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

Minn. L. Rev. Editorial Board

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/3113

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Shortly after John Durfee purchased a new Saab automobile in June, 1974, it developed several annoying defects.\(^1\) Despite repeated attempts, two Saab dealers failed to make adequate repairs under the terms of the standard new-car warranty. After some 6,300 miles of use, Durfee notified the wholesale distributor that he would not submit the automobile for further repairs and brought an action against both the selling dealer and the wholesale distributor\(^2\) seeking recovery of the full purchase price. The trial court, sitting without a jury, awarded plaintiff $600 in damages for breach of warranty, but, since the court found that the defects did not justify rescission of the sales contract, it did not order return of the purchase price.\(^3\) On appeal, the Minnesota Supreme Court reversed and remanded with instructions to enter judgment against both the dealer and distributor, holding: that the defects in the automobile substantially impaired its value to the plaintiff, thereby entitling him to revoke his acceptance

---

1. Plaintiff encountered numerous problems with the automobile. At the time plaintiff filed suit he complained of six defects that remained uncorrected: (1) the passenger seat had not been reinstalled after having been removed by the dealer for repair; (2) the automobile continued to stall; (3) the seatbelt warning system continued to activate without apparent cause; (4) a rattle persisted; (5) the temperature gauge registered hot; and (6) shortly after starting the motor, the heating unit malfunctioned. Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 352 (Minn. 1977). Although not discussed in the court's opinion, plaintiff contended that the stalling problem was a safety hazard since the automobile at least once stalled "smack in the middle of a set of railroad tracks." Brief for Plaintiff-Appellant at 10.

2. Plaintiff's Saab was manufactured by Saab-Scania AB of Sweden, a foreign corporation. Saabs were distributed in the United States by Saab-Scania of America, Inc. which supplied and installed accessory parts and delivered the vehicles to dealers. The automobile's warranty was, by its terms, a warranty from the American distributor. See note 11 infra.

3. The trial court apparently decided the case on the basis of the common law rather than the controlling sections of the Uniform Commercial Code. The trial court's opinion did not mention the U.C.C., and used the term, "rescission," which has been replaced in the Code by "revocation of acceptance." See notes 4, 71 infra. Reference to the Code first appears in published material in plaintiff-appellant's brief to the Minnesota Supreme Court. Plaintiff apparently did not draw the court's attention to the relevant sections of the U.C.C. at the trial level. See Brief for Plaintiff-Appellant, Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977); id. at app. (containing the text of the complaint, answer, and trial court opinion).
of the vehicle and to recover the full retail price as well as incidental damages; that the repair-and-replacement clause of the distributor's warranty failed as an exclusive remedy when the automobile was not placed in reasonably good operating condition; and that lack of privacy of contract did not bar plaintiff's recovery of the retail purchase price from the wholesale distributor. Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977).

Although the first two issues reached by the Durfee court represent new developments in Minnesota, their disposition by the court


(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity 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.

The Uniform Commercial Code was adopted in Minnesota by Act of May 26, 1965, ch. 811, 1965 Minn. Laws 1290, from the 1962 official draft. The official numbering system was retained with the addition of the chapter prefix, 336. Except as otherwise noted, the statutory provisions cited herein are substantively unchanged from the 1962 official draft. 21A Minn. Stat. Ann., Preface at III (West 1966). In this Comment, textual references to provisions of the U.C.C. will be presented without repeated reference to the 1962 version and the Minnesota Statutes chapter prefix.

5. Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 353, 355, 357 (Minn. 1977). Section 2-711 provides that when the buyer justifiably revokes acceptance under § 2-608, he may recover the purchase price.

6. 262 N.W.2d at 357. U.C.C. §§ 2-711(1)(b), 2-713(1) read together, give the revoking buyer a right to recover incidental and consequential damages in addition to the price paid. U.C.C. § 2-715 (1), defines incidental damages to 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 expense incident to the delay or other breach." U.C.C. Official Comment 1, states that this subsection "is intended to provide reimbursement for the buyer who incurs reasonable expenses in connection with the handling of . . . goods whose acceptance may be justifiably revoked . . . ." U.C.C. § 2-715, Official Comment 1. The Durfee court, relying on this comment, permitted the plaintiff to recover incidental damages of $116.30 as reimbursement for repair costs. 262 N.W.2d at 357 (citing Lanners v. Whitney, 247 Or. 223, 428 P.2d 398 (1967)). Although plaintiff did not prove any consequential damages, the Code does permit their recovery.

[Vol. 63:665]
was consistent with well established case law in other U.C.C. jurisdictions. The court first considered U.C.C. section 2-608, which provides that where defects in goods substantially impair their value, an aggrieved buyer may, by giving notice within a reasonable period of time, revoke his acceptance and recover the purchase price. The Durfee court found that the "succession of minor defects . . . [coupled] with the frequent stalling of the Saab" constituted substantial impairment, and permitted revocation of acceptance even

7. U.C.C. § 2-608. For the full text of this section, see note 4 supra. The revocation of acceptance remedy is available to the buyer in the second of three phases of the sales transaction. A buyer who acts promptly has the option of "rejecting" the goods for any defect under § 2-602—entitling him to recover the price paid under § 2-711—or accepting the goods and recovering loss of bargain damages under § 2-714. The buyer who has let the reasonable period for rejection pass must show that the defects in the goods substantially impair their value in order to be entitled to "revoke acceptance" under § 2-608 and to secure the advantages of the optional remedies available to the rejecting buyer. Once the reasonable period for revocation of acceptance has passed, the buyer must keep the goods and is limited to recovery of loss of bargain damages under § 2-714. Compare U.C.C. § 2-602 with id. § 2-608 and id. § 2-714.

The reasonable period within which revocation of acceptance must take place is not a fixed period, but may be extended by the latency of the defects or by the buyer's reasonable reliance on the seller's assurances of a non-forthcoming cure. See generally J. White & R. Summers, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 8-3 at, 260-64 (1972).

The Durfee court summarized the following requirements prescribed by § 2-608 for an effective revocation of acceptance:

1. the goods must be nonconforming;
2. the nonconformity must substantially impair the value of the goods to the buyer;
3. the buyer must have accepted the goods on the reasonable assumption that the nonconformity would be cured;
4. the nonconformity must not have been seasonably cured;
5. the buyer must notify the seller of his revocation;
6. revocation 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; and
7. the buyer must take reasonable care of the goods for which he has revoked acceptance.

262 N.W.2d at 353 (footnotes omitted).

8. 262 N.W.2d at 354. Although the trial court had found that the Saab "apparently could not, or would not, be placed in reasonably good operating condition" it refused to rescind the contract. Id. The Minnesota Supreme Court affirmed the factual finding but differed with the trial court's conclusions of law, noting that the trial court had not addressed the question in the language of the U.C.C. Id.

The supreme court announced a common sense approach to substantial impairment: allowing revocation of acceptance "if the defect substantially interferes with operation of the vehicle or a purpose for which it was purchased." Id. at 354. In doing so, the court approved commentators' analogies "to the determination of a material breach under traditional contract law." Id. at 353 (citing J. White & R. Summer, supra
though the automobile had been driven some 6,300 miles over a nine month period before notice was given.¹

¹ note 7, § 8-3, at 257-58). The court noted that the minor defects alone “might not constitute substantial impairment,” but quoted with approval from Stofman v. Keenan Motors, Inc., 63 Pa. D. & C.2d 56, 58, 14 U.C.C. Rep. Serv. 1252, 1259 (1973), which held that a stalling defect was ipso facto substantial impairment because of the danger of highway accidents. 262 N.W.2d at 355. It appears, therefore, that safety related defects such as stalling will weigh heavily in future determinations of substantial impairment.

Courts in other Code jurisdictions have reached similar conclusions in interpreting substantial impairment in the context of defective automobiles. Some have dealt with more grievous defects than those encountered in Durfee and so are not directly comparable. See, e.g., Tiger Motor Co. v. McMurtry, 284 Ala. 283, 224 So. 2d 638 (1969) (engine misfired and consumed excessive amounts of oil and gasoline); Overland Bond & Investment Corp. v. Howard, 9 Ill. App. 3d 348, 292 N.E.2d 166 (1972) (transmission fell out and brakes failed); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 554 P.2d 349 (1976) (extensive damage to engine of used car caused by unsuitable transmission). In cases in which defects were less severe, courts have reached conflicting results. Compare Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 382 A.2d 954 (1978) (revocation of acceptance allowed for purely cosmetic but persistent paint defects) with Reece v. Yeager Ford Sales, Inc., 155 W. Va. 453, 184 S.E.2d 722 (1971) (cosmetic defects alone are not substantial impairment). Easily reparable defects will generally not be held to constitute substantial impairment. See Rozmuz v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 224 A.2d 782 (1966) (no substantial impairment where engine mounts were loose). But, regardless of the severity of a defect, it may substantially impair the value of a vehicle if an inept or uncooperative dealer simply does not make repairs. See Zoss v. Royal Chevrolet, Inc., 11 U.C.C. Rep. Serv. 527 (Ind. Super. Ct. 1972) (“Unsuccessful repair is itself a sufficient nonconformity to give rise to the buyer’s right of revocation of acceptance.”). If the injury is attributable to events occurring after the sale, the seller will not be liable under § 2-608 because the vehicle would have conformed to the sales contract when accepted. See Collum v. Fred Tuch Buick, 6 Ill. App. 3d 317, 285 N.E.2d 532 (1972) (absence of oil filter resulted in fire, but since missing filter was shown to be result of serviceman’s oversight, buyer failed to prove damage caused by “defect”). Where a defect exists at the time of sale, even if it was latent and does not appear until after the sale, and the defect interferes with the actual operation of the vehicle, courts generally find substantial impairment if the defect is not set right. See, e.g., Stofman v. Keenan Motors, Inc., 63 Pa. D. & C.2d 56, 14 U.C.C. Rep. Serv. 1252 (1973) (substantial impairment found for stalling problem and other minor defects).

9. U.C.C. § 2-608(2) provides that revocation of acceptance must occur within a reasonable period of time after discovery of the defects, and before the occurrence of any substantial change in the goods that is not caused by their own defect. See note 4 supra. Plaintiff wrote a letter to defendant Saab-Scania’s attorney approximately nine months after purchasing the automobile and three months after initiating a suit in which he informed the distributor that plaintiff would no longer “submit the car for any further repair.” Brief for Plaintiff-Appellant app. at A-11. Plaintiff put the automobile in storage and did not use it after writing the letter. 262 N.W.2d at 352. The court apparently treated this letter as the act of revocation. See id. Since no specific form of notice is prescribed by the Code, plaintiff’s letter and subsequent behavior constituted fair notice of revocation. See Phillips, Revocation of Acceptance and the Consumer Buyer, 75 Com. L.J. 354, 356-57, 363 n.40 (1970).
The court next considered U.C.C. section 2-719, which makes Code remedies available to the buyer when a seller's otherwise permissible "repair-and-replacement" remedy agreement limiting or excluding all other remedies is invalidated because circumstances cause the remedy to fail of its essential purpose.¹⁰ The defendant

The reasonable length of time in which a buyer must revoke may be extended if the defect was latent at the time of acceptance. See generally J. White & R. Summers, supra note 7, § 8-3, at 261-62. In Durfee, the court noted that the stalling problem, on which the finding of substantial impairment was mainly based, did not appear until five months after plaintiff had accepted the Saab. 262 N.W.2d at 354. The reasonable period for revocation may also be extended if the buyer's delay was induced by the seller's reasonable assurances of a cure that is not forthcoming. See generally J. White & R. Summers, supra note 7, § 8-3, at 282-64.

The Durfee court did not deal directly with the issue of whether the nine months intervening between purchase and notice of revocation constituted a reasonable length of time. It did state, however, in apparent reference to the repeated repair attempts, see 262 N.W.2d at 351-52, that "[m]any courts find that the period in which the seller attempts to cure the nonconformity is not part of the time in which the buyer must act." 262 N.W.2d at 353 n.4, (citing Four Sons Bakery, Inc. v. Dulman, 542 F.2d 829 (10th Cir. 1976); Moore v. Howard Pontiac-American, Inc., 492 S.W.2d 227 (Tenn. App. 1972)). Other Code jurisdictions have permitted revocation on this principle after much longer delays. See, e.g., Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 382 A.2d 954 (1978) (17 months). See generally J. White & R. Summers, supra note 7, § 8-3, at 264; 41 Tenn. L. Rev. 173 (1973); Annot., 65 A.L.R.3d 354 (1975).

Although troubled by the question, the Durfee court held that "in this circumstance" the 6,300 miles of operation between purchase and revocation did not "constitute a substantial change in condition so as to preclude revocation of acceptance." 262 N.W.2d at 353 n.4 (citing Zoes v. Royal Chevrolet, Inc., 11 U.C.C. Rep. Serv. 527 (Ind. Super. Ct. 1972), in which revocation was permitted after approximately 4,200 miles of use). Other Code jurisdictions have gone much further than Durfee. See, e.g., Tiger Motor Co. v. McMurtry, 284 Ala. 283, 224 So. 2d 638 (1969) (revocation of acceptance permitted after 20,000 miles of use over an 11-month period).

When substantial use has been made of a defective automobile by the buyer, many courts have allowed the seller a set-off for the value of such use, relying on the Code's general retention of the equitable principles of prior law in § 1-103. See, e.g., Moore v. Howard Pontiac-American, Inc., 492 S.W.2d 227, 230 (Tenn. App. 1972). Although there is no specific Code provision authorizing such a set-off, commentators have generally agreed that such a right exists. See, e.g., Phillips, supra, at 357 ("In all cases of revocation after any significant use by the buyer, the seller should be able to recover from the buyer in restitution for the fair value of any benefit conferred as a result of such use."). The Durfee court did not reach the question of whether defendant was entitled to a set-off for the value of the 6300 miles plaintiff had driven the Saab because defendant failed to raise it. 262 N.W.2d at 353 n.4. Since the defendant had prevailed in the lower court on the issue of "rescission," there was no apparent need to raise the question of set-off on appeal. The court's reliance on this omission by defendants seems questionable.

¹⁰. U.C.C. § 2-719 provides,

(1) Subject to the provisions of subsections (2) and (3) of this section and
of the preceding section on liquidation and limitation of damages,
(a) the agreement may provide for remedies in addition to or in
substitution for those provided in this article and may limit or alter
distributor, Saab-Scandia, contended that plaintiff had no recourse to Code remedies so long as defendants stood ready to attempt further repairs on the automobile under its warranty. The court re-

the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

11. Saab-Scania relied chiefly on this issue in its appeal before the Minnesota Supreme Court. See Brief for Defendant-Respondent (Saab) at 9-12.

The Saab owner's manual contained the following warranty and disclaimers:

IMPORTANT NOTICE TO OWNER, PLEASE READ DISCLAIMER OF IMPLIED WARRANTIES

THIS WARRANTY IS THE ONLY WARRANTY APPLICABLE TO YOUR 1974 SAAB AUTOMOBILE (except for the Emission System Warranty) AND IS EXPRESSLY IN LIEU OF ANY WARRANTIES OTHERWISE IMPLIED BY LAW, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTY OF MERCHANTABILITY AND THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE. SAAB-SCANIA, AB., Saab-Scania of America, Inc. AND FRANCHISED SAAB DEALERS, DO NOT, INDIVIDUALLY OR COLLECTIVELY, ASSUME OR AUTHORIZE ANYONE TO ASSUME FOR ANY OR ALL OF THEM ANY OBLIGATION OR RESPONSIBILITY TO EITHER THE PURCHASER OF A SAAB AUTOMOBILE OR TO ANY OTHER PERSON WITH RESPECT TO THE CONDITION OF SUCH AUTOMOBILE OTHER THAN AS EXPRESSLY ASSUMED IN THIS WARRANTY.

BASIC WARRANTY
Your 1974 Saab Automobile, manufactured by SAAB-SCANIA AB. of Sweden, and accessories supplied by Saab-Scania of America, Inc., and installed upon it in the process of delivery, are warranted by Saab-Scania of America, Inc. to be free from defects in material and workmanship (except tires which are separately warranted by their manufacturers) for a period of twelve (12) months, unlimited mileage, from the earlier of either (1) the date of the original retail delivery or (2) the date of the original use by Saab-Scania of America, Inc.

Your franchised Saab dealer will repair or replace defective parts at no charge for parts and labor, provided, however, that it is notified of the defect within the above stated warranty period. THIS REMEDY IS THE SOLE AND EXCLUSIVE REMEDY AVAILABLE UNDER THIS WARRANTY AND ALL OTHER REMEDIES ARE HEREBY SPECIFICALLY EXCLUDED. FURTHERMORE, NEITHER SAAB-SCANIA AB., Saab-Scania of America, Inc., NOR ANY FRANCHISED SAAB DEALER SHALL BE RESPONSIBLE FOR ANY CONSEQUENTIAL OR INCI-
jected Saab-Scania's contention and, relying on the trial court's finding that the Saab "could not, or would not, be placed in reasonably good operating condition" despite numerous repair attempts, held that the seller's exclusive remedy agreement had failed of its essential purpose.\textsuperscript{12} Plaintiff was therefore permitted to seek relief through the revocation of acceptance remedy provided by the U.C.C.\textsuperscript{13} \textit{Durfee}'s

**DENTAL DAMAGES RESULTING FROM A DEFECT WITHIN THE APPLICABLE PROVISIONS OF THIS WARRANTY.**


12. 262 N.W.2d at 356-57.

13. \textit{Id.} at 357. Since the U.C.C. provides for recovery of consequential and incidental damages upon buyer's rightful revocation of acceptance, \textit{see note 6 supra}, Saab-Scania's separate disclaimer of responsibility for these classes of damages, which was linked with the ineffective exclusive repair-and-replacement remedy provision, \textit{see note 11 supra}, was held similarly ineffective as the disclaimer. 262 N.W.2d at 357. Plaintiff was therefore permitted to recover incidental damages. \textit{See note 6 supra.}

Saab-Scania also separately disclaimed responsibility for consequential damages. \textit{See note 11 supra.} Because plaintiff did not prove any consequential damages, the \textit{Durfee} court did not reach the question of whether this separate disclaimer would be effective. Disclaimers of consequential damages present a more interesting question than the incidental damages dealt with in \textit{Durfee}. Section 2-719(3) deals specifically with disclaimers of consequential damages, rendering them ineffective only if "unconscionable." \textit{See note 10 supra.} The use of the term "unconscionable" in this subsection seems to apply a more rigorous standard to plaintiffs seeking to recover consequential damages in the face of an express disclaimer than other classes of damages. There is a split in authority over whether this subsection should be given separate effect in cases like \textit{Durfee} where a plaintiff would otherwise be privileged to recover consequential damages because of the failure in essential purpose of an exclusive contractual remedy under U.C.C. § 2-719(2). \textit{Compare Jones & McKnight Corp. v. Birdsboro Corp.}, 320 F. Supp. 39, 43-45 (N.D. Ill. 1970) (interpreting Pennsylvania's enactment of the U.C.C. to permit plaintiff to recover consequential damages when an exclusive remedy has failed of its essential purpose under § 2-719(2) absent a showing of unconscionability required by § 2-719(3)) \textit{with} County Asphalt, Inc. \textit{v. Lewis Welding & Eng'r Corp.}, 328 F. Supp. 1300, 1308-09 (S.D.N.Y. 1970), \textit{aff'd}, 444 F.2d 372 (2d Cir.), \textit{cert. denied}, 404 U.S. 939 (1971) (interpreting Ohio's enactment of the U.C.C. to require application of the more rigorous unconscionability standard of §2-719(3) under similar circumstances). The Court of Appeals for the Eighth Circuit, in interpreting Minnesota's enactment of the U.C.C., has predicted that Minnesota would follow the former authority, holding that "the fundamental intent of section 2-719(2) reflects that a remedial limitation's failure of essential purpose makes available all contractual remedies, including consequential damages authorized pursuant to sections 2-714 and 2-715." \textit{Soo Line R. Co. v. Fruehauf Corp.}, 547 F.2d 1385, 1373 (8th Cir. 1977). The \textit{Durfee} court's reasoning in holding plaintiff entitled to incidental damages under section 2-719(2) despite the warranty's separate disclaimer and the fact that the court cited \textit{Soo Line} to support its conclusion, suggests that the rule set out
holding that an exclusive repair-and-replacement remedy may be invalidated by the failure to successfully cure nonconformities within a reasonable period of time is supported by the case law of other U.C.C. jurisdictions.\textsuperscript{14}

The more important aspect of the case is its addition of the Code's revocation of acceptance remedy to the list of legal weapons the consumer-blower may wield against the non-privy, remote supplier of defective goods.\textsuperscript{15} Under the U.C.C., an aggrieved buyer who has accepted goods with defects that substantially impair their value has the option of retaining the goods and bringing an action for loss of bargain damages under section 2-714,\textsuperscript{16} or revoking acceptance under section 2-608\textsuperscript{17} and recovering the purchase price upon return in \textit{Soo Line} will be followed when the issue reaches the Minnesota Supreme Court. See 262 N.W.2d at 357; see generally, \textit{J. White & R. Summers}, supra note 7, § 12-10, at 382.

14. The \textit{Durfee} court cited \textit{Beal v. General Motors Corp.}, 354 F. Supp. 423 (D. Del. 1973) as support for this point. See 262 N.W.2d at 356. \textit{Beal} provides this widely cited formulation of the application of section 2-719(2) to repair-and-replacement clauses in motor vehicle warranties:

\begin{quote}
The purpose of an exclusive remedy of replacement or repair of defective parts, whose presence constitute a breach of an express warranty, is to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct and consequential damages that might otherwise arise. From the point of view of the buyer the purpose of the exclusive remedy is to give him goods that conform to the contract within a reasonable time after a defective part is discovered. When the warrantor fails to correct the defect as promised within a reasonable time he is liable for a breach of that warranty . . . . The limited, exclusive remedy fails of its purpose and is thus avoided under § 2-719(2), whenever the warrantor fails to correct the defect within a reasonable period.
\end{quote}

354 F. Supp. at 426 (citation omitted).

The Eighth Circuit Court of Appeals had previously interpreted Minnesota's enactment of § 2-719(2) to justify a finding of "failure of essential purpose" when the warrantor refused to repair under the terms of its warranty. \textit{Soo Line R. Co. v. Fruehauf Corp.}, 547 F.2d 1365, 1371 (8th Cir. 1977), cited at 262 N.W.2d at 356 n.11. It is clear, however, that a refusal to repair is not a prerequisite to the buyer's recovery. See, e.g., \textit{Beal v. General Motors Corp.}, 354 F. Supp. 423, 427 n.2 (D. Del. 1973) ("good faith attempts to repair might be relevant to the issue of what constitutes a reasonable time. However, since § 2-719(2) operates whenever a party is deprived of his contractual remedy there is no need for a plaintiff to prove that failure to repair was willful or negligent."). \textit{Beal} was also cited by the \textit{Durfee} court. See 262 N.W.2d at 356 n.11. For a detailed analysis of the interpretive problems of section 2-719(2), see Eddy, \textit{On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)}, 65 Calif. L. Rev. 28 (1977).

15. "Remote supplier" will be used in this Comment to describe all parties in the chain of distribution—wholesalers and manufacturers—who are not in direct contractual privity with the buyer.

16. \textit{See note 33 infra}.

17. \textit{See note 4 supra}. 
REVOCATION DAMAGES

of the goods to the seller. Although consumer-buyers prior to Durfee were generally able to recover loss of bargain damages from a remote defendant when there was a breach of an express warranty regardless of formal privity, Durfee is apparently the first case in any jurisdiction in which the U.C.C. remedy of revocation of acceptance has explicitly been invoked against a remote supplier of defective goods in the absence of privity of contract.

The privity requirement historically has been a major obstacle to consumers' recovery from remote suppliers of defective goods. At common law, privity of contract was a prerequisite to a buyer's recovery for breach of warranty. This derives from the fundamental premise of the law of contracts: the consensual nature of contractual obligations. Without a contract between the parties, the remote supplier could not be said to have consented to undertake any obligations to the ultimate consumer; the aggrieved consumer could not, therefore, maintain an action in contract. The requirement of contractual privity was carried over into codifications of the law of contracts. Both the Uniform Sales Act and the Uniform Commercial Code limited the buyer's remedies for breach of warranty to actions against the "seller." Because neither uniform law mentioned any other potential defendant, courts assumed that privity of contract between the buyer and the seller was a requirement in cases involving only

18. Recovery is possible under U.C.C. § 2-711. See note 5 supra.
19. See notes 26-36 infra and accompanying text.
20. Research has disclosed no case comparable to the Durfee court's explicit application of § 2-608 against a non-privy defendant although at least two courts have reached a comparable result to that in Durfee through indirect means. See note 37 infra and accompanying text.
22. The Uniform Sales Act was a widely adopted predecessor to the U.C.C. The Act was in effect in Minnesota from June 1, 1917, see Act of April 20, 1917, ch. 465, § 78, 1917 Minn. Laws 792, to July 1, 1966, see Act of May 26, 1965, ch. 811, § 336.10-103, -105, 1965 Minn. Laws 1484-85 and in many other states for a roughly coterminous period. See 30 MINN. STAT. ANN. 55 (1947) (table showing states in which adopted). In Minnesota, the Uniform Sales Act was codified in MINN. STAT. § 512.01-79 (1961).
23. By its terms, the Uniform Sales Act's provisions for remedies for breach of warranty gave a cause of action to the buyer only for breaches of warranty by the seller. The relevant provisions were prefaced by the phrase, "[w]here there is a breach of warranty by the seller, the buyer may, at his election . . . ." MINN. STAT. § 512.69(1) (1961) (emphasis added). The parallel provision of the U.C.C. provides: "[The buyer] may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach . . . ." U.C.C. § 2-714(1).
Although not specifically authorized by these two uniform laws, an exception to the privity requirement has developed for cases in which the remote supplier has expressly warranted the goods to the ultimate buyer. An express warranty may take a variety of forms.

25. The U.C.C. provides an explicit exception to the privity requirement for cases involving non-economic loss. See note 93 infra. The term economic loss will be used in this Comment to embrace both loss of bargain and expectation loss. Loss of bargain refers to loss represented by the product's failure to be worth the price paid, for example, an automobile that does not run properly. Expectation loss refers to incidental and consequential pecuniary loss suffered as a result of the product's diminished utility, for instance, the buyer pays a license tax on a nonoperable vehicle or loses wages because the defective automobile fails to transport him to his job. Economic loss does not include the more catastrophic injuries commonly associated with products liability actions. Included in this category are personal injury, accidental loss of the product itself due to a defect in part of product, and physical property damage. The latter three classes of loss are recoverable in tort, in the absence of privity. RESTATEMENT (SECOND) OF Torts § 402A (1965). The U.C.C. approves the tort treatment of non-economic injury set forth in the Restatement. See U.C.C. § 2-318; note 93 infra.

26. The express warranty exception to the privity rule was developed in cases involving personal injuries. See, e.g., Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, (1932), second appeal, 179 Wash. 123, 35 P.2d 1090 (1934). In Baxter, the court found a manufacturer's advertising claim that an automobile windshield was shatterproof created an express warranty to the ultimate consumer who was injured through reliance on the claim. Id. at 463, 12 P.2d at 412. Courts reasoned that the remote supplier's advertising, voluntarily directed towards the ultimate consumer, provides a basis for recovery that approximates the traditional notion of contractual privity and can be viewed as a consensual duty. See generally Economic Loss, supra note 24, at 920-22. Some authorities contend that the relationship between the remote supplier who falsely represents the quality of his goods and the ultimate consumer who is injured through reliance on it satisfies the privity requirement in the traditional sense of that word. Since it was the remote supplier who induced the purchase of the defective product through his advertising, these authorities would view the middlemen as mere conduits in the transaction. See generally Economic Loss, supra note 24, Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1134-38 (1960) [hereinafter cited as Prosser, The Assault Upon the Citadel]; id. at 933. Because express warranties approximate contractual privity, courts were also willing to extend the express warranty exception to the privity rule to cases involving only economic loss. See, e.g., Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (express warranty sufficient to support clothing manufacturer's recovery from remote chemical supplier for cost of defective chemicals and profits lost due to the defect); Inglis v. American Motors Corp., 3 Ohio St. 132, 209 N.E.2d 583 (1965) (loss of bargain recovered by consumer buyer from remote manufacturer of defective automobile based on express warranty found in advertising). The express warranty exception to the privity requirement is now generally accepted in American jurisdictions. See J. White & R. Summers, supra note 7, § 11-6, at 335; Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 836 & n.239 (1966) [hereinafter cited as Prosser, The Fall of the Citadel] (collecting cases which have so held). Express warranty
As in *Durfee*, it may consist of a conventional written statement, provided by the remote supplier to accompany the goods to the ultimate buyer, warranting that the goods are of a stated quality or fit for a particular purpose. The remote supplier may also create an express warranty through the less obvious means of mass media advertising. Representations of quality in advertising are usually intended to reach and influence the ultimate purchaser rather than the intermediate dealer, and many courts assess liability if the goods fail to live up to these claims. A buyer may, therefore, often be able to bring an action directly against an express warrantor despite the absence of formal privity.

Although some courts have perceived such an action as outside of the Sales Act and U.C.C. and have therefore ignored their provisions regarding remedies for breach of warranty, many courts have directly applied the U.C.C.'s remedy provisions in such cases—typically section 2-714. Minnesota Statutes section 325.953(2) continues to be the only contract theory upon which relief can be granted in the absence of privity for economic loss in many jurisdictions. See, e.g., Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (strict tort liability and implied warranty theories restricted to cases in which there was personal injury or property damage, but recovery for loss of bargain and lost profits on express warranty grounds permitted).

27. U.C.C. § 2-313 (providing for the creation of express warranties by affirmation, promise, description, or sample). This section, like other U.C.C. provisions considered, provides for rights only between buyer and seller. Application of such express warranties against remote suppliers is supported by the authorities cited in note 26 supra.

28. See note 26 supra.

29. Id.

30. Although the express warranty exception to the privity rule is widely accepted, some authorities have criticized it as an artificial attempt to find a consensual duty where none actually exists. These authorities would prefer to base the remote supplier's liability on his breach of a straightforward duty imposed by law on a strict tort or implied warranty theory. See, e.g., Seely v. White Motor Co., 63 Cal. 2d 9, 20, 403 P.2d 145, 152-53, 45 Cal. Rptr. 17, 24-25 (1965) (concurring and dissenting opinion by Justice Peters pointing out that there had been no reliance on the remote supplier's representations); *Economic Loss*, supra note 24, at 922 ("absent actual reliance, the existence of representations to the public by the manufacturer is merely a makeweight factor, and liability could more logically be predicated on implied warranty or strict tort theories.") (footnotes omitted).


33. U.C.C. § 2-714 provides in part,
requires nonprivy warrantors to honor their express warranties,\(^3\) and Minnesota case law indicates that the U.C.C. is the source of remedies for breach of non-privy express warranties.\(^3\) It appears, therefore, that Minnesota would follow the majority view and permit a consumer-buyer to sue a remote supplier for breach of express warranty and to recover economic loss under section 2-714.\(^3\)

Although absence of privity of contract does not prevent a buyer from recovering loss of bargain damages from an express warrantor under U.C.C section 2-714, courts have not allowed non-privy buyers to recover the retail purchase price through the Code's alternative remedy of revocation of acceptance under section 2-608,\(^1\) despite the

\(\text{(1)}\) Where the buyer has accepted goods and given notification . . . he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

\(\text{(2)}\) 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.

\(\text{(3)}\) In a proper case any incidental and consequential damages under the next section may also be recovered.

34. MINN. STAT. § 325.953(2) (1978) provides,
Honoring of express warranties. The maker of an express warranty arising of a consumer sale in this state shall honor the terms of the express warranty. In a consumer sale, the manufacturer shall honor an express warranty made by the manufacturer; the distributor shall honor an express warranty made by the distributor; and the retail seller shall honor an express warranty made by the retail seller.

This statute is not a part of Minnesota's enactment of the Uniform Commercial Code, and the Durfee court did not rely on it. Section 325.954 provides special remedies for violation of § 325.953(2), but also specifically provides that this "shall not be construed as restricting any remedy that is otherwise available." MINN. STAT. § 325.954 (1978). Although there is no case law guidance on this question, § 325.953(2) does allow buyers to proceed directly against non-privy express warrantors who breach their warranties, and § 325.954 may be interpreted to provide specific legislative authority for use of U.C.C. remedies. In any event, the Minnesota court appears to allow non-privy actions against express warrantors under the U.C.C. without specific legislative mandate. See note 35 infra.

35. See, e.g., Chatfield v. Sherwin-Williams Co., 266 N.W.2d 171, 176 (Minn. 1978) (awarding consequential damages under § 2-715(2)(b) to a professional barn painter where defective paint provided by the remote paint manufacturer faded on his customer's buildings constituting a breach of both express and implied warranties).

36. Although no reported Minnesota case has reached this issue in isolation, there is little doubt that economic loss is recoverable from an express warrantor, even in the absence of privity. In Durfee, the court observed that "[i]f plaintiff had sued Saab-Scania for breach of . . . express warranty . . . , the absence of privity would not bar the suit despite the language of the pertinent Code sections." 262 N.W.2d at 367.

37. Two cases might be read to support application of § 2-608 against remote suppliers. Volvo of America Corp. v. Wells, 551 S.W.2d 826 (Ky. 1977); Gauthier v.
fact that section 2-714 is drafted in terms of "buyers" and "sellers" just as is section 2-608. For example, in Voytovich v. Bangor Punta Operations, Inc., the Sixth Circuit Court of Appeals, applying Ohio law, held that U.C.C. section 2-608 could not be invoked against the non-privy defendant, as it "was not the seller." Nevertheless, the court affirmed the trial court's alternative judgment for loss of bargain damages under U.C.C. section 2-714 against the non-privy express warrantor.

The court's refusal to allow buyers of substantially impaired goods to revoke acceptance against remote defendants under section Mayo, 77 Mich. App. 513, 258 N.W.2d 748 (1977). Both of these cases upheld trial court orders applying § 2-608 against non-privy suppliers. Both indicated, however, that they did so only because the substantial result would not have differed had the lower court applied the correct law. In Wells, both dealer and distributor were joined as defendants and the dealer had received a directed verdict on a plea for indemnity against the distributor. On these facts the question of privity was purely academic since "the result would have been the same as far as Volvo is concerned." 551 S.W.2d at 829. In Gauthier, the court analyzed the case in terms of products liability law, which clearly established the remote supplier's liability for the defective product, measured by the purchase price less salvage value, but did not entitle the buyer to return the goods and recover the price. 77 Mich. App. at 515-16, 258 N.W.2d at 749-50. Although the court "d[id] not see this case as one for revocation of acceptance," id. at 515, 258 N.W.2d at 749, it affirmed the trial court, noting that the trial judge had reached a "substantially equivalent result," reducing damages to account for salvage value by ordering the manufacturer to take possession of the defective goods. Id. at 516, 258 N.W.2d at 750. Thus, neither Wells nor Gauthier is comparable to the Durfee court's direct and explicit application of § 2-608 against a non-privy defendant. Cf. 262 N.W.2d at 357-58 (direct application of revocation of acceptance as a remedy).

38. Compare Minn. Stat. § 336.2-714(1)(1978) ("Where the buyer has accepted goods . . . , he may recover as damages for any nonconformity of tender the loss resulting . . . from the seller's breach . . . .") (emphasis added) with Minn. Stat. § 336.2-608(2) (1978) ("Revocation of acceptance . . . is not effective until the buyer notifies the seller of it.") (emphasis added).

39. 494 F.2d 1208 (6th Cir. 1974).
40. Id. at 1211.
41. Id. ("there can be no dispute that Voytovich had a right to sue the manufacturer, and to recover damages for breach of express warranty [under section 2-714(2)]."). In so holding, the Sixth Circuit panel relied on two Ohio cases—Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E. 2d 583 (1965), Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958)—holding privity unnecessary. See 494 F.2d at 1211. Other courts facing the question have reached similar results. See, e.g., Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144 (1976); Curtis v. Fordham Chrysler Plymouth, Inc., 81 Misc. 2d 566, 364 N.Y.S.2d 767 (1975); Cooper v. Mason, 14 N.C. 472, 188 S.E.2d 653 (1972)(by implication); Emmons v. Durable Mobile Homes, Inc., 521 S.W.2d 153 (Tex. Civ. App. 1975); Reece v. Yeager Ford Sales, Inc., 155 W.Va. 461, 184 S.E.2d 727 (1971). In none of these cases, however, was it clear that the buyers would have been entitled to recover loss of bargain damages under § 2-714.
2-608 limits their Code remedy to that provided by section 2-714. While both sections allow recovery of incidental and consequential damages, under section 2-714, the loss of bargain damages are measured by the difference between the value the goods would have if they were as warranted—usually the purchase price—and the value of the defective goods. Even if the defects substantially impair the usefulness of the goods to the consumer, the diminution in value is all that can be recovered under this section. Moreover, the consumer has the burden of disposing of or selling the defective goods for which he often has no use.

On the other hand, if the consumer is permitted to revoke his acceptance of the defective goods under section 2-608, the full purchase price can be recovered under section 2-711, and the burden of disposing of the goods is shifted to the seller. Consequently, section 2-608 is, from the consumer's point of view, a more desirable remedy.

In Durfee, the court permitted the plaintiff to revoke acceptance against a remote supplier under section 2-608 and, upon return of the defective automobile, to recover the full retail purchase price in addition to incidental damages. In justifying its holding, the court stated

42. Compare U.C.C. § 2-711(1) (allowing buyers who justifiably revoke acceptance under § 2-608 to recover the full purchase price) with id. at § 2-714 (restricting buyers who have irrevocably accepted goods to recovery of loss-of-bargain).

43. Liability under both sections is predicated on the failure of the goods to conform to the obligations under the contract. Compare note 4 supra with note 33 supra.

44. See U.C.C. §§ 2-711(1)(b), -713(1), -714(3).

45. See U.C.C. § 2-714(2).

46. See U.C.C. § 2-711(1) (right to recover the price arises only "[w]here the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance").

47. It is apparent that the seller, who is in the business of dealing in the goods, has better market access and marketing skills than the consumer buyer. Casting the burden of realizing the salvage value of the goods on the consumer is economically inefficient due to the consumer's probable higher transactional costs and lesser ability to optimize recovery on the sale of the defective goods. See generally Phillips, supra note 9, at 354.

48. See note 42 supra.


50. See generally J. White & R. Summers, supra note 7, § 8-3, at 253-66; Phillips, supra note 9 at 354.

Theoretically, both remedies make the buyer whole. In practice, however, the consumer buyer is better served under § 2-608. The non-privy buyer's damages under § 2-714 would be inadequate in the sense that the damages he received would be diminished by the salvage value of the defective goods when the defect substantially impaired their value.

51. 262 N.W.2d at 357-58. See notes 5, 7 supra.
that distributors warrant their automobiles in order to increase indirectly their own sales to their dealers, and that consumers rely on such warranties in making their purchase decisions. The court further noted that breach of such express or implied warranties would have provided plaintiff with a cause of action for ordinary damages under the authority of prior decisions, despite language in the relevant U.C.C. sections describing the right to recovery in terms of "buyers" and "sellers." Relying on the mandated liberal administration of Code remedies, the court reasoned that when the breaches of warranty were severe enough to amount to "substantial impairment," the buyer should not be precluded from securing the advantages of his revocation of acceptance remedy merely because of the insolvency or nonavailability of the immediate seller. The court therefore imposed liability on the remote supplier stating that "the distributor . . . , who profits indirectly from retail sales, must take responsibility for the solvency of its dealers when its warranty is breached."

Although apparently unique among cases decided under the U.C.C., the court's abolition of the privity requirement in an action for recovery of the purchase price is not without precedent. finds support in a closely analogous line of non-U.C.C. Louisiana cases. Under the Louisiana Civil Code, a buyer is permitted to return defective goods to the seller and to recover the purchase price when he is able to meet roughly the same burdens imposed on the revoking buyer by section 2-608 of the U.C.C. Beginning in 1972 with Media

52. 262 N.W.2d at 357. See also note 38 supra and accompanying text.
53. Id. (citing Minn. Stat. § 336.1-106(1) (1978): "The remedies provided by this chapter 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 . . . ").
54. 262 N.W.2d at 357. Although the court did not explicitly state that the dealer was insolvent, it evidently was concerned about the dealer's financial ability to meet judgment. The dealer did not participate in the appeal, either by brief or argument, id. at 352, and Saab-Scania was unable to assure the court at oral argument of the dealer's continued existence. Id. at 357.
55. Id. at 357-58.
56. The articles relevant to this discussion provide, "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, including reasonable attorneys' fees, is answerable to the buyer in damages." La. Civ. Code Ann. art. 2545 (West Supp. 1978). See Lovett, State Deceptive Trade Practice Legislation, 46 Tul. L. Rev. 724 (1972). "Redhibition" is the nature of the wrong:

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.


Although cast in very different language, both U.C.C. § 2-608 (revocation of ac-
Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.,77 Louisiana courts have permitted this action to be brought against remote suppliers of defective goods.58 They have done so despite the fact that the Louisiana Civil Code, like the U.C.C., refers only to "buyer" and "seller" and nowhere defines "seller" to include a supplier of goods.59

A functionally similar result was reached under the Uniform Sales Act by the Minnesota Supreme Court in Beck v. Spindler,60 a decision which, although not specifically relied on by the Durfee court
for this purpose," also supports the abolition of the privity require-
ment in an action for the purchase price. In *Beck*, a 1959 case, a buyer
of defective goods brought an action against both the retail seller and
the remote manufacturer for rescission of the sales contract and re-
covery of the purchase price. The Minnesota Supreme Court affirmed
the judgment against both the privy retailer\(^2\) and the non-privy man-
ufacturer.\(^3\) Because an action for rescission of contract under the
Uniform Sales Act is similar in some respects to revocation of accept-
ance under the Uniform Commercial Code,\(^4\) the *Beck* court's disre-
gard of the absence of privity in an action for return of the retail price

---

61. The *Durfee* court cited *Beck* only for the proposition that plaintiff could have
maintained a suit against Saab-Scania for breach of implied warranty. *See* 262 N.W.2d
at 357.

62. 256 Minn. 555, 567, 99 N.W. 2d 684, 686 (1959) (companion case, affirming
trial court's judgment against retail dealer).

63. 256 Minn. 543, 99 N.W.2d 670 (1959). *Beck* involved a plaintiff who pur-
chased a house trailer from a local dealer, who had obtained it from an out-of-state
manufacturer. The trailer proved to be wholly unsuited to the rigors of a northern
Minnesota winter; an inadequate heating system and insulation caused condensation
and extensive water damage rendering the trailer uninhabitable despite the best efforts
of both the dealer and manufacturer. Plaintiff, after being evicted by the holder of the
conditional sales contract, sued to recover the payments made. After a jury verdict
against both defendants, the Minnesota Supreme Court affirmed, holding that by
attempting to repair the trailer, the manufacturer "assumed contractual obligations
to the purchaser and [became] a seller within the meaning of [*the Uniform*] Sales
Act." *Id.* at 563-64, 99 N.W.2d at 683-84 (1959). This appears to be a finding of privity-
in-fact. Dean Prosser, however, apparently understood liability in *Beck* to have been
predicated on express and implied warranties, *see* Prosser, *The Fall of the Citadel,
supra* note 24, at 792 n.4, and the Minnesota Supreme Court has consistently cited
*Beck* for the general proposition that privity is not required for suits for breach of
"implied warranty." *See*, e.g., *Durfee* v. Rod Baxter, Inc., 262 N.W.2d 349, 357 (Minn.
1977); *Milbank Mutual Ins. Co. v. Proksch*, 309 Minn. 106, 114-15, 244 N.W.2d 105,
109 (1976); *McCormack v. Hankscraft Co.*, 276 Minn. 322, 340, 154 N.W.2d 488, 501
(1967).

64. Rescission, like revocation of acceptance, was an action entitling the
aggrieved buyer to recover the price paid upon return of defective goods. *See* note 65
infra. There are, however, two important differences: First, the revoking buyer under
the U.C.C. must show that the defects in the goods substantially impair their value,
*see* notes 4, 8 supra, but rescission was available under the Uniform Sales Act as a
remedy for any breach of warranty. *See* note 65 infra. Second, the revoking buyer is
entitled to recover consequential and incidental damages in addition to the price under
the U.C.C., *see* note 6 supra, the rescinding buyer, by contrast, was limited, under the
Uniform Sales Act, to recovery of the price paid. *See* note 65 infra. Hence, under the
Uniform Sales Act, the buyer of defective goods had to elect his remedy, choosing
between recovery of the purchase price in an action for rescission and recovery of loss
of bargain, consequential, and incidental damages in a suit for breach of warranty. *Id.*
Under the Uniform Commercial Code, the revoking buyer must prove that the defects
in the goods substantially impair their value, but once he has done so, he may recover
both the price and damages. *See* note 71 infra and accompanying text.
against a remote supplier provides some precedent for Durfee.

Durfee is also consistent with the Code's abolition of the old election of remedies rule. Under that rule, a feature of both the common law and the Uniform Sales Act, a buyer of defective goods had to make an often difficult choice: he could retain the goods, thereby affirming the contract, and seek loss of bargain, consequential, and incidental damages in a breach of warranty action, or he could repudiate the contract by returning the goods, and bring an action for rescission, in which case his recovery would be limited to restitution of the purchase price. Because the theory of the action for recovery of the purchase price was unjust enrichment, a rescinding consumer could recover no more than what the defendant had gained—the retail purchase price. Consequential and incidental damages could


67. In considering an action for rescission of a sales contract for breach of warranty under Minnesota's enactment of the Uniform Sales Act, see note 65 supra, the Minnesota Supreme Court held,

The right of the vendee to recover sums paid under a rescinded contract does not rest on the agreement. Rather is it grounded on the theory that the vendor, having obtained money under a contract made void by rescission, is unjustly enriched at the vendee's expense and, as a consequence, should be subjected to a legal duty to restore that which has been improperly gained. Kavli v. Leifman, 207 Minn. 549, 553, 292 N.W. 210, 213 (1940); see Seifert v. Union Brass & Metal Mfg. Co., 191 Minn. 362, 364-65, 254 N.W.273, 274 (1934). See generally, RESTATEMENT OF RESTITUTION § 1, Comments a-e (1937). For a historical perspective, see id. at 1-10 (introductory note). Unjust enrichment was by no means the sole theory under which courts awarded restitutionary recoveries to rescinding buyers at common law or under the Uniform Sales Act. By the twentieth century, this theory was rapidly becoming a historic artifact and courts most often spoke merely of a right of recovery. See Anderson, Quasi Contractual Recovery in the Law of Sales, 21 MINN. L. Rev. 529, 535-38 n.18 (1937) (collecting all reported cases from American courts in which buyer successfully sued for the price upon seller's breach of warranty).

68. Noting that many courts were awarding incidental and consequential damages despite the Sales Act's limitation of the rescinding buyer's remedy to recovery of the purchase price, Professor Anderson observed,

Where a buyer who rescind[s] for breach of warranty . . . [is] allowed to recover not only his part payment of price but also expenses or damages incurred—the recovery of the expenses or damages cannot be justified on any doctrine of unjust enrichment because the expense or damage to the buyer does not enrich the seller . . .

[These cases may be dismissed as being merely "wrong" decisions, but [their] number . . . perhaps indicates . . . new rules of law are being created.

Anderson, supra note 67, at 568-69. The principle of these "wrong" cases noted by
not be recovered.\textsuperscript{69}

The drafters of the U.C.C. recognized that, regardless of the remedy, an action for defective goods was contractual in nature; thus, in fashioning the new revocation of acceptance remedy, they permitted the revoking buyer to recover consequential and incidental damages in addition to the purchase price.\textsuperscript{70} In a breach of warranty action, therefore, the U.C.C. puts the revocation of acceptance remedy under section 2-608 on the same footing as the loss of bargain remedy under section 2-714.\textsuperscript{71} Similarly, Durfee treats these two remedies consistently by extending the limited abrogation of the privity requirement in breach of warranty actions\textsuperscript{72} to cover actions for recovery of the purchase price upon return of the defective goods. By allowing a plaintiff to revoke acceptance and recover the purchase

---

Professor Anderson in 1937 was finally codified into the remedy of revocation of acceptance in the Uniform Commercial Code. \textit{See} note 71 \textit{infra}.

\textsuperscript{69} In reversing a common law case in which the trial court had awarded damages for fraud in addition to restitution on rescission of the contract, the Minnesota Supreme Court explained the basic principle behind the buyer's forced election of remedies:

[T]he very rescission for which plaintiff contends and which he established below bars any claim for damages for the fraud inducing him to make the purchase which he has rescinded. A defrauded party cannot both rescind the contract, recovering incidentally what he has parted with, and at the same time recover damages for fraud. The damage in such a case comes from the fact that the defrauded party is induced to bind himself by the contract. By rescission he nullifies and so escapes the contract and in consequence there is no damage.

\textit{Scheer v. F.P. Harbaugh Co.}, 165 Minn. 54, 56, 205 N.W. 626, 627 (1925). \textit{But see} Waldman Produce, Inc. v. Frigidaire Corp., 157 Misc. 438, 284 N.Y.S. 167 (1935) (court allowed a rescinding buyer of a defective refrigerator to recover both the payments made and the value of spoiled produce). The result in the New York court's \textit{Waldman} decision was logically supported by distinguishing between loss of bargain damages and the classes of incidental and consequential damages. Since loss of bargain damages logically required a bargain, rescission remained inconsistent with a claim for loss of bargain damages and recovery could not be had. Incidental and consequential damages, however, arose from the buyer's reliance on the seller's misrepresentation or the seller's failure to perform as warranted and so logically did not require a continuing contractual obligation. \textit{See} Comment, \textit{supra} note 66, at 113.

\textsuperscript{70} \textit{See} note 6 \textit{supra}; U.C.C. § 2-714(3).

\textsuperscript{71} The Official Comments to § 2-608 provide:

[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 of "rescission," a term capable of ambiguous application . . . . 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.


\textsuperscript{72} \textit{See} text accompanying notes 33-36 \textit{supra}.
price against a remote supplier, the Minnesota Supreme Court has corrected the imbalance between the two remedies that was reflected in the Voytovich case.\textsuperscript{73}

In addition to furthering the no-election policy of U.C.C. section 2-608,\textsuperscript{74} the Durfee decision is also consistent with an action to recover the purchase price under the U.C.C. Formerly, since such an action was based on the theory of unjust enrichment,\textsuperscript{75} it could not be claimed that the non-privy wholesaler had been unjustly enriched to the full extent of the retail purchase price.\textsuperscript{76} Under the U.C.C., however, unjust enrichment can no longer be the basis of such an action since the buyer is now entitled to recover all of his damages, even if they exceed the purchase price.\textsuperscript{77} Instead, the action is based on the "nonconformity" of the goods—the functional equivalent of a breach of warranty.\textsuperscript{78} Entitling the buyer to recover the purchase price on a showing that the defects are severe enough to substantially impair the value of the goods, reflects the Code’s policy of shifting the burden of realizing the salvage value of the goods to the seller when the breach of warranty is sufficiently grave.\textsuperscript{79} Both sections 2-608 and 2-714 provide remedies based on the warrantor’s breach of his contractual duty to deliver conforming goods. Because an action seeking recovery of the purchase price no longer depends on the theory of unjust enrichment, the Durfee court was justified in affording it the same treatment with respect to the privity requirement as the loss of bargain remedy for breach of warranty under section 2-714.

\textsuperscript{73} See text accompanying notes 39-47 supra.
\textsuperscript{74} See note 71 supra.
\textsuperscript{75} See notes 66-69 supra and accompanying text.
\textsuperscript{76} The dealer’s markup could not constitute unjust enrichment to a remote supplier who has received only the wholesale price. Courts have usually held that an action for rescission under either the common law or the Uniform Sales Act could not be maintained against a non-privy supplier. See, e.g., General Motors Corp. v. Earnst, 279 Ala. 299, 184 So. 2d 811 (1966) (interpreting the Uniform Sales Act); Kyker v. General Motors Corp., 381 S.W.2d 884 (Tenn. 1964) (same). See also Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208 (6th Cir. 1974) (decision based on Ohio law finding there could be no revocation of acceptance without privity, and holding that there could be no rescission under the common law). But see Beck v. Spindler, 256 Minn. 543, 564, 99 N.W.2d 670, 684 (1959) (court held, without elaboration, that rescission under the Uniform Sales Act was only "incidental" to the right to recover for the remote manufacturer’s breach of warranty).
\textsuperscript{77} See note 5 supra.
\textsuperscript{78} Both § 2-608 and § 2-714 describe the buyer’s right to recovery as arising from "nonconformities." See notes 4, 33 supra. "Conforming" is defined in § 2-106(2): "Goods or conduct including any part of a performance are ‘conforming’ or conform to the contract when they are in accordance with the obligations under the contract." U.C.C. § 2-106(2) (1978).
\textsuperscript{79} See notes 7, 47-50 supra and accompanying text.
Although it may seem to go beyond the legislature's intent to apply section 2-608—which refers only to "sellers"—against a remote supplier, similar wording has not prevented application of section 2-714 to suits against parties not in privity.\(^8\) Indeed, the concept of privity seems overly technical when a supplier has expressly warranted the goods to the ultimate consumer;\(^8\) the same considerations that justified abolition of the privity requirement in express warranty actions apply with equal force regardless of whether the buyer is seeking his loss of bargain or the return of the purchase price.\(^8\) If anything, the case for abolishing the privity requirement for actions under section 2-608 is stronger; if privity is not required to recover damages for an ordinary breach of warranty, there can be no justification for denying the Code-mandated revocation of acceptance remedy when the breach of warranty is so severe as to constitute substantial impairment.

When a remote supplier fails to provide goods that conform to his warranties, therefore, he may be subject to liability depending on the degree of nonconformity. If the nonconformity is relatively minor, the supplier will be liable only for damages under section 2-714. But, if the nonconformity substantially impairs the value of the goods and the buyer is able to meet the other requirements of section 2-608, the buyer will have the alternative of revoking his acceptance and re-

\(^8\) See notes 39-41 supra and accompanying text.
\(^8\) See note 30 supra.

82. The diseconomy of requiring formal privity is well illustrated by Klein v. Asgrow Seed Co., 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966). In Klein, a seed manufacturer released a batch of defective tomato seed into the stream of commerce. Some of the seed was eventually purchased by plaintiff who suffered economic loss when the seed failed to ripen as warranted. Plaintiff sued the retailer for damages under the Uniform Sales Act. The retailer cross-claimed against the distributor which cross-claimed against the seed broker which cross-claimed against the manufacturer. Each party recovered judgment against its privy and all judgments were affirmed with costs to the manufacturer. Id. at 103-04, 54 Cal. Rptr. at 620. The overall cost of achieving this result would have been lower had the ultimate consumer had a clear right to proceed directly against the remote manufacturer.

The retail automobile dealer has been held to have a right to indemnity from the distributor when he has been held liable to the consumer under U.C.C. § 2-608. See, \(e.g.,\) Volvo of America Corp. v. Wells, 551 S.W.2d 826 (Ky. 1977) (dealer received directed verdict against distributor on cross-claim seeking indemnification of judgment awarded buyer); see also, Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 382 A.2d 954 (1978) (court noted a contractual indemnity agreement between dealer and manufacturer and, while affirming the consumer's judgment under U.C.C. § 2-608 against only the privy dealer, assumed that the indemnity agreement would shift the burden of this judgment to the manufacturer). These cases achieve the Durfee court's result of holding the remote supplier ultimately liable for the U.C.C. § 2-608 mandated measure of damages, but require the expense of involving the retailer in the suit and would not be possible where, as in Durfee, the retail dealer is not available.
covering the purchase price and consequential and incidental damages from the remote supplier, who will then have the burden of disposing of the goods.

_Durfee_ leaves unanswered the question of what circumstances will justify invoking section 2-608 against a non-privy defendant. The court reached its decision on the assumption that plaintiff's immediate vendor was insolvent and would be unavailable to meet judgment.\(^83\) Since the court placed some emphasis on the dealer's assumed insolvency as a justification for its result, one might question whether revocation of acceptance will be available against remote suppliers in any other circumstances. There does not appear to be any legal principle that supports such a limitation. If the distributor's liability results from its breach of its duties as a warrantor of the goods,\(^84\) and not from an expedient search for a "deep pocket" regardless of legal duty, liability should be imposed without considering the financial status of other parties to the sale. _Media_\(^85\) and the Louisiana cases may be indicative of future developments in Minnesota. Although _Media_, like _Durfee_, was decided in circumstances in which the immediate seller was assumed to be unavailable to meet judgment,\(^86\) subsequent Louisiana cases have taken the proper approach and applied liability regardless of the availability of alternative defendants.\(^87\) _Durfee_ should be interpreted to permit direct suits under section 2-608 against remote suppliers without regard to the solvency or availability of the immediate seller.

The _Durfee_ court's reasoning raises yet another issue that has not been resolved in Minnesota: whether a consumer buyer can obtain relief directly against a remote supplier on an _implied_ warranty theory when only economic loss is involved. This issue was not reached in _Durfee_ because Saab-Scania expressly warranted the vehicle to be "free from defects."\(^78\) The court, however, did not explicitly limit application of the revocation of acceptance remedy against remote suppliers to cases involving express warranty.\(^89\) Furthermore, in

\(^{83}\) 262 N.W.2d at 357. See note 45 supra.

\(^{84}\) See 262 N.W.2d at 357 ("we think the buyer is entitled to look to the warrantor for relief.")


\(^{86}\) Id. at 87, 262 So. 2d at 380.

\(^{87}\) See, e.g., Rey v. Cuccia, 238 So. 2d 840 (La. 1974); Smith v. Max Thieme Chevrolet Co., 315 So. 2d 82 (La. App. 1975). In these cases, both the manufacturer and dealer were defendants, and there was no indication that the privy defendants were unable to meet judgments.

\(^{88}\) See note 11 supra.

\(^{89}\) The court's reference to "implied warranty" as an alternative theory of recovery, 262 N.W.2d at 357, suggests that Saab's status as an express warrantor was not
justifying its application of section 2-608 against a remote seller, the court intimated that lack of privity would have been no obstacle, even had there been no express warranty: "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."

Should this dictum be followed, a non-privy buyer will be able to sue for breach of implied warranty to recover damages for purely economic loss. This result would be a substantial development in Minnesota law, for it would, in essence, hold non-privy defendants strictly liable for such loss. Whether purely economic loss may be recovered on an implied warranty or strict tort liability theory in the essential to plaintiff's recovery. See note 90 infra and accompanying text. This appears to be the court's construction, despite the fact that it referred to Saab-Scania's express warranty in a footnote, 262 N.W.2d at 353 n.3, defined the good's nonconformity in terms of this express representation, id., and referred to Saab-Scania as the "warrantor" of the automobile in assessing liability. Id. at 357.

90. 262 N.W.2d at 357 (emphasis added) (citing McCormack v. Hankscraft Co., 278 Minn. 322, 337, 154 N.W.2d 488, 499 (1967) (express warranty held sufficient to support non-privy liability in a personal injury case); Beck v. Spindler, 256 Minn. 543, 557, 99 N.W.2d 670, 679 (1959) (implied warranty held sufficient to support non-privy liability for economic loss)). The Durfee court also cited, with a "See generally" introductory signal, Milbank Mutual Ins. Co. v. Proksch, 309 Minn. 106, 114, 244 N.W.2d 105, 109 (1976) (U.C.C. § 2-318 held to create liability for damage to property of father whose daughter was buyer of defectively fireproofed Christmas tree).

91. For an explanation of the term "economic loss" as used in this Comment, see note 25 supra.

92. Liability for breach of implied warranty is, in essence, strict liability. See Sontor v. A & M Karagueusian, Inc., 44 N.J. 52, 56, 207 A.2d 305, 312 (1965); RESTATEMENT (SECOND) OF TORTS § 402A, comment m (1965); Prosser, The Fall of the Citadel, supra note 26, at 800. See also note 99 infra. Although characterization of a products liability claim as a contract or tort action may have significance, see Note, Economic Losses and Strict Products Liability: A Record of Judicial Confusion Between Contract and Tort, 54 NOTRE DAME LAW. 118 (1978), both the strict liability and implied warranty theories of recovery may impose liability without proof of fault.

93. The classic formulation of the requirements and nature of the non-privy implied warranty or strict tort liability theory of recovery may be found in the RESTATEMENT (SECOND) OF TORTS:

402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
absence of privity of contract remains a highly controversial issue; even after years of debate, there is a split of authority on the question. Although strict liability has been almost universally imposed on non-privy defendants when defective goods have caused personal injury or property damage, there has been considerable reluctance to extend the implied warranty/strict tort liability theory of recovery to cases involving mere economic loss, especially the loss of bargain damages traditionally relegated to the law of contracts. Prior Min-

(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (1965).

An official comment to § 402A makes it clear that warranty defenses no longer play a role in these product liability actions. Id., comment m, at 355-56.

The U.C.C. has endorsed the principle of § 402A through three alternative formulations of § 2-318 that provide a cause of action to "third party beneficiaries" of both express and implied warranties. Alternative A extends coverage only to the family, household, or guests of the buyer for personal injuries. Alternative B extends this protection to "any natural person who may reasonably be expected to . . . be affected by the goods." Alternative C extends this coverage to the same class, but also extends liability to cover any "injury." All three alternatives state that this liability cannot be excluded or limited by the seller, but Alternative C applies this prohibition only to injury "to the person." U.C.C. § 2-318 (1978). Alternative C has been adopted in Minnesota. Act of May 23, 1969, ch. 621, § 6, 1969 Minn. Laws 1064-65 (effective July 1, 1969). It is the most liberal of the three alternatives from the consumer perspective and it appears that it would be possible to interpret "injury" broadly enough to include economic loss. The official comments, however, indicate that recovery under § 2-318 is governed by tort rather than contract principles. The official comments explain that "the third alternative . . . follow[s] the trend of modern decisions as indicated by [the] Restatement of Torts 2d § 402A (Tentative Draft No. 10, 1965) in extending the rule beyond injuries to the person [as amended in 1966]." U.C.C. § 2-318, Official Comment 3 (1978). This comment's endorsement of § 402A which applies only to personal injury and property damage, indicates that § 2-318 was not intended to govern cases in which a plaintiff's "injury" was merely that the product was not worth the price paid. See J. White & R. Summers, supra note 7, § 11-5, at 333.

94. Compare note 102 infra with note 103 infra. See generally Prosser, The Fall of the Citadel, supra note 26, at 805-48; Robertson, supra note 58 at 78-79 n.146.


96. See, e.g., Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966) (buyer entitled to go to the jury on strict liability theory when newly purchased automobile caught fire and was destroyed but buyer suffered no personal injury).

97. See, e.g., Hawkins Constr. Co. v. Matthews Co., 209 N.W.2d 643 (Neb. 1973). In Hawkins, defective scaffolding collapsed, causing property damage to the scaffold itself and other property. Although the court permitted recovery for the other property damage in line with the Restatement position, recovery for the product itself was not allowed. The court stated,

[W]e feel that the doctrine of strict tort liability was not conceived as a substitute for warranty liability in cases where the purchaser has only lost the benefit of his bargain. . . . We perceive no sound reason for extending
Minnesota case law has given inconsistent indications on this issue, but no recent Minnesota case has explicitly held a non-privy defendant strictly liable merely for the loss of bargain damages and trivial incidental expenses that are typified in the Durfee case.

---

the doctrine of strict tort liability to the point where it emasculates the law of sales and the Uniform Commercial Code . . .

Id. at 653.

98. Minnesota's position on the Santor-Seely issue, see notes 102-103 infra and accompanying text, has not yet been clarified. In Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959), decided under the Uniform Sales Act, the court apparently held the remote manufacturer of a defective house trailer liable for loss of bargain to a non-privy consumer buyer on an implied warranty theory, but ambiguities in the court's opinion and the fact that Beck predated clear articulation of the strict liability theory in products actions raises doubts about Beck's continuing effect. See note 63 supra. Subsequent cases have given some indications that Minnesota would follow the Seely position. In McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967), the court formally adopted the strict tort liability rule in language quite clearly limiting the doctrine to cases involving personal injuries. Id. at 337-40, 154 N.W.2d at 499-501.

One federal court has explicitly held that Minnesota law does not permit a plaintiff who has suffered only economic loss to sue in strict tort liability. Noel Trans. & Pkg. Del. Serv., Inc. v. General Motors Corp., 341 F. Supp. 968, 970-71 (D. Minn. 1972) (memorandum and order granting manufacturer's motion for summary judgment on issue of strict tort liability for commercial loss but denying motion on express and implied warranty grounds). Although the Noel court gave no reasoned explanation of its distinction between the strict tort and implied warranty theories, the courts of the Eighth Circuit appear to have accepted the Noel holding as an accurate representation of Minnesota law. See Hales v. Green Colonial, Inc., 490 F.2d 1015, 1022 (8th Cir. 1974) (citing Noel as the Minnesota rule); Midland Forge, Inc. v. Letts Industries, Inc. 395 F. Supp. 506, 512 (N.D. Iowa 1975) (citing Noel as the Minnesota rule). The Minnesota Supreme Court, however, has continued to cite Beck with apparent approval, see e.g., Milbank Mut. Ins. Co. v. Proksch, 309 Minn. 106, 115, 244 N.W.2d 105, 109 (1976); McCormack v. Hankscraft Co., 278 Minn. 322, 340, 154 N.W.2d 488, 501 (1967), and has never clearly distinguished between express and implied warranty theories in products liability actions. See, e.g., Chatfield v. Sherwin-Williams Co., 266 N.W.2d 171 (Minn. 1978) (remote manufacturer's breach of both express and implied warranties found, but court did not specify which theory of recovery it relied on in holding defendant liable; court did not mention the apparent lack of privity).

99. The Minnesota court specifically adopted strict tort liability for cases involving property damage in Milbank Mut. Ins. Co. v. Proksch, 309 Minn. 106, 244 N.W.2d 105 (1976) (defectively fireproofed Christmas tree caused fire damaging house), but has not faced the more difficult question of pure loss of bargain since Beck. See note 98 supra. The Proksch court's expansive dictums, however, might be read as abolishing the concept of contractual privity in product defect cases:

The result of McCormack was to bring warranty, negligence, and strict tort liability theories of product liability into harmony to protect consumers and ultimate users from dangerous defective products. An important part of the harmony thus achieved was the abolition of privity as a defense in actions involving any of those theories.

Id. at 115, 244 N.W.2d at 10 (footnote omitted). Even this expansive dictum, however, falls short of holding strict liability for loss of bargain for a mere cosmetic defect. See Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
Whether the implied warranty or strict liability theory of recovery will be available to recover loss of bargain damages from a remote supplier will depend on the resolution of the more fundamental issue of whether the supplier’s duty to the consumer sounds in tort or contract. The essential question in these situations is what circumstances will justify substituting a judicially mandated standard of product performance for the standard consensually undertaken by the supplier. The intense debate over this question has centered around the divergent views adopted by the New Jersey and California Supreme Courts in two leading 1965 cases: Santor v. A & M Karagheusian, Inc. and Seely v. White Motor Co.

Courts following the Santor view focus on the consumer’s lack of bargaining power. Because consumers generally have no opportun-

100. Because the non-privy defendant’s liability under the implied warranty-strict liability theory of recovery is imposed by law rather than consensual undertaking, it is in essence predicated on tort theory. Strict products liability originally emerged as a somewhat extraordinary device to ensure compensation of consumers where the supplier’s negligence was suspected but could not be proved. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (non-privy recovery on implied warranty when car driven by wife of buyer crashed, causing personal injuries and damaging automobile so badly that negligence could not be proved). Prosser identifies Henningsen as the origin of strict tort liability although the name “implied warranty” remained. See Prosser, The Fall of the Citadel, supra note 26, at 791-800.

In Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), the New Jersey Supreme Court built on its earlier leading decision in Henningsen and made it clear that “strict liability in tort” was simply a new name for the non-privy liability on an implied warranty that it had established in the Henningsen decision. See id. at 66, 207 A.2d at 312 (“the ‘strict tort liability’ doctrine . . . [is] ‘surely a more accurate phrase’ than breach of implied warranty”) (citation omitted). The Restatement amplifies this point: “[W]arranty’ must be given a new and different meaning if it is used in connection with this section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.” RESTATEMENT (SECOND) OF TORTS § 402A, comment m (1965).

One effect of allowing economic loss to be recovered under this tort based theory is to disable the intricate provisions of the law of contracts that enable the parties to a sales transaction to distribute the risks inherent in any enterprise by their mutual agreement. See generally Economic Loss, supra note 24, at 958-64.

101. Compare, e.g., Economic Loss, supra note 24, at 957-58 (warning against “unforeseen ramifications” of strict liability for non-hazardous loss of bargain) with Note, supra note 92, at 129 (arguing for unlimited availability for “consumers”).

102. 44 N.J. 52, 207 A.2d 305 (1965) (allowing recovery of loss of bargain damages on implied warranty/strict tort liability theory when carpet developed cosmetic defects).

103. 63 Cal. 2d 26, 903 P.2d 145, 45 Cal. Rptr. 17 (1965) (recovery of lost profits resulting from defective truck would be denied in absence of express warranty) (dictum).

104. For a clear articulation of the “disparity of bargaining power” justification for the Santor rule, see Seeley v. White Motor Co., 63 Cal. 2d 9, 19-29, 403 P.2d 145, 152-58, 45 Cal. Rptr. 17, 24-30 (1965) (Peters, J., concurring and dissenting).
ity to bargain over the standard of product performance to which the supplier agrees to be held, these courts prescribe a standard through their definition of "product defect," and impose liability for all loss occasioned by a breach—regardless of its nature. The consumer's recovery of loss of bargain is grounded on the same broad considerations of public policy that prompted the development of this theory of recovery in personal injury cases.

Courts following Seely focus instead on the nature of the harm caused by the product defect. Acknowledging that catastrophic personal injury or property damage justify imposition of a judicial standard of product performance, courts following Seely balk at extending the strict tort liability theory to protect lesser interests. This view preserves a role for the consensually based rules in the law of contracts in the consumer transaction. The consumer's recovery for loss of bargain is defined in terms of the bargain; he may recover against a remote supplier only when the goods fail to conform to the

105. The Santor court assessed liability by holding that the manufacturer's implied warranty of merchantability extended to the remote buyer, or, in the alternative, that the strict tort concept of "defect," see note 93 supra (§ 402A formulation), also applied to nondangerous "defects." See 44 N.J. at 67, 207 A.2d at 313.

106. The policy justifications courts have put forward center around three basic ideas seeking to promote the public interest in human safety: first, to the extent that safer products are possible, strict liability deters suppliers from taking short cuts since they will have to compensate injury regardless of proof of fault. Second, to the extent that products cannot be made safer, strict liability will force suppliers to lessen the impact of inevitable user injury by spreading the loss to the general public through higher prices reflecting the strict liability risk. Third, to the extent that conventional warranty doctrines may hold remote suppliers strictly liable through a chain of suits—each buyer recovering in turn from his privy supplier until the manufacturer is reached—the direct action promotes judicial economy. See generally Prosser, The Fall of the Citadel, supra note 26, at 799-800. After consideration of these basic public policies, the New Jersey Court expanded the scope of the doctrine to include mere loss of bargain. Santor v. A & M Karagheusian, Inc., 44 N.J. 52,66, 207 A.2d 305, 312 (1965) ("In this era of complex marketing practices and assembly line manufacturing conditions, restrictive notions of privity of contract between manufacturer and consumer must be put aside and the realistic view of strict tort liability adopted.").

The most comprehensive exploration of the countervailing policy issues raised by this question may be found in a student note published shortly after the Santor and Seely decisions. See Economic Loss, supra note 24.

107. See Products Liability, supra note 24, at 1070-76.
108. Seely v. White Motor Co., 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965) ("A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury . . . . He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.").

109. See note 24 supra and accompanying text.
110. See Prosser, The Fall of the Citadel, supra note 26, at 823 ("Loss on the bargain must depend upon what the bargain is . . . .").
supplier's express representations. This limitation on the implied warranty or strict tort theory of recovery is imposed to permit suppliers to offer goods of limited performance in the marketplace so long as they similarly limit their claims of product quality.

Because the Durfee court failed to consider these conflicting views and the policies underlying them, and did not address the potential impact of its statement regarding remote liability for implied warranty, its casual dictum cannot be regarded as authoritative. Although the Minnesota Supreme Court may eventually decide to permit recovery for purely economic loss in implied warranty or strict liability despite the absence of privity, such a decision should be based on a careful and reasoned analysis of the countervailing policy considerations in the context of a factual setting directly rais-

111. See note 26 supra and accompanying text.
112. Seely v. White Motor Co., 63 Cal. 2d 9, 17, 403 P.2d 145, 150-51, 45 Cal. Rptr. 17, 22-23 (1965) ("The manufacturer would be liable for damages of unknown and unlimited scope [under strict tort liability for economic loss]. Application of the rules of warranty prevents this result [by requiring an express warranty]."). See Robertson, supra note 58, at 78-79 n.145 (collecting cases following the Seely rule). Robertson asserts that Seely's is the majority approach. Id. at 78. Dean Prosser approved Seely as the "sounder rule." Prosser, The Fall of the Citadel, supra note 26, at 822-23.

The main criticism of the Santor rule is that it upsets the familiar and basically logical rules of contract law. See Economic Loss, supra note 24, at 958 ("manufacturer's liability to subpurchasers for economic loss would effectively nullify several provisions of the Uniform Commercial Code") (emphasis deleted). The freedom to agree to limit or exclude implied warranties is one of the contractual limitations on consumers' recovery that the strict tort doctrine abolishes. See RESTATEMENT (SECOND) OF TORTS § 402A, comment m (1965) ("The consumer's cause of action . . . is not affected by any disclaimer or other agreement . . . . "). See also Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69, 95 (1960) (enforcing an exclusion of consequential damages would be "inimical to the public good" in the personal injury context). Although there are some indications that an effective disclaimer of this tort liability could be made against commercial entities under the Santor rule, see Monsanto Co. v. Alden Leeds, Inc., 130 N.J. Super. 245, 259, 326 A.2d 90, 98 (1974) ("the extent to which the strict liability in tort doctrine will be applied to a commercial loss is up to the parties") (dictum), the remote seller is faced with the practical problem of how to attempt to disclaim liability against potential plaintiffs with whom he may not have had any dealings. See Products Liability, supra note 24, at 1078.

Ignoring contractual limitations on recovery of loss-of-bargain may create anomalous results. One student commentator, noting that the Santor rule abrogating contract principles in consumer transactions applied only against non-privy defendants, urged that in New Jersey buyers "would be well advised never to deal directly with a manufacturer." Id.

If the wisdom of the Code is that the § 2-719 restraints on sellers' freedom of contract are adequate protection for the consumer in the case of formal privity, see notes 10-14 supra and accompanying text, then there appears to be no reason to forestall their application where, as in Durfee, formal privity is lacking.
ing the issue. For the present, Durfee's holding that a buyer may revoke acceptance against a remote supplier can be reliably applied only when the goods substantially fail to conform to the remote supplier's express warranty. If the court someday adopts the rule of remote liability for economic loss under the U.C.C. provisions for implied warranty, then, under Durfee, remote buyers who purchase goods that do not conform to implied warranties will have the full benefit of the alternative remedies provided by the Code. Thus, whether the standard of product performance against which the non-conformity of the goods is measured is expressed by the supplier or implied by law, the buyer would have the option of recovering his loss of bargain under section 2-714 or, provided the nonconformity substantially impairs the value of the goods, recovering the price after revocation of acceptance under section 2-608.113

If, as Dean Prosser announced in 1966,114 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 non-privy 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.

113. See notes 65-81 supra and accompanying text.
114. See Prosser, The Fall of the Citadel, supra note 26; see also Prosser, The Assault Upon the Citadel, supra note 26. Since Dean Prosser so liberally sprinkled his two epic works on products liability with metaphorical references to the "citadel of privity," it has been obligatory for subsequent authors to do likewise. See, e.g., Done
nelly, After the Fall of the Citadel, 19 SYRACUSE L. REV. 1 (1967); Reynolds, Strict Liability for Commercial Services—Will Another Citadel Crumble?, 30 OKLA L. REV. 298 (1977); Sales, The Service-Sales Transaction: A Citadel Under Assault, 10 ST.
MARY'S L.J. 13 (1978); Note, Limitations Upon the Remedy of "Strict Tort" Liability for the Manufacture and Sale of Goods—Has the "Citadel" Been Devastated?, 17 CASE W. RES. L. REV. 300 (1965). In an attempt to discharge this burden, the accompanying paragraph is offered.