient. Finally, the buyer must prove that he gave the seller(s) notice of revocation within a reasonable time after he discovered, or should have discovered, the defects.[451] He must give notice "before any substantial change in [the] condition of the goods which is not caused by their own defects."[452] When these requirements are considered in conjunction with the Code's denial in section 1-106(1) of attorney's fees, it becomes clear that revocation of acceptance is far more difficult to achieve than rejection under section 2-601,

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447. This accords with Professor Speidel's draft of December 21, 1993. Proposed § 2-318 would read in relevant part:

> (a) A seller's express or implied warranty, made to an immediate buyer, extends to any remote buyer who may reasonably be expected to buy the goods and who suffers damage from breach of the warranty. In this section "seller" includes a manufacturer, and "goods" includes a component incorporated in substantially the same condition into other goods.
>
> . . . .
>
> (d)(4) Unless otherwise agreed with such seller, the remote buyer has no right to consequential damages for breach of a warranty extended under subsection (a) or created under Section 2-313(a)(3).

REVISED ARTICLE 2, *supra* note 16.

448. WHITE & SUMMERS, *supra* note 5, § 8-4.

449. *See* U.C.C. § 2-608 (1977).

450. *See id.* § 2-608(1); WHITE & SUMMERS, *supra* note 5, § 8-4 (discussing "substantial impairment" at length).

451. *See* U.C.C. § 2-608(2).

452. *Id.*

or proof of damages under section 2-714. These built-in limitations afford sufficient protection for sellers.

A remote seller should never be held liable for breach of an obligation by any other person in the distribution chain.[453] In other words, revocation of acceptance and refund must only be allowed against a remote seller who is contractually responsible for a defect which substantially impairs the value of goods to a remote buyer. The seller by definition took a price for the goods. If this were not true, the label "seller" would be inappropriate and no warranty would arise. In the normal course, sellers, such as manufacturers and distributors, sell for a profit. The price paid by any buyer prior to the purchase by a buyer at the end of the distribution chain generally includes profit for the preceding seller. Having sold for a profit and having made a warranty running to the remote buyer, it makes sense that a remote seller should be liable to the same extent as an immediate seller for breach of the same or a similar warranty. Liability to the same extent means liability for a refund when revocation of acceptance is appropriate.

The troublesome issue arises when a refund exceeds the amount received by the remote seller on *its* sale. Consider again the case of the distributor who sold a farm tractor for $40,000 to a dealer who then sold it to a farmer for $50,000. If the farmer is allowed to revoke acceptance against the distributor and to gain a $50,000 refund, the distributor is forced to pay $10,000 more than he received. One could argue that refund should be limited to the amount received by the seller. Unfortunately, if this course is taken, the buyer does not receive his lost expectancy. The better course is to put the aggrieved buyer into his full expectancy and to provide the remote seller with an action against *his buyer* for a refund. On the foregoing facts, the dealer would need to pay $10,000 to the distributor after the farmer's revocation of acceptance, an amount which is equal to the dealer's gross profit.

One can argue that if the dealer has not breached any warranties, one should not penalize the dealer by allowing an action by the remote seller for recoupment of loss. The matter, however, can be seen in a different light. The difference between the $50,000 and $40,000 is the dealer's gross profit, the profit made on the sale of the tractor to the revoking buyer. Causing the dealer to give up gross profit to its seller is neither based on fault nor is it punitive. It simply puts each person up the chain of distribution in approximately the position he would have occupied if the deal had been aborted at an earlier stage. If the farmer

453. Troutman v. Pierce, Inc., 402 N.W.2d 920 (N.D. 1987) is plainly wrong, since revocation of acceptance and refund against the dealer was allowed on account of the remote manufacturer's breach. *See id.* at 924.

rightly revokes acceptance and returns the tractor to the distributor, one might reasonably conclude that the dealer should not have any profit on the sale.[454] In short, to accomplish the objective of giving the aggrieved buyer his expectation interest and to avoid injustice to the remote seller, an adjustment between or among sellers in the distributive chain should be allowed.[455]

Assuming transaction costs, a dealer could occasionally experience a hardship. More likely, a dealer will be insolvent when a remote seller attempts to recoup money paid as settlement to a remote buyer. In this event, it is the remote seller, such as a manufacturer, who should take the risk of loss, and not the innocent buyer. This was a point made by the Supreme Court of Minnesota in *Durfee* where the court stated that the car distributor or manufacturer must take some responsibility for the insolvency of its dealers.[456] Giving the remote seller a chance to recoup that part of the price refunded to the remote buyer which exceeds the remote seller's receipts on the sale is a reasonable mechanism to achieve equity among the parties.

IX. CONCLUSION

This article began with the hypothetical story of Cherri who is stuck with word processors and a printer that are unworkable. The immediate seller is insolvent and the remote seller indifferent. She owes her bank money on a note for a loan used to pay for the equipment. The law office is suffering for lack of operable equipment and she is deliberating about her course of action.

If the equipment were consumer goods, Cherri would have a claim for relief even against the remote seller under Magnuson-Moss. Whether her claim would include return and refund would turn on whether the warranty was limited or full, unless she could induce a court to follow *Ventura v. Ford Motor Corp.*[457] In any event, however, Magnuson-Moss cannot help Cherri. Since the goods were bought for office use, she will not be able to state a Magnuson-Moss claim. Neither is a lemon law claim likely. Lemon laws, with few exceptions, are limited to new motor vehicles. Of course, if Cherri were living in

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454. Of course, since the gross profit of $10,000 includes some overhead, the dealer necessarily loses money when the entire gross profit is returned to the manufacturer. Furthermore, the dealer has lost the sale. This may give rise to a claim by the dealer against the distributor or manufacturer, but such a claim is not part of this inquiry.

455. Perhaps the comments to U.C.C. § 2-608 should be written to induce courts to make such adjustments.

456. Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 357-58 (Minn. 1977).

457. 433 A.2d 801 (N.J. Super. Ct. App. Div. 1981). In *Ventura* the court allowed the "rescission-type" remedy for breach of a limited warranty. *Id.* at 811.

Louisiana, an action in redhibition might be possible. If successful, there would be a forced exchange with the remote seller.

Outside of Louisiana, Cherri must hope to convince the court that section 2-608 in combination with section 2-711(1) is applicable to the remote seller. Otherwise, she will be stuck with an action for damages and must dispose of the defective goods as best she can; assuredly an unsatisfactory result. In such a situation, the court should follow the minority view and allow revocation of acceptance and refund as the means best devised to satisfy Cherri's reasonable expectation interest. This would satisfy the Code's stated objective under section 1-106(1). While this view is reasonably consistent with section 2-608 when interpreted in light of other Code sections, the clarification which should come from the proposed textual change to section 2-318 should be welcomed. Such a clarification with appropriate cross-references to section 2-608 would go a great distance toward rounding out Article 2's remedial scheme in order to meet the Code's remedial objective.

Soon after the Supreme Court of Minnesota decided *Durfee*, a student writing in the Minnesota Law Review stated:

> If, as Dean Prosser announced in 1966, the citadel of privity has already fallen, then some may view *Durfee* as a Fourth Punic Campaign—a gratuitous salting of the ruins. It appears, however, that *Durfee* represents a conquest of a corner of the fortress that had somehow escaped notice in the frenzy of the main battle. *Durfee* does not extend the concept of nonprivity liability beyond established warranty doctrines. Rather, *Durfee* eliminates an aberrant judicial discrimination against the revocation of acceptance remedy, pointing the way toward the consistent treatment of buyers' remedies under the U.C.C. breach of warranty provisions.[458]

The efforts of this work have been directed toward sustaining the conclusion set forth in the quoted paragraph, namely, that the majority view represents an "aberrant judicial discrimination against the revocation of acceptance remedy."[459] For the sake of a more directed growth in the case law, the suggested amendment contained in Professor Speidel's recent draft for a revised Article 2, which would allow revocation of acceptance and refund without privity by amendment to section 2-318, builds upon the best of the case law. It sets a proper course for the further development of remedies under Article 2, and avoids an unnecessarily cramped and restrained reading of the Code's remedial parts which has undermined the Code's remedial whole. The amendment or some variation thereof should be adopted as part of a revised Article 2.

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458. Note, *supra* note 414, at 693.
459. Note, *supra* note 414, at 693.

Meanwhile, courts should adopt the *Durfee* line of analysis whenever appropriate.

It might also be worthwhile to reconsider the term "revocation of acceptance." Since acceptance under U.C.C. section 2-606 is tied to tender by the immediate seller, undoing the acceptance against someone other than the immediate seller will forever be a stumbling block to the employment of the remedy against remote sellers. Indeed, to accomplish the desired result the acceptance must be undone in a sense. What is more important is simply recognition that title to the goods goes to the breaching warrantor in exchange for the price. Perhaps a new section replacing section 2-608 could be entitled "Return of the Goods and Refund for Buyer after Acceptance" thereby borrowing from section 2-711(1) and to some extent from Magnuson-Moss. This might help untie the conceptual knot that has prevented more widespread growth of this remedy beyond immediate parties.