COMMENT

SUING UPSTREAM: COMMERCIAL REALITY AND RECOVERY FOR ECONOMIC LOSS IN BREACH OF WARRANTY ACTIONS BY NON-PRIVITY CONSUMERS

I. INTRODUCTION

One of the principal concerns of a market-driven economy is the efficiency with which a product reaches the consumer. The market places a premium on the seamless downstream flow of goods from their origin into the hands of the ultimate buyer. To facilitate this current, manufacturers, producers, and suppliers often place goods in the hands of intermediaries who either incorporate the goods into a finished product available to consumers or are simply more adept at marketing the goods to the buyer. In this way, remote sellers can efficiently respond to changes in consumer demand, and consumers are afforded quick and unfettered access to products that meet their particular needs.

The tradeoff for consumers in this stream of commerce model is the all too frequent problem of holding an upstream seller, with whom the consumer had no direct contact, liable for goods that are defective or otherwise unmerchantable.[1] In such cases, the buyer suffers economic damages due to the unacceptable nature of the goods, which can take the form of "direct damages resulting from the diminished value of the investment and consequential damages resulting from the buyer's inability to use the goods as planned."[2]

1. Professor Gary Monserud has identified three distinct situations where this problem commonly occurs: (1) agreements whereby a dealer procures goods from a remote seller to market to the buyer, (2) agreements in which an intermediate party acquires component parts from a remote seller and incorporates them into a finished product available to the buyer, and (3) agreements requiring a prime contractor to procure goods from a supplier for incorporation into a construction project according to the buyer's specifications. Gary L. Monserud, *Blending the Law of Sales with the Common Law of Third Party Beneficiaries*, 39 DUQ. L. REV. 111, 176–77 (2000). The principal focus of this Comment will be on the first, and to a lesser extent the second, of the situations he describes.

2. Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void*, 67 B.U. L. REV. 9, 11 (1987). At this juncture, it is important to distinguish between the privity of contract required

The common law has traditionally regarded the lack of a contractual relationship, or lack of privity,[3] with the remote seller as fatal to the buyer's claim for economic damages against the remote seller.[4] In many decisions today, this vertical privity[5] prerequisite continues to act as a barrier to consumer attempts to bring claims against upstream manufacturers with whom they had no direct contractual relationship.

In spite of the significant number of jurisdictions that seem to maintain a white-knuckled grip on the vertical privity requirement, there is a notable and still emerging trend among courts to reconsider the doctrine in light of current commercial practices and to allow the consumer to maintain his claim against the remote seller.[6] This trend has roughly coincided with changes in the treatment of the privity requirement in Article 2 of the Uniform Commercial Code ("U.C.C." or "the Code"), which applies to transactions in goods.[7] Thus, jurisdictions that have adopted Article

for a buyer's recovery of economic damages and the privity required for the buyer's recovery in tort in the event that the defective goods cause personal injury or property damage. This Comment deals principally with the former, though some commentators have suggested the line between the two is a fine one. *See* Ellen Taylor, *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. REV. 231, 233–35 (1996).

3. In the commercial context, the term privity generally refers to a contractual relationship between two parties. *See, e.g.*, BLACK'S LAW DICTIONARY 1217 (7th ed. 1999) (defining privity as "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so"); PATRICIA F. FONSECA & JOHN R. FONSECA, WILLISTON ON SALES § 22:9 (5th ed. 2006) [hereinafter WILLISTON ON SALES] ("Parties to a sales transaction are said to be in privity with one another when they have entered into a contract with each other."); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-2 (3d ed. 1988) ("Parties who have contracted with each other are said to be 'in privity.'").

4. *See, e.g.*, Flory v. Silvercrest Indus., 633 P.2d 383, 388 (Ariz. 1981); *see also* DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON THE SALE AND LEASE OF GOODS 174–75 (4th ed. 2004) ("At common law the manufacturer could successfully maintain a defense based on lack of privity, because the manufacturer did not deal directly with the buyer.").

5. Vertical privity refers to the contractual relationship between a seller and a downstream buyer. White and Summers use the example of "a man who buys a lathe from a local hardware store and then later sues the manufacturer [a]s a 'vertical' non-privity plaintiff." WHITE & SUMMERS, *supra* note 3, § 11-2. Conversely, a horizontal non-privity plaintiff does not refer to a buyer within the distributive chain, but to "one who consumes or uses or is affected by the goods," such as "a woman poisoned by a bottle of beer that her husband purchased from a local grocer." *Id.*

6. WILLISTON ON SALES, *supra* note 3, § 22:11.

7. U.C.C. § 2-103 (2002). Article 2 of the U.C.C. has been adopted in some form by every state except Louisiana. WHITE & SUMMERS, *supra* note 3, § 1.

2 have begun to engage in a heated debate over the propriety and continued viability of the vertical privity requirement for the recovery of economic loss. In at least one instance, the debate has raged within the same state.[8]

The focal point of this Comment will be an examination of this debate, which first requires an overview of the historical background of the vertical privity requirement from its common law moorings to its notable absence from the provisions of Article 2 of the U.C.C. This Comment proceeds to outline the traditional arguments for retaining the requirement, as well as those for abrogating it that have been espoused by participants in the recent trend. The Comment will then provide a detailed evaluation of how these arguments interact in the context of warranties under the U.C.C. Finally, the Comment will conclude with a forecast of the vertical privity requirement's future and what that future may mean for the average consumer.

II. BACKGROUND

A. Judicial Origins of the Privity Concept

According to many commentators, the English case of *Winterbottom v. Wright*[9] represents one of the seminal cases in the common law development of the court-created doctrine of privity.[10] In *Winterbottom*, the defendant supplier had contracted with the Postmaster General to supply mail coaches for transporting mail.[11] Under the contract, the defendant supplier had agreed to keep the mail coaches in safe and working order while they were under the control of the Postmaster General.[12] The plaintiff, who had contracted with the Postmaster General to carry the mail, filed suit against the defendant supplier, alleging that he was seriously

8. *Compare* Michels v. Monaco Coach Corp., 298 F. Supp. 2d 642, 650 (E.D. Mich. 2003) (holding that "vertical privity no longer is required in Michigan to pursue a breach of implied warranty claim against a remote manufacturer"), *with* Harnden v. Ford Motor Co., 408 F. Supp. 2d 315, 322 (E.D. Mich. 2005) (upholding the vertical privity bar in a breach of implied warranty case and disapproving of the reasoning in *Michels*).

9. (1842) 152 Eng. Rep. 402 (Exch.).

10. *See* Harold Greenberg, *Vertical Privity and Damages for Breach of Implied Warranty Under the U.C.C.: It's Time for Indiana to Abandon the Citadel*, 21 IND. L. REV. 23, 25 (1988); Speidel, *supra* note 2, at 24–25 n.54. For another early English decision discussing the privity requirement, see Tweddle v. Atkinson, (1861) 121 Eng. Rep. 762 (Q.B.). *See generally* Monserud, *supra* note 1, at 114–15 (discussing the evolution of third party rights under English common law).

11. *Winterbottom*, 152 Eng. Rep. at 402.

12. *Id.* at 402–03.

injured when one of the defendant's mail coaches broke down and he was thrown from his seat.[13] The court held that, regardless of whether the defendant had breached his contractual duty to keep the coach in safe condition, the plaintiff could not maintain an action against him because he was not privy to the contract between the defendant supplier and the Postmaster General.[14] Lord Abinger expressed a specific concern that to disregard privity of contract in this case would be to expose the defendant to "an infinity of actions" by anyone who might have been harmed by the coach, which led him to conclude that "there is no instance in which a party, who was not privy to the contract entered into with [the defendant], can maintain any such action."[15] Advocates of the vertical privity requirement continue to raise this concern of sellers' unlimited liability as a major reason for the retention of the requirement.[16]

While the recovery sought by the plaintiff in *Winterbottom* was for personal injury, the privity principle found its way into the law of the United States in cases where plaintiffs attempted to recover for economic injury. For example, in *Mellen v. Whipple*,[17] an early Massachusetts case, the defendant Whipple purchased an interest in a parcel of land that was encumbered by a mortgage, and as part of the consideration for the contract of sale with the seller, assumed the obligation to pay off the mortgage.[18] The original mortgagees then assigned the mortgage to Mellen, who filed suit against Whipple to recover the outstanding mortgage debt.[19] Whipple argued that he had no obligation to pay Mellen, with whom he was not in privity.[20] The Massachusetts Supreme Judicial Court, citing the privity principle that had been established by English common law, concluded that Whipple's defense was a viable one and denied Mellen recovery of the mortgage debt.[21] Embedded in its privity analysis, the court pointed to the lack of consideration between Whipple and Mellen, expressing an unwillingness to impose an agreement where none existed.[22] This concern is another contention proponents of the vertical privity requirement persist in raising today.[23]

13. *Id.* at 403.
14. *Id.* at 405–06.
15. *Id.* at 404–05.
16. *See infra* Part II.C.3; *see also* Speidel, *supra* note 2, at 24–25 n.54 (tracing the "floodgate" argument to *Winterbottom*).
17. 67 Mass. (1 Gray) 317 (1854).
18. *Id.* at 318.
19. *Id.*
20. *Id.* at 318–19.
21. *Id.* at 322–24.
22. *Id.* at 321.
23. *See infra* Part II.C.2 (discussing the freedom of contract argument

State courts continued to draw upon the principle, extending it into the realm of warranties made by sellers. In one Kansas case, the plaintiff, Booth, purchased a stallion from the defendant, Scheer, who had warranted the stallion to be healthy and suitable for breeding.[24] Booth then sold the stallion to a third party, likewise warranting its quality to the third party as part of the bargain.[25] When the stallion was revealed to be in poor condition and of little value, the third party filed suit for breach of warranty against Booth, who then sought indemnity from Scheer.[26] The Kansas Supreme Court rejected Booth's indemnity claim against Scheer, holding that there is "no privity of contract between the vendor in one sale and the subvendees of the same property in subsequent sales."[27] Further, the court stated that "[a]lthough the warranty may be couched in the same terms in each successive sale, the obligation of the warrantor in each sale is personal to his own vendee."[28] The court's holding that warranties were personal in nature was echoed by many other pre-U.C.C. courts, and supported the inference that a buyer could not recover from a remote seller for the breach of such a warranty.[29]

B. The U.C.C. and Privity

1. The Buyer's Claim Under the U.C.C.

The advent of the U.C.C. and its incorporation into state law brought about a distinct body of consumer protection law in the commercial setting. This protection is embodied today in the Code's recognition of three distinct types of warranties that can be made, and therefore breached, by sellers: express warranties,[30] implied warranties of merchantability,[31] and implied warranties of fitness

relied upon by proponents of the vertical privity requirement).

24. Booth v. Scheer, 185 P. 898, 899 (Kan. 1919).

25. *Id.*

26. *Id.*

27. *Id.* at 900.

28. *Id.*

29. *See infra* Part II.C.1.

30. *See* U.C.C. § 2-313 (2002). Under the Code, express warranties are created by an affirmation of fact or promise by the seller relating to the goods, a description of the goods, or any samples or models if such actions by the seller are made a basis of the bargain between the buyer and seller. *Id.*; *see generally* WHITE & SUMMERS, *supra* note 3, §§ 9-3 to -6.

31. *See* U.C.C. § 2-314 (2002). Article 2 implies into a contract of sale a warranty that the goods sold to the buyer are merchantable "if the seller is a merchant with respect to goods of that kind." *Id.*; *see generally* WHITE & SUMMERS, *supra* note 3, §§ 9-7 to -9.

for a particular purpose.[32]

Under the Code, express warranties generally arise from express affirmations of fact or promises made by the seller.[33] The seller need not use the precise words "guarantee" or "warranty" to create an express warranty, but it is "unlikely that an express warranty [would] be found by silence or omission."[34] Further, the Code draws a distinction between actual promises or affirmations of fact and mere puffery or sales talk.[35] In contrast, implied warranties of merchantability and fitness for a particular purpose arise by operation of law and do not rest on the dickered aspects of the transaction between the parties.[36]

However, under the common law vertical privity requirement discussed above, and particularly in light of cases employing the type of reasoning used in *Booth v. Scheer*, these warranties are of little use to the non-privity plaintiff. Therefore, the fate of a non-privity plaintiff's claim against a remote seller would seem to hinge on the Code's treatment of the subject.

2. The § 2-318 Vacuum

Section 2-318 of the U.C.C., which addresses the common law doctrine of privity, sets forth three alternative provisions that may be adopted by states.[37] Alternative A provides:

> A seller's warranty to an immediate buyer, whether express or implied, . . . extends to any individual who is in the family or household of the immediate buyer or the remote purchaser or who is a guest in the home of either if it is reasonable to expect that the person may use, consume, or be affected by the goods and who is *injured in person* by breach of the warranty.[38]

32. *See* U.C.C. § 2-315 (2002). The Code also implies into a contract of sale a warranty that the goods are fit for the buyer's particular purpose if "the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." *Id.*; *see generally* WHITE & SUMMERS, *supra* note 3, § 9-10.

33. WILLISTON ON SALES, *supra* note 3, § 17:6.

34. *Id.*

35. *Id.*

36. *Id.* § 18:1.

37. *See* U.C.C. § 2-318 (2002).

38. *Id.* (emphasis added). As of 2004, Alternative A, or a provision of similar import, has been adopted by twenty-eight states and the District of Columbia: Alaska, Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wisconsin. UNIF. COMMERCIAL CODE § 2-318,

This language only extends a seller's warranty *horizontally* to people other than the buyer who may reasonably be expected to use the goods.[39] The extension under this alternative is not one of extending liability vertically, but rather involves "the ultimate user of the goods trying to utilize the status of the immediate purchaser."[40] Further, the use of the "injured in person" language makes clear that the provision is only triggered in cases of personal injury. Thus, Alternative A, on its face, provides no help to the non-privity consumer attempting to hold an upstream seller liable for economic loss.

The second alternative provision in § 2-318, Alternative B, is only a slight variation on Alternative A. Alternative B reads:

> A seller's warranty to an immediate buyer, whether express or implied, . . . extends to any individual who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty.[41]

The language of Alternative B, like that of Alternative A, only extends a seller's warranty horizontally and only applies to cases of personal injury.[42] Alternative B simply extends a seller's warranty farther along the horizontal line of potential plaintiffs, in that it does not limit its coverage to family members or guests of the immediate buyer, but extends its coverage to "any individual who

1B U.L.A. 276 (2004). For a thorough analysis of the privity issue in warranty cases in Alternative A jurisdictions, see William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions that have Adopted Uniform Commercial Code Section 2-318 (Alternative A)*, 20 PEPP. L. REV. 1215 (1993).

39. WHITE & SUMMERS, *supra* note 3, § 11-3.

40. WILLISTON ON SALES, *supra* note 3, § 22:9.

41. U.C.C. § 2-318 (2002). As of 2004, Alternative B, or a provision of similar import, has been adopted by eight states: Alabama, Colorado, Delaware, Kansas, South Carolina, South Dakota, Vermont, and Wyoming. UNIF. COMMERCIAL CODE § 2-318, 1B U.L.A. 276 (2004). There is a split of authority regarding Wyoming's status as an Alternative B jurisdiction or an Alternative C jurisdiction. The 2004 Uniform Laws Annotated version of U.C.C. § 2-318 lists Wyoming as among the jurisdictions that have adopted Alternative B. *See id.* However, the language of Wyoming's statute more closely approximates that of Alternative C. *Compare* U.C.C. § 2-318, *with* WYO. STAT. ANN. § 34.1-2-318 (LexisNexis 2007). *See also* William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions that Have Adopted Uniform Commercial Code Section 2-318 (Alternatives B and C)*, 27 AKRON L. REV. 197, 235 (listing Wyoming as an Alternative C jurisdiction). For the purposes of this Comment, Wyoming will be regarded as an Alternative C jurisdiction.

42. WHITE & SUMMERS, *supra* note 3, § 11-3.

may reasonably be expected to use, consume, or be affected by the goods."[43] Therefore, a non-privity plaintiff's claim for economic damages against a remote seller is no better under Alternative B than it would be under Alternative A.

The final alternative provision in § 2-318, Alternative C, provides:

> A seller's warranty to an immediate buyer, whether express or implied, . . . extends to any person that may reasonably be expected to use, consume, or be affected by the goods and that is injured by breach of the warranty.[44]

This alternative, the most liberal of the three, would not limit its coverage to cases of personal injury, which is evident from the absence of the "injured in person" language found in both Alternatives A and B.[45] However, the prevailing interpretation of Alternative C is that it only addresses the extension of a seller's warranty horizontally to others who might be affected by the goods purchased by the immediate buyer and says nothing on the question of whether the non-privity purchaser can recover from an upstream seller.[46]

The official comments to U.C.C. § 2-318 shed some light on this section's conspicuous silence on the vertical privity question. Comment 2 remarks, "[b]eyond this, the section is neutral and is not intended to enlarge or restrict the developed or developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."[47] Thus, the

43. U.C.C. § 2-318 (2002).

44. *Id.* As of 2004, Alternative C, or a provision of similar import, has been adopted by five states: Hawaii, Iowa, Minnesota, North Dakota, and Utah. UNIF. COMMERCIAL CODE § 2-318, 1B U.L.A. 276 (2004). Wyoming is also commonly considered to be an Alternative C jurisdiction. See text accompanying note 41. Professor Stallworth has also undertaken a study of the privity requirement in warranty claims in jurisdictions that have adopted Alternatives B and C. Stallworth, *supra* note 41.

45. WHITE & SUMMERS, *supra* note 3, § 11-3.

46. *Id.* § 11-5; *see also* BARKLEY CLARK & CHRISTOPHER SMITH, THE LAW OF PRODUCT WARRANTIES ¶ 10.03[3][d] (1984) ("Although the three Alternatives of Section 2-318 recognize the difference between personal injury and economic loss, with Alternative C allowing recovery of the latter, that provision is aimed only at the horizontal privity problem, i.e., who belongs in the class of third-party beneficiaries that can sue for breach of warranty."). However, some courts in Alternative C jurisdictions have drawn upon its broad statutory language to conclude that this section allows recovery by a remote purchaser. *See, e.g.*, W. Equip. Co. v. Sheridan Iron Works, 605 P.2d 806, 809–10 (Wyo. 1980) (allowing a remote purchaser to recover from the manufacturer of defective water tanks under the language of Alternative C).

47. U.C.C. § 2-318 cmt. 2 (2002).

approach of § 2-318 to the vertical privity question is one of marked and direct avoidance, and the drafters' intent was to simply leave the fate of the remote purchaser's claim in the hands of the courts and legislatures of each state.[48] Whether the drafters' rationale for this hands-off approach was simply one of perfunctory adherence to the common law tradition already in place or a more affirmative nod to those courts already disposing of the requirement is unclear.[49] In any event, it is apparent that the success of a buyer's claim against a remote seller depends on which side of the debate his particular jurisdiction endorses in the vacuum left by § 2-318.

C. The Traditional Argument

Courts imposing the vertical privity requirement on purchasers today offer a number of arguments for its retention, many of which hearken back to its early English origins. But as a practical matter, many courts refuse to discuss this issue when their particular state legislature has not addressed it.[50] This refusal is problematic, because it encourages courts to engage in searching and often futile inquiries as to legislative intent at the time § 2-318 was adopted in the state. This legislative deference also appears unnecessary in light of the Code's neutrality on the subject and the fact that the vertical privity requirement is a judicially created doctrine in the first place.[51] Nevertheless, the courts that have agreed to consider the question and have retained the requirement have consistently drawn upon the same core arguments.[52]

48. *Id.*; *see also* WHITE & SUMMERS, *supra* note 3, § 11-5 (stating that U.C.C. § 2-318 "do[es] not prevent a court from abolishing the *vertical* privity requirement even when a non-privity buyer seeks recovery for direct economic loss"); WILLISTON ON SALES, *supra* note 3, § 22:10 (asserting that the Code's treatment of horizontal privity "did not at the same time put a terminus on the expanding or developing law regarding 'vertical privity'"); Speidel, *supra* note 2, at 12 ("[T]he Code is neutral on the question [of vertical privity], leaving the issue for decision by the legislatures and courts of the several states.").

49. Williston subscribes to the latter view, arguing that this purposeful avoidance was intended to encourage courts to recognize commercial reality and the potential for injustice created by imposing the vertical privity requirement upon buyer's claims against remote sellers in the stream of commerce model. WILLISTON ON SALES, *supra* note 3, § 22:10.

50. *See, e.g.*, S & R Assocs. v. Shell Oil Co., 725 A.2d 431, 438 (Del. Super. Ct. 1998) (refusing to allow recovery by a corporate remote purchaser of pipes because the "change in policy should be made by the Legislature rather than the Court").

51. *See supra* Part II.A.

52. For representative decisions of courts in states retaining the rule, see Harnden v. Ford Motor Co., 408 F. Supp. 2d 315, 322 (E.D. Mich. 2005); Harris Moran Seed Co. v. Phillips, 949 So. 2d 916, 922–23 (Ala. Civ. App. 2006); Flory v. Silvercrest Indus., 633 P.2d 383, 388 (Ariz. 1981); Ramerth v. Hart, 983 P.2d

1. The Nature of Warranty Protection

One commonly invoked theoretical argument rests on the underlying nature of a warranty between a buyer and seller. The central concept behind this argument is that a warranty is a product of the interaction between the buyer and seller, making "the obligation of the warrantor in each sale . . . personal to his own vendee."[53] Under this view, the only warranty that may be relied upon by the buyer is one given to him by his immediate seller, and the only obligation a seller has under a warranty is to his immediate buyer. The corollary to this is, of course, that a remote purchaser has no remedy for breach of warranty by a remote seller that results in economic loss because the warranty, by its very nature, simply does not extend to him.

2. Freedom of Contract

Another banner waved by proponents of the vertical privity bar, and somewhat of a derivative of the theoretical warranty argument, references the judicial province and traditional principles of restraint. To remove the privity bar and "extend the seller's implied warranty to remote parties not in privity so as to permit recovery for economic loss would impair traditional rights of parties to make their own contract."[54] In other words, there is no contract between a buyer and remote seller, and to discard the privity requirement would, in effect, be tantamount to a court creating a contract between the two because the buyer would be afforded rights against the remote seller as if the two had contracted. Courts employing this reasoning are also quick to point to the fact that "a buyer should pick his seller with care," and to abolish the privity requirement would discourage him from doing so.[55]

3. The Seller's Exposure to Unreasonable Liability

A related argument often raised by proponents has its origins

848, 851–52 (Idaho 1999); Presnell Constr. Managers, Inc. v. EH Constr., L.L.C., 134 S.W.3d 575, 579–80 (Ky. 2004); Energy Investors Fund, L.P. v. Metric Constructors, Inc., 351 N.C. 331, 338, 525 S.E.2d 441, 446 (2000); Hupp Corp. v. Metered Washer Serv., 472 P.2d 816, 817 (Or. 1970); Messer Greisheim Indus. v. Cryotech of Kingsport, Inc., 131 S.W.3d 457, 463 (Tenn. Ct. App. 2003); Daanen & Janssen, Inc. v. Cedarapids, Inc., 573 N.W.2d 842, 846 (Wis. 1998).

53. Booth v. Scheer, 185 P. 898, 900 (Kan. 1919).

54. Prof'l Lens Plan, Inc. v. Polaris Leasing Corp., 675 P.2d 887, 898 (Kan. 1984) (quoting Hole v. Gen. Motors Corp., 442 N.Y.S.2d 638, 640 (N.Y. App. Div. 1981)).

55. *Id.*

alongside the birth of the privity requirement itself.[56] Courts have frequently expressed the concern that abolishing the privity requirement in instances of economic loss to the buyer would expose remote sellers to unforeseeable and unreasonable liability.[57] These courts argue that sellers must be able "to ascertain with some precision potential liability of this sort."[58] Otherwise, the argument proceeds, a remote seller is simply converted into the insurer of a buyer who may be engaging in any sort of unforeseeable activities with the goods.[59] Thus, this particular argument is essentially a public policy concern over placing sellers at the mercy of a multitudinous market of potential buyers, each believing the seller owes them a specific duty to meet their particular needs.

D. The Emerging Trend

1. Chipping Away at the Rule

While there surely were earlier instances, the 1962 promulgation of the revised U.C.C. § 2-318 caused a number of courts to take notice of the plight of the downstream consumer.[60] In a testament to judicial ingenuity, and perhaps proceeding with the subtle encouragement provided in Comment 3 to U.C.C. § 2-318, these courts began to punch holes in the vertical privity prerequisite to allow the downstream buyer recovery for economic loss against the remote seller in cases where the vertical privity requirement threatened an unjust result.

One commonly employed method involved drawing a distinction between the nature of express and implied warranties and treating the downstream buyer as a third party beneficiary.[61] Courts have understandably been more willing to extend the benefit of a remote seller's express warranty to a buyer than that of an implied

56. See the discussion of *Winterbottom v. Wright*, *infra* Part II.A.

57. *See, e.g.*, Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1032 (5th Cir. 1985) ("Denying recovery for pure economic losses is a pragmatic limitation on the doctrine of foreseeability, a limitation we find to be both workable and useful.").

58. Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976, 978 (D. Alaska 1973).

59. *See* WHITE & SUMMERS, *supra* note 3, § 11-6.

60. WILLISTON ON SALES, *supra* note 3, § 22:10. Williston maintains that the drafters of § 2-318 intended to leave "open the avenue of freedom to develop the case laws to prevent . . . injustices from arising in each of the individual jurisdictions as the needs of that jurisdiction dictate." *Id.*

61. For a cogent argument that the law of third party beneficiaries should fill the gap in the Code's treatment of vertical privity, see Monserud, *supra* note 1.

warranty of merchantability or fitness for a particular purpose.[62] This is particularly true in situations where the remote seller might have communicated an express warranty to the dealer with the intent that it be passed on to the ultimate buyer. In such cases, some courts have regarded the buyer as the beneficiary of the contract between the remote seller and the intermediate dealer.[63] Conceptually, the remote seller's intent that the warranty be communicated to the buyer, or, at the least, his knowledge of the purpose of the goods served as the substitute for the contractual contact normally embodied in the privity requirement.[64] However, this technique had an inherent limitation in the requirements of third party beneficiary theory and therefore did not cover situations where the remote seller had no knowledge of the existence of the buyer or had not overtly intended the warranty to extend beyond the intermediate dealer.[65]

Other courts engaged in a similar incorporation of outside legal principles to prevent perceived injustice to consumers. In some cases, manufacturers acted through dealers or participated in the negotiation of the sale to such a degree that courts would simply hold the dealer to be the agent of the manufacturer and the manufacturer as the de facto seller, thereby enabling the buyer to maintain a breach of warranty action against the manufacturer.[66]

62. *See* CLARK & SMITH, *supra* note 46, ¶ 10.02[1] (arguing that "it makes policy sense to ignore vertical privity as a defense where a manufacturer makes an express warranty . . . that is intended to follow a product into the hands of the ultimate purchaser, though several links removed in the chain of distribution"); Speidel, *supra* note 2, at 16 (noting that a remote seller's express warranties are conceptually easier to extend to a buyer because "an inference of reliance can be drawn from the fact that the seller's representations . . . were followed by a decision to purchase").

63. *See, e.g.*, Spring Motors Distribs., Inc. v. Ford Motor Co., 489 A.2d 660, 674 (N.J. 1985) (holding that a non-privity buyer could recover economic losses from the remote supplier of transmissions based on an express warranty communicated by the supplier to the truck dealer).

64. Speidel, *supra* note 2, at 36 n.97 (citing Carbo Indus., Inc. v. Becker Chevrolet, Inc., 491 N.Y.S.2d 786, 790 (N.Y. App. Div. 1985)). For a case in which a buyer was allowed to recover economic loss from a remote purchaser under third party beneficiary theory based on breach of an implied warranty, see *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 422 P.2d 496 (Wash. 1967).

65. The Restatement (Second) of Contracts requires that the promisee and promisor intended for the beneficiary to receive the benefit of the contract. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). Implicit in this intent requirement is that the beneficiary be an identifiable individual, which is often not the case in the stream of commerce model.

66. *See, e.g.*, Richards v. Goerg Boat and Motors, Inc., 384 N.E.2d 1084 (Ind. Ct. App. 1979) (allowing the purchaser of a boat to recover from the manufacturer when all negotiation was between the purchaser and the manufacturer and the only contact between the purchaser and the dealer was

However, just as the third party beneficiary method discussed above was inherently limited by the requirements to confer third party beneficiary status, this agency theory was limited to situations where the manufacturer's involvement in the sale evidenced "factors which should be considered sufficient to bring [the manufacturer] into the transaction directly as a seller."[67] If the seller refrained from engaging in the requisite degree of participation, the agency exception did not apply, and the vertical privity obstacle once again prevented the buyer from proceeding against the upstream seller.

2. Abolishing the Requirement

As such exceptions both increased in number and became more firmly rooted as precedent, courts and commentators began to consider replacing this ingenuity and avoidance with a forthright admission that the vertical privity rule had outlived its usefulness. The most significant argument for the abolition of the rule centered on the stream of commerce distribution model that has become the centerpiece of the modern economy. In the modern economy, it has become "the atypical consumer who [could] deal with the seller at a meaningful arm's length transaction."[68] Rather, the normal consumer makes his purchase "from a retail seller who is nothing more than an economic conduit for the manufacturer's product."[69] Thus, to limit a downstream buyer's remedies to his immediate seller began to appear unrealistic when that seller was often nothing more than a straw man. This principle applied with particular force to the remote sellers' common practice of using a warranty (or language that might be construed as such) as a tool to induce ultimate purchasers. This new view toward commercial reality provided the spark for many courts to put aside case-by-case exceptions and abolish the privity requirement altogether.

One recent Indiana decision is illustrative of this trend.[70] In *Hyundai Motor America, Inc. v. Goodin*, the Indiana Supreme Court considered the viability of a buyer's claim for economic damages against a remote automobile manufacturer.[71] In *Goodin*, plaintiff Sandra Goodin test drove a Hyundai Sonata at the AutoChoice Hyundai dealership.[72] At some point in the test drive, she noticed

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the sale itself).

67. *Id.* at 1092.

68. WILLISTON ON SALES, *supra* note 3, § 22:10.

69. *Id.*

70. Hyundai Motor Am., Inc. v. Goodin, 822 N.E.2d 947, 948 (Ind. 2005). Indiana has adopted Alternative A contained in § 2-318. *See* IND. CODE § 26-1-2-318 (2006).

71. 822 N.E.2d 947, 948 (Ind. 2005).

72. *Id.*

the car shake when she applied the brakes, but the AutoChoice salesperson assured her the problem could be fixed by rotating the vehicle's tires.[73] Satisfied, Goodin signed a sales agreement containing the dealer's disclaimer for any warranties that might be made by the manufacturer, only to find that the brake problem persisted for a number of months in spite of attempted repairs.[74] Goodin, aware that she likely could not hold the dealer liable because of the disclaimer,[75] filed a complaint against the remote manufacturer, Hyundai, asserting causes of action for breach of both express and implied warranties, and seeking recovery for repair expenses and the car's diminished value.[76]

At trial, the court did not instruct the jury on vertical privity, and the jury returned a verdict for Goodin on her claim for breach of implied warranty of merchantability.[77] The Indiana Court of Appeals reversed, holding that Goodin was required to prove privity with the defendant Hyundai to maintain her claim for breach of implied warranty of merchantability, and since she had not, she could not recover.[78]

In its consideration of Goodin's claim against Hyundai, the Indiana Supreme Court engaged in an extensive overview of the vertical privity requirement, its historical underpinnings, and the arguments for its abrogation, ultimately concluding that the vertical privity requirement in Indiana was no longer viable.[79] In the course of its discussion, the court gave credence to the commercial reality discussed above, remarking that the rationale for vertical privity "has eroded to the point of invisibility as applied to many types of consumer goods in today's economy" and that "[w]arranties are often explicitly promoted as marketing tools, as was true in this case of the Hyundai warranties."[80] In view of this conclusion, the court reasoned that "consumers are entitled to, and do, expect that a consumer product sold under a warranty is merchantable, at least to the modest level of merchantability set by U.C.C. Section 2-314."[81] Ultimately, the court not only held that Goodin could maintain her claim for economic damages against Hyundai regardless of the lack

73. *Id.*

74. *Id.* at 948–49.

75. Goodin's attorney pointed to the disclaimer as a bar to suing the dealer at oral argument. *See id.* at 958.

76. *Id.* at 950.

77. *Id.* at 950–51.

78. Hyundai Motor Am., Inc. v. Goodin, 804 N.E.2d 775, 788–89 (Ind. Ct. App. 2004), *superseded by* 822 N.E.2d 947.

79. *Goodin*, 822 N.E.2d at 952–59.

80. *Id.* at 958.

81. *Id.* at 959.

of vertical privity, but also that Indiana law no longer recognized vertical privity as an obstacle for a consumer attempting to hold an upstream seller liable for breach of warranty.[82]

The conclusion and rationale of the Indiana Supreme Court are not unique. Many other courts have concluded that the vertical privity requirement is simply no longer viable given contemporary commercial practices.[83] While this trend shows no sign of slowing, its sustainability, and therefore the likelihood that it will supplant the traditional vertical privity rule, must be measured by a reconsideration of the traditional arguments for the rule in light of current commercial reality.

III. ANALYSIS

A. Commercial Reality and the Nature of Warranty Protection

As mentioned earlier, one of the prevailing assertions made by courts and commentators adhering to the common law vertical privity requirement is that it recognizes the personal nature of warranty protection. Under this view, a warranty is a personal obligation between a buyer and seller who have either agreed to its express terms or engaged in face-to-face dealings such that the terms of the warranty can be ascertained.[84]

But, when considered alongside current commercial practices by remote sellers, this justification is seriously undermined. As Williston notes, in today's economy it is the "atypical consumer" who deals directly with the manufacturer of a product.[85] Rather, once a product is manufactured, it is fanned out to numerous retailers or dealers who act as an "economic conduit" for the manufacturer.[86] Yet, manufacturers' warranties are surely just as prevalent, if not more so, in the modern economy,[87] and "it is not the retail seller who

82. *Id.*

83. *See* Leyva v. Coachmen R.V. Co., No. Civ. 04-40171, 2005 WL 2246835 (E.D. Mich. 2005); Morrow v. New Moon Homes, 548 P.2d 279, 289 (Alaska 1976); Manheim v. Ford Motor Co., 201 So. 2d 440, 441 (Fla. 1967); Groppel Co. v. U.S. Gypsum Co., 616 S.W.2d 49, 56 (Mo. Ct. App. 1981); Peterson v. N. Am. Plant Breeders, 354 N.W.2d 625, 632 (Neb. 1984); Spring Motors Distrib., Inc. v. Ford Motor Co., 489 A.2d 660, 674 (N.J. 1985); Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc., 604 P.2d 849, 851–52 (Okla. 1979); Spagnol Enters., Inc. v. Digital Equip. Corp., 568 A.2d 948, 952 (Pa. Super. Ct. 1989); Dawson v. Canteen Corp., 212 S.E.2d 82, 84 (W. Va. 1975).

84. *See* Booth v. Scheer, 185 P. 898, 900 (Kan. 1919); *see also supra* Part II.C.1 (discussing the nature of warranty argument).

85. WILLISTON ON SALES, *supra* note 3, § 22:10.

86. *Id.*

87. *See* Spring Motors Distribs., Inc. v. Ford Motor Co., 489 A.2d 660, 663 (N.J. 1985) (concerning a manufacturer who engaged in extensive advertising

advertises the product on a transnational scale hoping to attract a huge volume of consumers."[88] As one court remarked:

> The world of merchandising is, in brief, no longer a world of direct contact . . . when representations expressed and disseminated in the mass communications media and on labels . . . prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity.[89]

Thus, today's commercial practices have transformed the privity requirement from a legitimate tool of the seller to protect himself from unreasonable liability to a means of escaping liability at the expense of the average consumer.

Furthermore, the argument that a consumer should choose his seller carefully and therefore simply attempt to hold the intermediate dealer or retailer liable is no answer to this problem. Dealers and retailers often carefully disclaim any warranties made by manufacturers, leaving the buyer with no remedy whatsoever.[90] They may also be judgment-proof, thereby preventing the consumer from recovery for breach of warranty against the party with whom he has privity.[91] Indeed, the vertical privity requirement may actually encourage corporate manufacturers to affirmatively establish thinly capitalized subsidiaries for the purpose of avoiding responsibility for potentially defective products.[92]

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and used a warranty as a tool to attract the plaintiff buyer, but conducted the actual sale through an intermediate dealer).

88. WILLISTON ON SALES, *supra* note 3, § 22:10.

89. Randy Knitwear, Inc. v. Am. Cyanamid Co., 181 N.E.2d 399, 402 (N.Y. 1962).

90. For example, in the *Goodin* case previously discussed, the dealer had disclaimed all warranties made by Hyundai as part of the sales agreement. Hyundai Motor Am., Inc. v. Goodin, 822 N.E.2d 947, 958 (Ind. 2005). Had the Indiana Supreme Court not abolished the privity requirement and allowed Goodin to maintain a claim against Hyundai, the dealer's disclaimer would likely have precluded her from recovering at all. *Id.*

91. *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279, 282 (Alaska 1976) (concerning a mobile home purchaser who was forced to seek recovery from the remote manufacturer after the dealer went out of business). Professor Speidel suggests that the judgment-proof dealer scenario results in the remote seller being unjustly enriched because the remote seller retains payment for "sound" goods, while the buyer is left with the unmerchantable or defective goods. Speidel, *supra* note 2, at 46. Several courts have come to the same conclusion. *Id.* (citing Cova v. Harley Davidson Motor Co., 182 N.W.2d 800, 804 (Mich. Ct. App. 1970)).

92. *See* Indus. Graphics, Inc. v. Asahi Corp., 485 F. Supp. 793, 804 (D. Minn. 1980) (reasoning that refusing to allow a buyer to proceed against a remote manufacturer "could theoretically encourage manufacturers to utilize

B. Commercial Reality and Freedom of Contract

The long-established contention that the vertical privity rule acts to prevent courts from improperly imposing an agreement where the parties have not, fares little better when juxtaposed with today's chain of distribution model. One commentator has promoted a relational theory, which would find an agreement of sorts between the remote seller and ultimate purchaser based on the conduct of the remote seller.[93] Under this theory, by putting advertised products in the distributive chain, a remote seller has, in effect, represented to "all foreseeable purchasers that the goods are, at least, merchantable."[94] Admittedly, this is not the equivalent of an exchange of promises. However, it presents a basis for imposing warranty liability given that there has been a "bargain of sorts."[95] Therefore, a court imposing such warranty liability on a remote seller would not be imposing an agreement where one did not exist, but would simply be holding the remote seller liable for an implied representation that did not occur in the course of face-to-face dealings with the buyer.[96]

As a practical matter, this relational theory also has the potential to increase judicial efficiency. If a purchaser who is shackled with unmerchantable goods sues his immediate seller for the resultant economic loss, that immediate seller will undoubtedly attempt to hold the manufacturer liable using third-party practice.[97] In distributive chains involving multiple intermediate sellers, each successive seller will attempt to hold the former liable until the manufacturer is ultimately reached.[98] It goes without saying that this process can be costly, time-consuming, and a serious burden on judicial resources.[99] By allowing the purchaser to proceed directly

thinly capitalized intermediary corporations to sell defective products, thereby escaping liability").

93. *See* Speidel, *supra* note 2, at 42–44.

94. *Id.* at 42.

95. *Id.* at 44.

96. It is true that the traditional basis for implied warranties lies in the face-to-face dealings between the buyer and seller. *See* WILLISTON ON SALES, *supra* note 3, § 18:1. But the concept is arguably more elastic than that. Implied warranties also arise "based on common factual situations or conditions which will give rise to the creation of an implied warranty." *Id.* If the most common way the average consumer procures goods is through the chain of distribution model, and both the remote seller and consumer expect the goods to be merchantable, there is no reason the face-to-face distinction should matter. *See* Greenberg, *supra* note 10, at 40.

97. The Code refers to this procedure as "vouching in." *See* U.C.C. § 2-607(5) (2002).

98. Greenberg, *supra* note 10, at 41.

99. *Id.* at 41–42.

against the remote manufacturer, who is just as likely to have been held liable by one of the intermediate sellers, the entire dispute is resolved in the most efficient way possible, and the remote manufacturer is no worse off than if an intermediate seller had sued him.

C. Commercial Reality and the Seller's Exposure to Unreasonable Liability

Equally unavailing is the argument that abolishing the vertical privity rule for economic loss will subject remote sellers to unreasonable liability. It is true that, at first blush, removing the vertical privity bar and allowing a consumer to proceed upstream against a remote seller for economic loss would seem to open up the remote seller to a significantly greater risk of liability. But the key question is whether this risk is unjustified. The vertical privity requirement has been abolished in cases where the defective product causes property damage or personal injury to the consumer,[100] which has caused some courts to question whether there is any reason to distinguish between property damage and economic loss when both have the potential to be equally debilitating to the buyer.[101]

Consider, for example, a farmer who has purchased pesticides from a local retail store to be used in growing his crops. Assume the retailer has become insolvent or has disclaimed all warranties as part of the sale. If the pesticides were defective and destroyed the farmer's crops because they contained a hazardous chemical, the farmer could recover from the remote manufacturer for the resulting economic loss because this would be characterized as damage to property, which sounds in tort law. If the pesticides were defective because they were simply ineffective in deterring pests, resulting in the destruction of the crops, the farmer would have no option for recovery because of the vertical privity bar. Such a fine distinction makes little sense when "each species of harm can constitute the 'overwhelming misfortune' . . . which warrants judicial redress."[102]

The above result is rendered even more questionable when, as

100. *See* RESTATEMENT (SECOND) OF TORTS § 402A(2)(b) (1965).

101. *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279, 291 (Alaska 1976) ("[T]here is no satisfactory justification for a remedial scheme which extends the warranty action to a consumer suffering personal injury or property damage but denies similar relief to the consumer 'fortunate' enough to suffer only direct economic loss.").

102. *Id.*; *see also* Groppel Co. v. U.S. Gypsum Co., 616 S.W.2d 49, 59 (Mo. Ct. App. 1981) (recognizing that "economic loss is potentially devastating to the buyer of an unmerchantable product and that it is unjust to preclude any recovery from the manufacturer for such loss because of a lack of privity, when the slightest physical injury can give rise to strict liability under the same circumstances").

some courts and commentators have recognized, it is the remote seller who is the "party most able to prevent the defect and to bear its cost."[103] It is the remote seller, because of the financial and informational advantage it possesses over intermediate sellers and the average consumer, who is best able to prevent economic harm to eventual purchasers by ensuring that its products meet the baseline standard of merchantability imposed by the U.C.C. The result, as the Indiana Supreme Court put it, is that "the risk of a lemon is passed to all buyers in the form of pricing and not randomly distributed among those unfortunate enough to have acquired one of the lemons."[104]

There are also other inherent limitations on a buyer's recovery contained in the U.C.C. First, a remote seller is free to disclaim warranties under U.C.C. § 2-316[105] or to limit or exclude the buyer's remedy under U.C.C. § 2-719.[106] Second, a buyer's recovery for direct economic damages from a remote seller will be limited to the difference between the value of the goods as warranted and the actual value of the goods in their defective state.[107] Third, any consequential economic damages will be constrained by the foreseeability and mitigation limitations in U.C.C. § 2-715.[108] Thus, notwithstanding a court abolishing the vertical privity requirement in breach of warranty cases involving economic loss, it is clear a remote seller retains some very powerful protections under the Code.

After all of this, it is easy to overlook the fact that the buyer still must prove his case. If he cannot show that the remote seller did in fact make the alleged warranty (or that the warranty should be implied by law in the case of implied warranties), that the warranty was breached by the remote seller, and that the breach caused the

103. Greenberg, *supra* note 10, at 35.

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

105. U.C.C. § 2-316 (2002) allows a seller to exclude or modify the implied warranty of merchantability, but requires that disclaimers in consumer contracts conform to certain formal requirements.

106. U.C.C. § 2-719 (2002) permits a seller to limit or alter the damages recoverable by the buyer, including the limitation or exclusion of consequential damages, provided that such limitations are not unconscionable.

107. U.C.C. § 2-714(2) (2002) provides that 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." This means that, at worst, the remote seller will be liable for the purchase price of the goods.

108. U.C.C. § 2-715(2)(a) (2002) limits a buyer's consequential damages to "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise."

damages being claimed, the buyer will not recover.[109] Meeting this burden of proof may be particularly difficult when the product has passed through the hands of multiple intermediate sellers before reaching the buyer, suggesting that the chain of distribution model may hold some intrinsic protection for the remote seller after all.

IV. CONCLUSION

As the foregoing discussion illustrates, the case against the vertical privity rule in consumer economic loss cases is a strong one. While the demise of the rule is by no means a certainty, there are a number of signs that suggest its days may be numbered. Chief among these is the progression of the U.C.C. and its increasing focus on consumer protection. The 1962 version of U.C.C. § 2-318 contained only the language that is now Alternative A.[110] The 1972 promulgation of the more liberal Alternatives B and C, while only addressing horizontal privity,[111] does evidence an increased focus on consumer protection.[112] This is important because the vast majority of states take their cue from the Uniform Commercial Code when deciding commercial law policy issues. And while it may be true that the majority of states have adopted Alternative A, the most restrictive alternative, this may still be holdover from the previous version of U.C.C. § 2-318 that contained only that language. Moreover, a significant number of Alternative A jurisdictions have abolished the vertical privity requirement judicially[113] or have adopted versions of Alternative A that include the abrogation of the vertical privity limitation.[114] Other states have adopted modified versions of Alternative C that expressly abolish the vertical privity requirement without regard to the nature of the plaintiff's injury.[115]

109. Greenberg, *supra* note 10, at 55.

110. WHITE & SUMMERS, *supra* note 3, § 11-3.

111. *See supra* Part II.B.2.

112. However, one commentator has suggested that the revised Article 2 falls well short of adequately protecting consumers. *See* Caroline Edwards, *Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment*, 78 ST. JOHN'S L. REV. 663, 668–69 (2004).

113. The *Goodin* case discussed in Part II.D.2 is an example.

114. For example, Mississippi has adopted Alternative A. *See* MISS. CODE ANN. § 75-2-318 (1972). But elsewhere, the Mississippi state law provides, "[i]n all causes of action for . . . economic loss brought on account of . . . breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action." *Id.* § 11-7-20.

115. *See, e.g.*, VA. CODE ANN. § 8.2-318 (1950) ("Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied . . . .").

In addition to courts and legislatures, an increasing number of commentators agree that the rule has outlived its usefulness,[116] an observation which also portends the continued sustainability of the trend.

By the same token, there is no indication that the prevalence of the chain of distribution model is likely to change in the near future. This model allows manufacturers to maximize efficiency by centering their focus on production and leaving the marketing and sales facets largely to intermediate dealers and retailers. It also allows remote sellers to fan out their product to a wide array of independent retailers, optimizing the number and type of markets the product reaches. For the average consumer, the continued vitality of the chain of distribution model likely means the persistence of informational and bargaining disadvantages.

Yet, if the growth of the trend toward abolishing vertical privity for economic loss is any indication, courts and commentators have directed their attention to the consumer's predicament in the chain of distribution scheme. This suggests not only that the number of courts willing to follow the trend will increase, but also that there will be a corresponding emphasis on other methods that can be used to level the playing field between consumers and sellers in the chain of distribution. Abolition of the vertical privity requirement in economic loss cases may not simply be a step, but one of the precipitative steps in reconciling the chain of distribution model with the principles embodied in a system of fair exchange.

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116. *See* CLARK & SMITH, *supra* note 46, ¶ 10.03[3][d]; WILLISTON ON SALES, *supra* note 3, § 22:10; Greenberg, *supra* note 10, at 23; Speidel, *supra* note 2, at 13. *But see* WHITE & SUMMERS, *supra* note 3, § 11-6.

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