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A Seller’s Responsibilities to Remote Purchasers for Breach of Warranty in the Sales of Goods Under Washington Law

Thomas J. Holdych*

I. INTRODUCTION

In a sale of goods, a seller may expressly or impliedly warrant that the goods have certain physical qualities, such as being free from defects in manufacturing.¹ Although enforcing these warranties may not be problematical while the goods are in the hands of the immediate purchaser, that is, the buyer who bought directly from the seller, invoking the warranties may be considerably more difficult, if not impossible, when the goods have been sold to a remote buyer who seeks to enforce such guarantees. The problem confronting a remote purchaser is exemplified by Daughtry v. Jet Aeration Co.² In that case, James Daughtry purchased a home sewage treatment system manufactured by Jet Aeration Co. for use with a new house he was constructing.³ Three years after installing the system, Daughtry encountered difficulties with the system, including water backing up into the system’s chambers. After a number of attempts to correct the problems, including the provision of a new agitation unit by Jet Aeration, Daughtry sued Jet Aeration for breach of warranty.⁴ Despite trial court findings that Jet Aeration breached both express and im-

* Professor of Law, Seattle University School of Law. The author expresses his appreciation to Eliot Harris, Russel Robertson, and Christopher Wyant for their research assistance on this article.

3. Id.
4. Id. Daughtry also named a Jet Aeration distributor as a defendant but did not name the individual from whom he purchased the system. The case offers no explanation for Daughtry’s failure to sue the immediate seller for breach of warranty.
plied warranties pertaining to the proper functioning of the treatment system, Daughtry was unable to enforce the warranties against Jet Aeration because he did not purchase the system directly from the manufacturer and therefore lacked a contractual relationship with it.\(^5\) Instead, Daughtry was relegated to his rights under Article 2 of the Uniform Commercial Code, which enables a purchaser who suffers a loss from nonconforming goods to obtain a remedy for breach of warranty from the entity that sold it the goods.\(^6\)

Although a remote buyer, such as Daughtry, may have a remedy against its immediate seller, there are instances in which it may be more beneficial for a buyer to obtain relief from a more remote seller in the chain of distribution, one with whom the buyer is not in privity of con-

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5. Id. at 711, 592 P.2d at 634.

6. U.C.C. §§ 2-313, 2-314, 2-315 (2001). Unless otherwise noted, all citations to sections in Article II are to the sections as they existed prior to the 2003 amendments to that article.

Section 2-313 provides for the creation of an express warranty when a seller either makes an affirmation, promise or description that relates to the goods sold or provides a sample or model of the goods if the representation becomes part of the basis of the bargain between the seller and a buyer.

Section 2-314 provides that there is an implied warranty in a contract for the sales of goods that the goods shall be merchantable when the seller is a merchant with respect to goods of the kind sold.

Section 2-315 provides that a warranty of fitness for particular purpose is implied in a contract for the sale of goods when a seller has reason to know of 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.

Two limitations exist on a buyer's right to enforce a warranty against a seller. The first is the parol evidence rule, as provided in section 2-202. Pursuant to this rule, evidence of a prior agreement or a contemporaneous oral agreement may not be introduced to contradict the terms of a writing intended by parties as a final expression of their agreement and may not be introduced to supplement the agreement with consistent additional terms if the writing was intended as a complete and exclusive embodiment of the parties' agreement. See, e.g., Betaco, Inc. v. Cessna Aircraft Co., 103 F.3d 1281, 1292–93 (7th Cir. 1996) (writing, including disclaimer, complete integration barring antecedent warranty); Allmand Assocs., Inc. v. Hercules Inc., 960 F. Supp. 1216, 1229–30 (E.D. Mich. 1997); Ray Martin Painting, Inc. v. Ameron, Inc., 638 F.Supp. 768, 772–73 (D.Kan. 1986); Kelmar v. Mi-Michigan Freightliner, Inc., 52 U.C.C. Rep Serv 2d 411, 412 (Mich. App. 2003). See infra text accompanying notes 131–139 for a discussion of the parol evidence rule as it applies to remote seller representations made directly to remote buyers. The other limitation is found in section 2-316, which allows a seller to modify or disclaim implied warranties. So long as a seller complies with the requirements of section 2-316, a seller can disclaim either an implied warranty of merchantability or an implied warranty of fitness for a particular purpose. Washington law, however, requires that any warranty disclaimer be individually negotiated between the seller and buyer. See, e.g., Cox v. Lewis-}

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tract. For example, the immediate seller may have become insolvent\textsuperscript{7} or otherwise be unavailable.\textsuperscript{8} The buyer may have failed to give its immediate seller notice of breach of warranty, barring the buyer from any remedy against the seller.\textsuperscript{9} In addition, the contract of sale between the buyer and the immediate seller may have contained a disclaimer of warranty\textsuperscript{10} or remedy limitation,\textsuperscript{11} precluding or limiting any remedy against the seller.\textsuperscript{12} Finally, the remote supplier may have offered a more extensive express warranty, or a potential class action may be available against a remote supplier.\textsuperscript{13}

Despite these potential advantages for a remote purchaser, the provisions of Article 2 pertaining to warranties indicate, with one exception,\textsuperscript{14} that there must be privity of contract\textsuperscript{15} between a buyer and seller


\textsuperscript{9} U.C.C § 2-607(3) (2001). By its terms, this section does not require a seller to prove that it was prejudiced by a buyer's failure to give timely notice in order to invoke the measure's protection. See Aqualon Co. v. MAC Equip., Inc., 149 F.3d 262, 270 (4th Cir. 1998) (prejudice relevant to reasonable time for notice but not required to invoke the section); Armco Steel Corp. v. Isiacson Structural Steel, Co., 611 P.2d 507, 510-15 (Alaska 1980); but see Boyes v. Greenwich Boat Works, Inc., 27 F.Supp.2d 543, 551-52 (D.N.J. 1998) (prejudice from delay required). The notice requirement applies to consumer, as well as commercial, transactions. See Hebron v. American Isuzu Motors, Inc., 60 F.3d 1095, 1098 (4th Cir. 1995).

\textsuperscript{10} See Speidel, supra note 8, at 37. Section 2-316(2)-(3) provides several methods by which a seller can disclaim an implied warranty, for example, by using language such as "as is."

\textsuperscript{11} See Speidel, supra note 8, at 37. Section 2-719 allows parties to an agreement to provide for remedies in addition to or in substitution for those in the Code.

\textsuperscript{12} It is common for sellers of new automobiles to disclaim the implied warranty of merchantability and not make any express warranties, leaving buyers with express warranties or repair agreements provided by manufacturers as the sole bases for claims for nonconformities or for a remedy. See Donald F. Clifford, Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships, 75 Wash. U. L.Q. 413, 444 (1997); John O. Honnold et al., The Law of Sales and Secured Financing 290-91 (6th ed. 1993).


\textsuperscript{14} Certain individuals are third-party beneficiaries of a seller's warranty to its buyer. U.C.C. § 2-318 (2003). A seller may not exclude or limit the operation of U.C.C. section 2-318, which confers this third-party beneficiary status. There are three alternatives to section 2-318, the first of which, Alternative A, is the most restrictive. It limits third-party beneficiary status to any natural person who is a family or household member or guest of the purchaser who may be expected to be affected by the good in question and who suffers personal injury as a result of a breach of warranty. U.C.C. § 2-318, alt. A. The State of Washington has adopted this version. See Wash. Rev. Code § 62A.2-318.
in order for the buyer to assert an obligation with respect to the attributes of the goods against the seller. 16 Nevertheless, buyers have sought to expand the class of sellers against whom they can proceed.

(1965). Although a seller may not preclude third-party beneficiary rights under section 2-318 if it makes a warranty to a buyer, the section does not preclude a seller from refusing to give an express warranty or from disclaimer an implied warranty under section 2-316, in which case there is no warranty of which a third party can be a beneficiary. See U.C.C. § 2-318, cmt. 1. Importantly for present purposes, section 2-318 Alternative A deals only with horizontal privity issues, those in which the person seeking to enforce a warranty is one who uses or is affected by a good but not one who is a subsequent purchaser from the immediate buyer. See WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-318:2 ALTERNATIVE A (2002); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-1 (5th ed. 2000). Alternative A does not deal with or affect case law concerning vertical privity, cases involving suppliers and remote buyers. U.C.C. § 2-318, cmt. 3; WILLIAM D. HAWKLAND, supra, § 2-318:1: Horizontal, Vertical, and Diagonal Privity Limitations on Warranty Recovery; WHITE & SUMMERS, supra, § 11-3. Section 2-318 of the 2003 amendments to Article 2 contains three alternatives concerning third-party beneficiaries of warranties that are comparable to those in the unamended section. The major difference between the two sections is that the revision applies not only to a seller’s warranty to an immediate buyer but also to a seller’s obligation to a remote buyer under new sections 2-313A and 2-313B. U.C.C. § 2-318. See infra note 104.

15. The seminal case establishing the privity of contract requirement is Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842). There a coachman was employed by an individual who had a contract to deliver mail for the postmaster general. Id. The coachman alleged he was injured when a coach he was driving, which the postmaster general had contracted to have maintained by the defendant, broke down as a result of the defendant’s negligent maintenance. Id. at 403. In an opinion supporting dismissal of the coachman’s case against the defendant for negligence in the performance of his contract with the postmaster general, Lord Abinger said:

There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

Id. at 405.

16. An express warranty is created by a “seller” when, in part, the seller makes an affirmation or promise to the “buyer.” U.C.C. § 2-313 (2001). A buyer is one who buys or contracts to buy goods, U.C.C. § 2-103(1)(a), and a seller is one who sells or contracts to sell goods, U.C.C. § 2-103(1)(d). Section 2-106(1) defines a contract for the sale of goods and is based on the definition of contract in section 1-201(b)(12), which means the total legal obligation of the parties’ agreement. (Citations to Article I are to that article as amended in 2001.) The latter term, “agreement,” means the parties’ bargain in fact. U.C.C. § 1-201(b)(3) (2001). Thus it is the buyer under a contract to whom a seller makes an express warranty and not someone outside the contractual relationship. See Curtis R. Reitz, Manufacturers’ Warranties of Consumer Goods, 75 WASH. U. L.Q. 357, 360–61 (1997).

A warranty that goods shall be merchantable is implied in a “contract for their sale” if the “seller” is a merchant with respect to goods of the kind being sold. U.C.C. § 2-314. Both the requirement for a “contract for sale,” which is defined in section 2-106(1), and the “seller” requirement indicate that there must be a contract between the party seeking to enforce the warranty and his warrantor, and that the warrantor must be his seller. See Baughn v. Honda Motor Co., 107 Wash. 2d 127, 150–53, 727 P.2d 655, 668–69 (1986); Reitz, supra, at 368. Similarly, section 2-315, which provides for a warranty of fitness for a particular purpose, provides that the “seller” at the time of “contracting” must have reason to know any particular purpose for which the goods are being required and that the “buyer” is relying on the “seller’s” skill or judgment to select or furnish suitable goods. Again, use of the terms “seller,” “buyer,” and “contract-
In confronting these attempts by remote buyers, Washington courts have, with limited exceptions, continued to adhere to the privity requirement. In the recent case of *Tex Enterprises, Inc. v. Brockway Standard, Inc.*, for example, the Washington Supreme Court reaffirmed existing Washington law that a purchaser must be in privity of contract with a seller to maintain an action for breach of implied warranty of merchantability. The court also indicated, however, that privity is not a barrier to a claim for breach of express warranty when a seller makes a direct representation about its goods to a remote purchaser. The *Tex Enterprises, Inc.* case and others preceding it raise a number of questions concerning the enforceability of express and implied warranties against remote sellers.

The purpose of this article is to examine Washington law pertaining to a seller’s obligations to a remote purchaser with respect to the quality of goods, attending in particular to the judicially created exceptions to the privity requirement. Part II explores the reasons a seller may provide and a buyer may purchase a warranty, reasons that bear on resolution of the question whether the privity requirement should be retained. Parts III and IV analyze not only what warranty obligations a seller may have to a remote purchaser but also the theoretical bases for those obligations and the manner in which those obligations may be excluded, modified, or disclaimed. Part V considers a number of arguments in favor of abolishing the privity requirement and demonstrates that the arguments do not merit the requirement’s abrogation and that privity of contract is appropriate for a proper allocation of loss among a seller, its immediate buyer, and a remote buyer. Finally, the article concludes that seller liability to a remote buyer should exist, subject to the ability of a seller to create contractual rights in a remote buyer under U.C.C. section 1-103(b), only where the seller has made an express commitment to the buyer or

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17. See infra text accompanying notes 58–84 and 155–161.
20. The article does not deal with privity issues arising out of claims for personal injury except to the extent recovery is sought based on a breach of warranty. See, e.g., *Baughn*, 107 Wash. 2d at 668–69, 727 P.2d at 668–69. Personal injury claims not based on breach of warranty are governed by WASH. REV. CODE § 7.72.30, which requires no privity between a manufacturer and an injured claimant for injury caused by a defective product.
21. See infra notes 39–41 and accompanying text.
where the remote buyer is a third-party beneficiary of a contract of sale between the remote seller and its intermediate buyer under established contract principles. Consistent with this conclusion, the article further maintains that the ability of a seller to make an express warranty to a remote buyer should be enhanced by eliminating the requirement that a buyer be aware of a representation prior to purchase in order to be able to enforce the representation as an express warranty.

II. THE EXISTENCE OF WARRANTIES

Two kinds of warranty obligations exist that pertain to the attributes of goods: express and implied. Express warranties are part of the express or "dickered" terms between the parties to an agreement. Implied warranties, on the other hand, are default obligations supplied by the law to supplement the express terms between the parties absent disclaimer or modification.

Why a seller will either include an express warranty or not disclaim an implied warranty is an important question. Warranties impose costs on a seller by requiring it to assure that its goods conform to its representations or commitments and, if they do not, by requiring it to provide a buyer with an appropriate remedy. Such costs are included in the price paid by a buyer.

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22. In a contract for the sale of goods, a seller warrants that title to the goods shall be good, that their transfer shall be rightful, and that the goods shall be delivered free of any security interest or encumbrance of which the buyer had no knowledge at the time of contracting. U.C.C. § 2-312 (1999).

23. See id. § 2-313, cmt. 1. Express warranties are part of the parties' agreement or bargain in fact, U.C.C. § 1-201(b)(3) (2001), as opposed to simply provisions of their contract, which includes obligations supplied by the law, id. § 1-201(b)(12).

24. Default terms or obligations are provisions supplied by the law in the absence of agreement by the parties. They are not mandatory obligations such as that in section 1-304, which requires parties to perform contract and Code duties in good faith, since the default terms are subject to modification or elimination by the parties to an agreement. For discussions of default terms see Robert Scott, A Relational Theory of Default Rules for Commercial Contracts, 19 J. LEG. STUD. 597 (1990); Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 87 (1989).

25. Unlike express warranties, implied warranties are not part of the parties' agreement or bargain in fact, U.C.C. § 1-201(b)(3), but are part of their contract, which means the total legal obligation resulting from the parties agreement as determined by the Code and other applicable law, id. § 1-201(b)(12). U.C.C. §§ 2-314 and 2-315 provide for implied warranties of merchantability and fitness for a particular purpose absent disclaimer by the parties.

26. A buyer's remedies for breach of warranty consist of rejection, U.C.C. § 2-601, or revocation of acceptance of the goods, U.C.C. § 2-608, together with an action for market damages, U.C.C. §§ 2-712, 2-713. If the buyer retains the goods, the buyer may bring an action for the difference, at the time of acceptance, between the value of the goods as accepted and the value the goods would have had if they had conformed to the warranty, together with incidental and consequential damages, U.C.C. § 2-714. In addition to this liability, a seller confronting a breach of warranty claim also faces
Two competing theories attempt to explain a seller's decision to make or to not disclaim a warranty. According to the signaling theory, an express warranty provides to a buyer a signal about the quality of a product. Absent a warranty, a buyer would either have to make assumptions about a product's quality or incur costs in ascertaining information about its quality. When a buyer's information costs are high, it may have to assume either the worst or that a product is of average quality. For a seller who offers a product of above average quality or reliability, a warranty gives the buyer that information. A seller with such a product will give a more extensive warranty, since a warranty for a better quality or more reliable product is less costly to provide, involving lower remedy costs because of fewer nonconformities. The warranty, then, acts as a signal to consumers about the condition of the product and gives some degree of insurance for failure.

According to the comparative advantage theory, a seller will warrant that a good has certain attributes when a buyer values those attributes more than the cost of providing them or of insuring against losses resulting from their absence, and the seller can provide the attributes or insurance more cheaply than the buyer can. Thus, if a buyer prefers a

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28. Id. at 248-49.

29. The buyer's assumptions are related to the "lemons" problem formulated by George Akerlof, The Market for Lemons: Quality Uncertainty and the Market Mechanism, 84 Q. J. ECON. 488 (1970). According to Akerlof, a market failure will occur if there are differences in quality among goods of the same kind, and sellers know the quality of their goods, but buyers do not. Id. at 490. Buyers will assume that any particular item in the market will be of average quality and only pay a price based on that assumption. Since the average quality will be below that of better quality goods, sellers of those goods will withdraw them from the market since the market price will be lower than the cost of providing the higher quality good. Sellers of lower quality goods, however, will have an incentive to sell their goods since the market price exceeds their cost. As more low quality goods are brought to market, the average quality of goods in the market will fall together with their price. The market will continue to fall until no sellers remain because of the inability of buyers to ascertain the quality of goods. Id. Express warranties provide a solution to this "lemons" problem by conveying information about product quality in the market. Id. at 499.


31. The signaling theory implies that similar products that vary in quality will offer different warranties; the better the quality the more extensive the warranty coverage. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 425 (1988). For many products, however, warranty terms from different manufacturers are identical despite differences in quality, leading some to conclude that the signaling theory is not well supported by empirical facts. Id.

32. Priest, supra note 30, at 1308 (finding consumer will purchase repairs from seller when seller's price is less than cost of consumer providing repairs).
product free from defects in manufacturing more than the cost of providing such a product, and the seller can provide the defect-free attribute or insure against losses resulting from the attribute's absence more cheaply than the buyer can, the seller will provide a warranty against defects in manufacturing to the buyer.\textsuperscript{33}

III. EXPRESS WARRANTY OBLIGATIONS TO REMOTE BUYERS

\textit{A. The Uniform Commercial Code}

As indicated above,\textsuperscript{34} U.C.C. section 2-313 provides that a seller creates an express warranty concerning the quality of the goods it sells when it promises that the goods will have certain attributes, describes the goods in a particular manner, or provides the buyer with a model or sample of the goods. By its terms, section 2-313 deals only with an affirmation or description made by a seller to its buyer.\textsuperscript{35} Section 2-313 does not pertain to a representation made by a seller to an entity with whom the seller is not in privity of contract.\textsuperscript{36} Section 2-318, however, does extend an express warranty to certain designated third-party beneficiaries, but not to a remote buyer.\textsuperscript{37}

\textsuperscript{33} Professor George L. Priest's study of express warranties confirming the comparative advantage theory was conducted of manufacturers' express warranties to remote, consumer buyers. See Priest, supra note 30, at 1319. The warranties were made in transactions in which there was no privity between the manufacturers and intended purchasers.

\textsuperscript{34} U.C.C. §§ 2-313, 2-314, 2-315.

\textsuperscript{35} See supra note 16 and accompanying text. Such an affirmation can, of course, be made through an agent. Thus, if a contract between a remote seller and its distributor creates an agency relationship in the sale of the goods in question, there is privity between the remote seller and the remote buyer. See, e.g., Thompson Farms, Inc. v. Corno Feed Prods., 366 N.E.2d 3, 10 (Ind. Ct. App. 1977); Alberti v. Manufactured Homes, Inc., 407 S.E.2d 819, 825 (N.C. 1991) (manufacturer made representations to be communicated to remote buyers); Bobb Forest Prod., Inc. v. Mobark Indus., 783 N.E.2d 560, 576 (Ohio Ct. App. 2002) (manufacturer so involved in sale transaction that distributor mere agent); Gaha v. Taylor-Johnson Dodge, Inc., 632 P.2d 483, 486 (Or. Ct. App. 1981).

\textsuperscript{36} By contrast, the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312 (1975), which provides for the creation and enforcement of designated express written warranties or repair obligations, 15 U.S.C. § 2301(6), does not require privity of contract between a warrantor who makes such an express warranty or repair commitment and a consumer. See Abraham v. Volkswagen of America, Inc., 795 F.2d 238, 247–49 (2d Cir. 1986). Similarly, Wash. Rev. Code § 19.118.041 (1987), the Washington “Lemon Law,” requires an automobile manufacturer that makes a warranty to a consumer and fails to conform a vehicle to the warranty within a reasonable number of attempts to repurchase the vehicle or to provide the consumer with a replacement vehicle. This obligation exists despite a lack of privity of contract between the manufacturer and the consumer. See, e.g., Chrysler Motors Corp. v. Flowers, 116 Wash. 2d 208, 803 P.2d 314 (1991); Ford Motor Co. v. Barrett, 115 Wash. 2d 556, 800 P.2d 367 (1990).

\textsuperscript{37} See supra note 14. A seller's warranty can be extended to any person who may reasonably be expected to use, consume, or be affected by the goods and is injured by a breach of the warranty. U.C.C. § 2-318, alt. C (1966). Under the language of this alternative, a remote buyer may qualify as one expected to use or be affected by a remote seller's goods and subject to injury if there is a breach.
B. Common Law Principles and Obligations to Remote Buyers

The only basis in the U.C.C., outside of section 2-318, for allowing what might appear to be a nonprivity entity to claim an obligation to it by a remote seller is section 1-103(b). That section provides that the principles of law and equity, including the law of estoppel, supplement the provisions of the Code. The doctrine of promissory estoppel provides that a promise that a promisor should realize will induce action or forbearance on the part of the promisee or a third person, and which does induce such conduct, is binding if enforcement of the promise is necessary to avoid injustice. Thus, if a remote seller makes a promise to a remote buyer realizing, for example, that the buyer may rely on the promise to purchase goods supplied by the remote seller, the latter’s promise should be enforceable by the remote buyer if breach of the promise imposes a loss on the remote buyer. Of course, to invoke the doctrine a remote purchaser needs to have known of a remote seller’s warranty prior to purchasing the goods or engage in other behavior that makes the warranty enforceable.

In addition to promissory estoppel, common law contract principles on unilateral contracts may provide for an enforceable warranty by a remote seller. In *Carlill v. Carbolic Smoke Ball Co.*, a manufacturer offered a reward to anyone who contracted influenza after using its smoke ball, a medicinal device sold as a preventive against disease. The court held that a remote purchaser of a ball who contracted influenza could enforce the promised reward since the manufacturer made her and other consumers an offer of a unilateral contract, the acceptance of the offer of warranty. See Reitz, supra note 16, at 369–70; Hawkland, supra note 14, § 2-318:2 Alternative C. Alternative A, adopted in the State of Washington, Wash. Rev. Code § 62A.2-318, is restricted to parties in horizontal privity with the original purchaser.

38. Although the two warranties discussed in the text appear to be ones where there is no privity of contract, there is actually privity in both instances. In both, the warranty is made to the promisee and enforceable because of either estoppel or a bargained-for exchange.

39. “Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.” U.C.C. § 1-103(b) (2001).


41. See Millar H. Ruud, Manufacturer’s Liability for Representations Made by Their Sales Engineers to Subpurchasers, 8 UCLA L. Rev. 251, 272–73 (1961).

42. Under the Restatement of Contracts, a promise must induce the action or forbearance which is part of the basis for imposing liability on the promisor. Restatement (Second) of Contracts § 90.

and the consideration for the promise consisting of the remote purchaser’s using the ball.44 Similarly, a remote buyer might establish that a remote seller offered a warranty in exchange for the buyer’s engaging in certain action, most likely purchasing the good from an immediate seller. Although the unilateral contract theory is theoretically appropriate for remote seller representations where it is at least reasonably implicit that the seller is bargaining for the remote buyer’s behavior, the court’s approach in Carlill appears to have been infrequently cited in warranty cases.45 Moreover, a remote buyer probably would find it difficult to establish a unilateral contract where the warranty is an affirmation of fact or a description of a good, instead of a promise as in Carlill, or where a warranty accompanies a product and the buyer might not discover the warranty until after purchasing the good.48

C. The Privity Requirement for Express Warranties and Its Exceptions in Washington Case Law

At least until recently, the general rule in Washington has been that privity of contract must exist between a warrantor and a person seeking to enforce an express warranty. Application of the general rule is most aptly demonstrated by two cases: Dimoff v. Ernie Majer, Inc.49 and Daughtry v. Jet Aeration Co.50 In Dimoff, the plaintiffs purchased a truck from a dealer. The written purchase agreement between the dealer and the plaintiffs contained the dealer’s express warranty against defects and referred the purchasers to a Ford Motor Co. warranty on the back of the writing, a warranty apparently intended for remote purchasers.51 When the truck was found to have a cramped fuel line that caused the vehicle to perform poorly, the plaintiffs, in addition to suing the dealer for fraud and breach of warranty, brought an action against Ford for breach of express warranty.52 Finding no exceptions to the general rule,53 the court

44. [1893] 1 Q.B. 256, 261–75 (1892). Although the court found consideration in the use of the ball, some authorities indicate that the manufacturer was bargaining for purchase of the balls from third party sellers. See E. ALLEN FARNsworth, CONTRACTS 135 n.34 (4th ed. 2004); JOHN O. HONNOld ET AL., THE LAW OF SALES AND SECURED FINANCING 296 (7th ed. 2001).
45. See Clifford, supra note 12, at 426.
47. Id.
48. See Ruud, supra note 41, at 269–71. The author received a gift with a warranty card that simply instructed the purchaser or user to visit a designated website to discover the terms of the manufacturer’s express warranty. Needless to say, it is doubtful that many consumers either carry computers with them to access a website prior to purchase or incur the transaction costs of finding a computer and reading the terms on the website prior to buying the product.
49. 55 Wash. 2d 385, 347 P.2d 1056 (1960).
51. Dimoff, 55 Wash. 2d at 385, 347 P.2d at 1056.
52. Id. at 387, 347 P.2d at 1058.
upheld the trial court’s dismissal of the action against Ford because of an absence of privity of contract.  

Similarly, as discussed at the beginning of this article, the plaintiff in Daughtry purchased a home sewage treatment system manufactured by the defendant and subsequently encountered problems with the system that the defendant, among others, failed to correct. In an action for breach of warranty against the manufacturer, the Washington Supreme Court, over a vigorous dissent, held that the plaintiff’s claim against the manufacturer was barred by an absence of privity of contract.

In both Dimoff and Daughtry, however, the courts cited exceptions to the privity requirement for enforcing an express warranty. Perhaps one of the most notable of these is the tort-based reliance principle found in Baxter v. Ford Motor Co.

1. Tort-Based Reliance

In Baxter, a remote purchaser who lost his eye when a rock shattered his car’s windshield was allowed to maintain an action against an automobile manufacturer that had represented the vehicle he had purchased contained shatterproof glass. The court allowed the manufacturer’s catalog and sales literature, upon which the consumer had relied in purchasing the vehicle, to be admitted into evidence as the bases of liability even though there was no privity of contract between the consumer and manufacturer. The court held that lack of privity did not bar the consumer’s action because the consumer had relied on the manufacturer’s representations with respect to a product attribute that the consumer could not reasonably verify, and such reliance had resulted in his injury.

53. See supra notes 42–48 and accompanying text.
54. Dimoff, 55 Wash. 2d at 389, 347 P.2d at 1059.
55. See supra text accompanying notes 2–5.
57. Id. at 711, 592 P.2d at 634.
59. Id. at 456, 12 P.2d at 409.
60. Id. at 461–62, 12 P.2d at 412. The holding in Baxter appears to have been based in tort rather than contract law since the court’s opinion negates an obligation in contract. Id. See Freeman v. Navarre, 47 Wash. 2d 760, 289 P.2d 1015 (1955) (exception to privity requirement based on dangerous instrumentality); Bock v. Truck & Tractor, Inc., 18 Wash. 2d 458, 464–65, 139 P.2d 706, 709 (1943) (liability in Baxter based on tort, not contract, law); but see Malcolm L. Edwards, Privity: Property Damage; and Personal Injuries . . . A Re-Appraisal, 32 WASH. L. REV. 153, 155 (1957). Moreover, subsequent opinions in Dimoff, 55 Wash. 2d 385, 389, 347 P.2d 1056, 1059 (1960), and Daughtry, 91 Wash. 2d at 710–11, 592 P.2d at 634, distinguish the Baxter case on the ground that the product involved in that case was in an inherently dangerous condition.
2. Third-Party Beneficiaries

Another exception to the privity requirement, or an extension of the privity concept, exists where the entity seeking to enforce a warranty is a third-party beneficiary of the warrantor's promise. This exception is exemplified by *Jeffery v. Hanson*. There the plaintiff contracted to purchase a truck from a dealer who had located a truck with another dealer, the defendant. In a telephone conversation among the three individuals, the plaintiff stated that he would purchase the vehicle only if it were war-

The court's opinion in *Baxter* relied on the decision in *Mazetti v. Armour & Co.*, 75 Wash. 622, 624, 135 P. 633, 634 (1913). There the court held that a restaurant could bring an action for breach of implied warranty of merchantability against a food manufacturer for spoiled food that the restaurant purchased from an intermediary and served to a customer. In holding that a food manufacturer impliedly warrants its products to whomever "may be damaged by reason of their use in the legitimate channels," *id.* at 630, 135 P. at 636, the court set forth what have become oft-cited exceptions to the general privity requirement:

It has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor. To this rule certain exceptions have been recognized: (1) Where the thing causing the injury is of a noxious or dangerous kind. (2) Where the defendant has been guilty of fraud or deceit in passing off the article. (3) Where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous.

*Id.* at 624, 135 P. at 634.

Although the articulated holding in the *Mazetti* case involves a nonprivity implied warranty, the privity exceptions articulated by the court have been cited in cases involving express as well as implied warranties. See, e.g., *Daughry*, 91 Wash. 2d at 710–11, 592 P.2d at 634; *Dimoff*, 55 Wash. 2d at 389, 347 P.2d at 1059; *Baxter*, 168 Wash. at 458–59, 12 P.2d at 411. Moreover, as one commentator has pointed out, the second and third exceptions cited in *Mazetti* are not exceptions to the privity requirement for enforcement of a warranty but independent causes of action. Edwards, *supra* at 155.


61. Washington warranty cases allowing remote buyers to assert claims as third-party beneficiaries of either express or implied warranties do not consider the rights of the third-party beneficiaries as based on exceptions to the privity requirement but rather consider the existence of third-party beneficiary status as establishing privity between a remote seller and a remote buyer. See, e.g., *Kodiak Fisheries Co. v. Murphy Diesel, Inc.*, 70 Wash. 2d 153, 165, 422 P.2d 496, 503 (1967); *Lidstrand v. Silvercrest Industries*, 28 Wash. App. 359, 363, 623 P.2d 710, 713 (1981). This conception of privity is broader than traditional interpretations of the requirement that confine privity to the parties to a contract. See *Dunlop Pneumatic Tyre Co. v. Selfridge*, 1 A.C. 847, 853 (1915) (Haldane, L.); HAWKLAND, *supra* note 14, § 2-318:1. Moreover, the conception of privity in the third-party beneficiary warranty cases appears inconsistent with that in *Mazetti*, 75 Wash. 622, 624, 135 P. 633, 634, which is more consistent with traditional interpretations. See *supra* note 60.

warranted to be ninety percent new and had never been used in salt water.\textsuperscript{63} Both the contracting dealer and the defendant stated that the defendant would provide such warranties.\textsuperscript{64} Moreover, the defendant knew that the contracting dealer was purchasing the truck to sell to the plaintiff, with the warranties being for the benefit of and to be delivered to the plaintiff.\textsuperscript{65} The defendant issued the warranties to the contracting dealer who transmitted them to the plaintiff when the latter purchased the truck. The truck broke down, and the plaintiff sued the defendant. The court held that the privity requirement did not apply because, applying general contract principles, the plaintiff was a third-party beneficiary of the defendant’s promise and was, as such, entitled to enforce the promise.\textsuperscript{66}

Since the \textit{Jeffery} case, three significant cases have purported to follow the third-party beneficiary exception to the privity requirement. The first is \textit{Schroeder v. Fageol Motors, Inc.},\textsuperscript{67} in which the plaintiff purchased a truck from a dealer. The truck’s glove box contained a warranty book from the truck’s manufacturer with express warranties from the manufacturer and component parts manufacturers.\textsuperscript{68} The truck’s engine failed after 6000 miles, and the engine’s manufacturer attempted, but failed, to remedy the defects in the engine. The plaintiff sued the engine manufacturer for breach of its express warranty against defects in material and workmanship.\textsuperscript{69} The court held that the purchaser could, as a third-party beneficiary of that manufacturer’s warranty, sue the engine manufacturer since the warranty obviously was for the benefit of the operator, the purchaser.\textsuperscript{70} According to the court, this conclusion followed from the fact that the engine manufacturer warranted the engine to be free of defects for, among other things,\textsuperscript{71} a specified number of hours of

\textsuperscript{63} \textit{Id.} at 856, 239 P.2d at 347.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.} at 858, 239 P.2d at 348.
\textsuperscript{67} 12 Wash. App. at 163–64, 528 P.2d at 994.
\textsuperscript{68} The court’s opinion is somewhat confusing concerning the express warranty by Cummins Diesel, the defendant whose warranty was relevant to the action, since the failure of the truck’s engine to conform to the Cummins Diesel warranty and the failure of Cummins Diesel satisfactorily to repair that engine were the issues in dispute. \textit{Id.} The court stated that a warranty booklet by White Motors, the manufacturer of the truck, was in the truck’s glove box and that the book contained a component warranty for the Cummins diesel engine. \textit{Id.} at 162–63, 528 P.2d at 993–94. Cummins objected to being bound by this warranty, contending that it was the dealer’s warranty. \textit{Id.} at 163–64, 528 P.2d at 994. The court rejected the argument, not on the ground that Cummins Diesel made the warranty, but rather on the basis that Cummins Diesel introduced a written warranty, the terms of which were substantially the same as those in the manufacturer’s booklet. \textit{Id.} It was this latter warranty upon which the buyer could bring an action against Cummins Diesel. \textit{Id.}
\textsuperscript{69} \textit{Id.} at 163, 528 P.2d at 994.
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} The Cummins Diesel warranty guaranteed the engine to be “free of defects ‘for two years or 100,000 miles or 3,600 hours of operation.’” \textit{Id.}
"operation," the latter term implying that the warranty was for the direct benefit of the operator during the warranty period. 72

Several years later, the same court applied a similar analysis in Lidstrand v. Silvercrest Industries. 73 There the plaintiffs purchased a used mobile home from the original retail purchasers. The home leaked, and the home’s manufacturer attempted repairs, which were halted when the manufacturer discovered that the plaintiffs were not the original retail purchasers. 74 The plaintiffs sued the manufacturer on the latter’s express warranty that the home would be free from defects in material and workmanship for twelve months. 75 Citing the Schroeder case, the court held that the plaintiffs were intended beneficiaries of the manufacturer’s warranty since the warranty was in effect for twelve months regardless of who owned the home. 76

The final case applying the third-party beneficiary exception is Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Constr., Inc. 77 In that case, the plaintiff entered into a contract to have a steel grain-storage building constructed by a contractor. The contractor, in turn, contracted with the defendant to have the latter design the building and supply its components. When a portion of the building collapsed, causing damage to the rest of the building, the plaintiff sued the defendant for breach of express and implied warranties. 78 The plaintiff asserted the existence of four express warranties, the first and second of which were in the defendant’s advertising brochure, telling remote purchasers that the defendant’s buildings were “tailor-made and of the highest quality.” 79 The third warranty consisted of the defendant’s “standard warranty,” guaranteeing the building materials for one year. 80 This warranty

72. Id.
74. The manufacturer resumed attempting to make repairs when prompted by the state but failed in its attempts. Id. at 362, 623 P.2d at 713.
75. Id.
76. Id. at 361–63, 623 P.2d at 713–14. The court’s analysis of the manufacturer’s warranty and privity issue differs in one respect from that in Schroeder. In holding that the plaintiffs were third-party beneficiaries of the manufacturer’s warranty, the court found that the manufacturer made the warranty to the original retail purchasers. The latter purchasers, however, did not buy the mobile home from the manufacturer, but from a dealer. Therefore, there was no privity between the original purchasers and the manufacturer. Thus, there were two privity problems in the case: the first involving the original purchasers and the manufacturer, and the latter concerning the plaintiffs and the manufacturer. Both are vertical privity problems since they involve parties in the chain of distribution from the party who was in privity with the warrantor and not some product user associated or related to the privity purchaser. See Hawkland, supra note 14, § 2-318:1; White & Summers, supra note 14.
78. Id. at 339, 831 P.2d at 727.
79. Id. at 347–48, 831 P.2d at 731.
80. Id.
was included in the defendant’s price book, which apparently was available to its immediate, but not remote, purchasers. The final warranty was contained in the purchase order with the defendant’s purchaser and assured the quality of the defendant’s products.\footnote{Id.} Relying heavily on the decisions in \textit{Lidstrand} and \textit{Schroeder}, the court held that the standard one-year warranty was for the benefit of and enforceable by the plaintiff since the warranty would mean little to the contractor who built the structure and then moved on to its next job.\footnote{Id.} Without any substantial analysis, the court also ruled that the plaintiff could enforce the final warranty, the quality assurance in the purchase order,\footnote{Id. at 349–50, 831 P.2d at 732.} as a third-party beneficiary of the defendant’s promise,\footnote{55 Wash. 2d 385, 386–87, 347 P.2d 1056, 1057–58 (1960).} even though the guarantee in the purchase order appeared to be no different from the garden-variety warranties in \textit{Dimoff}\footnote{69 Wash. 2d 704, 592 P.2d 631 (1979).} and \textit{Daughtery}\footnote{119 Wash. 2d at 343–44, 831 P.2d at 729 (1992).} for which privity of contract was required.

Although the \textit{Jeffery} case is correctly decided on third-party beneficiary principles,\footnote{Under Washington law, whether a party is a third-party beneficiary depends on whether the parties to a contract intended the promisor to assume a direct obligation to the third party. Lonsdale v. Chesterfield, 99 Wash. 2d 353, 360–61, 662 P.2d 385, 389 (1983). That intent is based on whether performance under the contract would necessarily and directly benefit the third party. \textit{Id.}; Burg v. Shannon & Wilson, Inc., 110 Wash. App. 798, 808, 43 P.3d 526, 532 (2002).} the \textit{Lidstrand}, \textit{Schroeder}, and \textit{Touchet} cases are more difficult to justify on legal grounds. These cases decided that an express warranty for a period of time obviously is for the direct benefit of a third party if that individual is the one who will be in possession of or using the good during the warranty period.\footnote{119 Wash. 2d at 349–50, 831 P.2d at 732; \textit{Lidstrand} v. \textit{Silvercrest Indus.}, 28 Wash. App. 359, 363-65, 623 P.2d 710, 714 (1981); Schroeder v. Fageol Motors, Inc., 12 Wash. App. 161, 163–64, 528 P.2d 992, 994 (1974) \textit{rev’d on other grounds}, 86 Wash. 2d 256, 544 P.2d 20 (1975).} Not considered was the possibility that the warranty for a period of time might \textit{simply} operate for the direct legal benefit of the immediate purchaser.\footnote{See Goodman v. PPG Industries, Inc., 849 A.2d 1239 (Pa. Super. Ct. 2004) (producer’s 26-year express warranty for wood preservative sold to window manufacturer for use in making windows sold to residential customers was not intended to extend to such customers who could not sue as beneficiaries of the warranty); Chem Tech Finishers, Inc. v. Paul Mueller Co., 375 S.E.2d 881}
Chaser might not possess or be using a good at the time a breach occurs or becomes manifest under a remote seller’s warranty, that purchaser still has an enforceable interest in the remote seller’s obligation under the warranty. At the breach stage, that obligation is to pay the immediate buyer damages for breach of warranty or to indemnify that purchaser for losses for which it is liable to a remote purchaser. This analysis is supported by the decision in *Fortune View Condominium Ass’n v. Fortune Star Development Co.* There the court held that a warrantee under several express warranties, apparently including one for a period of time during which the warrantee would not be in possession of the goods, could bring an action for indemnification against the warrantor resulting from the making of these express warranties.

In addition to bringing an action for indemnification, an immediate buyer that has warranted a good to a remote buyer and has been sued for breach of warranty may “vouch in” a remote seller that has warranted the goods to it. U.C.C. section 2-607(5) codifies the common law proce-

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(Ga. Ct. App. 1988) (manufacturer warranty in brochure to distributor not intended to benefit remote purchaser even though remote purchaser saw the brochure, the goods were manufactured to remote buyer’s specifications, and the manufacturer shipped the goods directly to the remote buyer).

90. In *Central Washington Refrigeration Inc. v. Barbee*, 133 Wash. 2d 509, 513–15, 946 P.2d 760, 762–63 (1997), the Washington Supreme Court held that there is an implied in fact contractual indemnity obligation when a buyer incurs liability to a third party that occurs because of a nonconformity in the goods that would constitute a breach of the seller’s express or implied obligation. This implied indemnification obligation, while based on a seller’s warranty obligation, is distinct from an action for breach of warranty as is evidenced by the fact that the statute of limitations for breach of the indemnity obligation is not that in section 2-715(2) but rather begins to run when the party seeking indemnification pays or is legally obligated to pay damages to a third party. 133 Wash. 2d at 517–18, 946 P.2d at 764–65. For criticism of this interpretation of the effect the implied indemnity obligation has on the statute of limitations, see Thomas A. Leggette, *When Can an Implied Indemnity Cause of Action be Used to End-Run a Limitations Bar?*, 42 *Fed’n Ins. & Corp. Couns.* Q. 33 (1991) and Paul J. Wilkinson, *An Ind. Run Around the U.C.C.: The Use (or Abuse?) of Indemnity*, 20 *Pepp. L. Rev.* 1407, 1438 (1993).

91. 151 Wash. 2d 534, 90 P.3d 1062 (2004).

92. The warrantee in *Fortune View Condominium Assoc.* was a remote purchaser of the goods who was able to enforce the warranties, not as a third-party beneficiary, but on the basis discussed *infra* in text accompanying notes 106–120. It sought indemnification for damages that purchasers of the goods attempted to recover from it when the goods originally sold by the express warrantor failed to conform to its warranties. 151 Wash. 2d at 536–37, 90 P.3d at 1063.

93. The remote seller’s express warranties were contained in a brochure distributed to the remote purchaser, which stated that the goods were provided with a five-year limited warranty. *Id.* The court’s opinion does not indicate whether the remote purchaser could utilize this five-year warranty as well as other express representations in the brochure as a basis for its indemnification claim.

94. *Id.* at 539–41, 90 P.3d at 1065–66.

dure of vouching in.\textsuperscript{96} Under that section, an immediate buyer who is sued for breach of warranty for which the remote seller is answerable over may give the remote seller notice of the litigation, which would enable the remote seller to defend the buyer’s action. If the remote seller then fails to offer a defense, it will be bound by any finding of fact common to the remote buyer’s suit against the immediate buyer and a suit between the immediate buyer and the remote seller.\textsuperscript{97} Although a remote seller may be liable over for breach of its warranty, there are additional costs when contracting parties make that seller directly liable to a remote buyer as a third-party beneficiary,\textsuperscript{98} and a warrantor and its immediate buyer may find that liability suboptimal.

Even if it is clear, as it was in the Schroeder\textsuperscript{99} case, that a warranty is for the benefit of a remote buyer, a warrantor’s promise does not necessarily create a third-party beneficiary contract. Under contract law, a third-party beneficiary is not the person to whom a promisor addresses its promise; that person is the promisee.\textsuperscript{100} Rather, a third-party beneficiary is a person in whom rights to enforce a promisor’s obligation exist to effectuate the perceived intentions of the promisor and promisee.\textsuperscript{101} With respect to the warranties in the Lidstrand and Schroeder cases, the warrantors probably addressed their promises or affirmations directly to the remote buyers and not to the immediate buyers with the remote buyers as third-party beneficiaries.\textsuperscript{102} In both cases, the warranties appear to have been garden-variety manufacturer warranties with promises made to the

\textsuperscript{96} See HAWKLAND, supra note 14, § 2-607:9.

\textsuperscript{97} See id. (discussing vouching in for warranty of quality as opposed to warranty of title).

\textsuperscript{98} See infra text accompanying notes 184–185 and 272–320 on additional costs of liability to remote buyers.

\textsuperscript{99} 12 Wash. App. 161, 163–64, 528 P.2d 992, 994 (1974) rev’d on other grounds, 86 Wash. 2d 256, 544 P.2d 20 (1975). In finding that the remote buyer was a third-party beneficiary of the Cummins warranty, the trial court attached significance to a Cummins employee’s testimony that the warranty was for the benefit of the end user of the engine. \textit{Id.} As indicated, supra note 87, the test under Washington law whether an entity is a third-party beneficiary is whether the parties to a contract intended the promisor to assume a direct obligation to the third party. That intent is derived from the effect of the terms of the contract and not an examination of the parties’ “motives or desires.” See Burg v. Shannon & Wilson, Inc., 110 Wash. App. 798, 808, 43 P.3d 526, 532 (2002). The point of the text is not that subjective intent ought to be determinative but that even if a contract directly benefits an entity, it is not a third-party beneficiary if it is the promisee of the promise.


\textsuperscript{102} As indicated, supra note 83, the court’s opinion in \textit{Touche} indicated that the defendant’s affirmations in its advertising brochure that were made and given to remote purchasers, not to the immediate buyers, were enforceable as third-party beneficiary contracts. Touche Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc., 119 Wash. 2d 334, 350, 831 P.2d 724, 732 (1992). If the court so considered them, the objections raised in the text apply to that conclusion since the promises were not made to the immediate buyer for the benefit of the remote buyer.
remote buyers as promisees.\textsuperscript{103} Indeed, the warranties were probably very similar to the Ford Motor Co. warranty in the \textit{Dimoff} case, which the court held to be unenforceable by the remote buyers because of a lack of privity of contract.\textsuperscript{104} If not enforceable as third-party beneficiary contracts, the promises and affirmations in \textit{Schroeder} and \textit{Lidstrand} need to be justified on some other basis in warranty or contract law.\textsuperscript{105}

3. Express Representations to Remote Buyers

That other basis is found in \textit{Baughn v. Honda Motor Co.},\textsuperscript{106} and the \textit{Touchet}\textsuperscript{107} and \textit{Tex Enterprises, Inc.}\textsuperscript{108} cases. In \textit{Baughn}, the court rejected an express warranty claim by parents whose children were injured riding mini-trail bikes manufactured by the defendant.\textsuperscript{109} The plaintiffs contended that the defendant’s statements about the mini-trail bikes, apparently made to remote buyers, constituted express warranties under the U.C.C.\textsuperscript{110} Rather than upholding dismissal of the warranty claim for lack of privity or holding that U.C.C. section 2-313 does not apply to a representation made by a seller to a remote buyer,\textsuperscript{111} the court held that the defendant’s statements were mere commendations of the bikes, not af-

\textsuperscript{103} See \textit{Lidstrand v. Silvercrest Indus.}, 28 Wash. App. 359, 361, 623 P.2d 710, 712 (1981); \textit{Schroeder}, 12 Wash. App. at 162, 528 P.2d at 993. In an unpublished opinion, the Court of Appeals in Evergreen Inv. Group, L.L.C. v. Porter, No. 30664-6-II, 2004 WL 1732373 (Wash. Ct. App. 2004), held that two representations made by a seller directly to a remote buyer as promisee would be enforceable by the remote buyer as express warranties because the promise was a contract third-party beneficiary of the seller’s implied warranties, which satisfied the privity requirement. \textit{Id.} at *4–5. A more appropriate analysis of the express representations made to the remote buyer as promisee would have been that discussed \textit{infra} in the text accompanying notes 106–120.

\textsuperscript{104} 55 Wash. 2d 385, 389, 347 P.2d 1056, 1059 (1960).

\textsuperscript{105} New section 2-313A provides for the enforceability of a “pass-through warranty,” made by a remote seller in a writing accompanying the goods that is intended for the ultimate buyer, but not as a warranty since there is no contract between the obligor and obligee. \textit{See} U.C.C. § 2-313A, cmt. 1 (2003). Rather, the section treats the obligation as existing independently of a contract and as being enforceable so long as the obligor makes an affirmation, description, or promise pertaining to the goods in a record packaged with and accompanying the goods that is furnished to the remote purchaser. U.C.C. § 2-313A(1)–(3). If such pass-through warranties are enforceable as third-party beneficiary contracts as held in \textit{Schroeder} and \textit{Lidstrand}, there is no need for section 2-313A since the warranties are already enforceable by remote buyers under section 1-103(b), which allows for supplementary principles of law, such as that pertaining to third-party beneficiaries, to supplement the terms of the Code unless displaced by particular provisions of the Code. Because no provision of the Code deals with vertical privity problems, common law third-party beneficiary principles are available to supplement warranty law under the Code. \textit{See Touchet}, 119 Wash. 2d at 345–46, 831 P.2d at 730.

\textsuperscript{106} 107 Wash. 2d 127, 151–52, 727 P.2d 655, 669 (1986).
\textsuperscript{107} 119 Wash. 2d at 334, 831 P.2d at 724.
\textsuperscript{108} 149 Wash. 2d 204, 66 P.3d 625 (2003).
\textsuperscript{109} 107 Wash. 2d at 150–51, 727 P.2d at 668–69.
\textsuperscript{110} \textit{Id.} at 133, 151, 727 P.2d at 659, 668–69.
\textsuperscript{111} \textit{See} text accompanying \textit{supra} notes 34–36.
firmations of fact required to constitute warranties under section 2-313. In analyzing the plaintiffs’ express warranty claim, the court stated that the privity requirement to enforce a warranty is relaxed when a seller makes an express representation, “in advertising or otherwise,” to a remote buyer. The court also added that such a buyer must meet the basis of the bargain requirement in section 2-313 by proving that it was aware of the seller’s representation. In essence, a remote buyer can sue a seller under section 2-313 for breach of express warranty so long as it satisfies the substantive requirements of that section, even though there is no contract between that buyer and the seller.

In Touchet, the court cited the Baughn case to support a relaxation of the privity requirement for express warranties made to remote buyers. The court then indicated that two representations in a seller’s advertising brochure to remote buyers were enforceable under the Baughn analysis.

Finally, in the Tex Enterprises, Inc. case, the court reversed an appellate court ruling that a remote buyer could sue a manufacturer for breach of implied warranty of merchantability but added that the buyer could attempt to prove on remand that the manufacturer made an express warranty to the remote buyer. The alleged express warranty consisted of a representation by the manufacturer’s representative to the remote buyer that the manufacturer’s containers were just as good as those the buyer was then using, a representation that was made prior to the time the buyer entered into a contract to purchase the manufacturer’s containers from a third party. Significantly, in opining on which state’s law governed the determination of whether the manufacturer’s representation constituted a warranty, the court noted that the remote buyer’s warranty claim did not depend on the contract between the manufacturer and its immediate buyer. Being independent of the contract between the manufacturer and the immediate buyer, the remote buyer’s warranty claim was predicated not on the remote buyer being a third-party benefici-

112. Baughn, 107 Wash. 2d at 152, 727 P.2d at 669.
113. Id.
114. Id. at 151–52, 727 P.2d at 669.
115. 119 Wash. 2d at 347–48, 831 P.2d at 731.
116. Id. But as mentioned previously, see supra note 83, on two occasions the court’s opinion appears to indicate that the affirmations in the advertising brochure were enforceable because the remote buyer was a third-party beneficiary of the contract between the seller and its immediate purchaser. The court’s language differs, however, from its immediate discussion of the two representations contained in the advertising brochure, a discussion that relied on the analysis in Baughn. Id.
117. 149 Wash. 2d 204, 66 P.3d 625.
118. Id. at 213–14, 66 P.3d at 630.
119. Id. at 206, 66 P.3d at 626.
120. Id.
ciary of that contract but rather, in light of the *Baughn* case, on its ability to satisfy the criteria in section 2-313.121

A difficulty with applying section 2-313 to affirmations or promises such as those in *Lidstrand* and *Schroeder*, other than the fact that the section applies to a contract between a seller and a buyer,122 is the section’s requirement that such a representation be part of the basis of the bargain between the parties.123 In *Baughn*, the court stated that a remote buyer seeking to enforce an express warranty must establish that it was aware of the representation, apparently prior to acquiring the warrantor’s good.124 In the *Schroeder* case, it is quite possible that the remote buyer could have satisfied this obligation since the court’s opinion indicates that the buyer saw the manufacturer’s warranty book prior to purchasing the truck.125 On the other hand, in many cases, including those involving relatively expensive items, buyers are not aware of representations accompanying the goods until after they have purchased the goods. The requirement that a purchaser be aware of a representation prior to purchase is not as severe an impediment to enforcement of an express warranty as it is in cases, such as *Touchet*, where the affirmation or promise is contained in a remote seller’s advertising, since the buyer may more frequently be aware of the seller’s statement prior to purchase.126 But

121. See id. at 213, 66 P.3d at 630.
122. See supra note 16 and accompanying text.
123. U.C.C. § 2-313(1). Given the propriety of enforcing remote seller representations because they are part of the bundle of attributes sold with a product and included in its price (see infra notes 127–128 and accompanying text), one can perceive how the courts in the *Lidstrand* and *Schroeder* cases concluded they ought to be enforceable by remote buyers and utilized third-party beneficiary analysis to obtain that result.
124. 107 Wash. 2d at 151–52, 727 P.2d at 669.
even in those cases there are instances in which a seller will make an affirmation or promise to the market, which is treated by the market as an attribute of the product and priced as part of the bundle of attributes constituting the product,\textsuperscript{127} and a particular buyer will not be aware of the representation prior to purchase. Elsewhere it has been argued that a “basis of the bargain” test requiring ex ante knowledge of a seller’s representation offered to the market is inefficient, inconsistent with the manner in which markets determine product attributes including warranties, and inappropriate in depriving a buyer of a product attribute for which it has paid.\textsuperscript{128} Nevertheless, elimination of the ex ante knowledge requirement in establishing that a representation was part of the basis of the bargain does not appear likely,\textsuperscript{129} leaving the enforceability of many seller affirmations and promises to remote buyers in doubt.\textsuperscript{130}


\textsuperscript{128} Id. at 801–02. The authors demonstrate that markets determine product attributes, including contract terms and warranties, and that a test for the enforceability of an express warranty that requires a buyer to demonstrate ex ante knowledge of a representation is inefficient in imposing unnecessary transaction costs in acquiring knowledge of the representation. \textit{Id.} Rather, representations made to the market as a whole in the sale of a product, whether known or bargained for by an individual buyer, should be treated as enforceable express warranties. \textit{Id.} at 802–03.

Professor Curtis R. Reitz has also demonstrated that imposing a knowledge requirement, particularly for remote buyers, imposes interpretive difficulties:

If a knowledge requirement is retained, an array of interpretive problems can be foreseen:

If a buyer had seen or heard a manufacturer’s advertisement, but had no conscious awareness or recall of that advertisement when entering into a retail transaction, is the buyer protected? If a buyer is influenced to select certain goods by another person who had seen or heard an advertisement, is this indirect knowledge imputed to the buyer so as to meet the requirement?


\textsuperscript{129} As indicated, \textit{supra} note 105, new section 2-313A does not require a remote buyer to have ex ante knowledge of a seller affirmation or promise accompanying the goods for an enforceable obligation to exist on the part of the seller to the remote buyer. On the other hand, new section 2-313B requires that a remote purchaser have ex ante knowledge of a seller’s affirmation or promise that is contained in advertising or similar communications to the public, communications like the advertising brochure in the \textit{Touchet} case.

\textsuperscript{130} As a matter of contract law, the basis of the bargain test should not require a remote buyer to establish that it knew of an affirmation or promise prior to purchase where the representation is one of the terms of a bargain between a remote seller and its immediate buyer, and the remote buyer is a third-party beneficiary of the affirmation or promise. \textit{Cf.} FARNSWORTH, \textit{supra} note 44, at 675–78 (third-party beneficiary subject to defenses that affect enforceability of promisor’s agreement with promisee). Thus, in the \textit{Touchet} case, the promises contained in the seller’s price book and in the purchase agreement between the seller and the immediate buyer would be enforceable by the remote buyer as third-party beneficiary contracts so long as the representations were part of the express terms between the seller and the immediate buyer and the requirements for third-party beneficiary contracts were satisfied.
4. Distinguishing Between the Exceptions to the Privity Requirement

Whether an affirmation or promise sought to be enforced by a remote buyer is enforceable under section 2-313 or as a third-party beneficiary contract is important not only in determining the criteria for enforceability of such a representation but also in deciding what effects the contract between the seller and immediate purchaser might have on the remote buyer's claims. The effects of the parol evidence rule \(^{131}\) and limitations of remedies, \(^{132}\) among others, \(^{133}\) may depend on whether a warranty is enforceable as a third-party beneficiary contract or in accordance with the terms of section 2-313. \(^{134}\)

In the Touchet case, for example, some of the warranties were contained in a sales brochure distributed to remote buyers. Although the court's analysis of the remote buyer's warranty claims indicates that the claims were enforceable under section 2-313, the court's opinion on two occasions states rather broadly that the remote seller's express warranties, apparently all of them, were enforceable as third-party beneficiary contracts. \(^{135}\) If the warranties were enforceable under section 2-313, the remote buyer's claims would not depend on the contract between the seller and the immediate buyer. That being the case, a merger clause or limitation of remedy contained in the contract between the immediate parties would not affect the rights of the remote buyer with respect to the seller's warranties.

Those results would follow both conceptually from the relationship of the parties and their agreements and from the terms of the U.C.C. Specifically, the parol evidence rule excludes evidence of conflicting terms

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132. Id. § 2-719 (2001).
134. See supra note 83. Some authority indicates that there should be little or no difference, at least with respect to remedy limitations, between the rights of a person asserting warranty rights directly under section 2-313 and an individual making a warranty claim as a third-party beneficiary. In Arlie R. Nogay, Enforcing the Rights of Remote Sellers Under the U.C.C.: Warranty Disclaimers, the Implied Warranty of Fitness for a Particular Purpose and the Notice Requirement in the Non-Privity Context, 47 U. Pitt. L. Rev. 873, 897 (1986), the author maintains that a remedy limitation under section 2-719 should be enforceable by a remote seller against a remote buyer if the limitation is "properly structured" into the agreement between the remote buyer and its seller in a manner that informs the remote buyer that the remote seller is limiting the remote buyer's remedies. Consistent with his analysis of warranty modifications and disclaimers the author posits, at least implicitly, that a remedy limitation is ineffective if it is merely contained in the agreement of which the remote buyer is a third-party beneficiary. See id. at 894–95. For a contrary analysis of the effectiveness upon a third party of warranty modifications and disclaimers contained in a contract between the immediate parties to a sale that is applicable to remedy limitations, see Jean Fleming Powers, Expanded Liability and the Intent Requirement in Third-Party Beneficiary Contracts, 1993 Utah L. Rev. 67, 130–33 (1993).
135. 119 Wash. 2d at 344, 350, 831 P.2d at 729, 732.
in an antecedent agreement or in a contemporaneous oral agreement where parties adopt a writing that embodies their agreement. The rule also excludes evidence of even consistent additional terms if the parties adopt the writing as a complete embodiment of all the terms of their agreement.\textsuperscript{136} The parol evidence rule in section 2-202 provides that terms "to which the confirmatory memoranda of the parties agree" or which are contained in a "writing intended by the parties as a final expression of their agreement" may not be contradicted or supplemented under the circumstances articulated immediately above.\textsuperscript{137} Section 1-201(b)(3) defines "agreement" as the bargain of the parties in fact, and section 1-201(b)(26) specifies that a "party" is one who has engaged in a transaction or made an agreement subject to the U.C.C. Both conceptually and under the U.C.C., it is the parties to the immediate agreement who decide whether contemporaneous or antecedent terms are discharged by a subsequent writing.\textsuperscript{138} In the case of a remote seller's communication, such as advertising or a pass-through warranty that accompanies the goods, that agreement consists of the terms of the seller's communication to the remote buyer and not of the agreement between the seller and the immediate buyer.\textsuperscript{139} It is unreasonable to believe that a remote buyer would implicitly assent to a seller's discharging, under the parol evidence rule, a commitment made to the remote buyer in a direct communication from the seller by including a contrary term or a merger clause in the seller's agreement with its immediate buyer. Such a belief is unreasonable because a remote buyer, and the entire market of remote buyers, would find it difficult, if not impossible, to price the seller's warranty commitment if that commitment could be eliminated in a collateral or subsequent agreement with the seller's immediate buyer.

\textsuperscript{136} U.C.C. § 2-202; see also Restatement (Second) of Contracts §§ 213, 215 (1981).
\textsuperscript{137} U.C.C. § 2-202.
\textsuperscript{138} Id. ("[T]erms . . . intended by the parties as a final expression of their agreement . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement . . . but may be . . . supplemented by . . . consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.") (emphasis added).
\textsuperscript{139} Calling a remote seller's commitment the agreement under sections 1-201(b)(3) and 2-202 is difficult technically since the term "agreement" means the bargain of the parties in fact. U.C.C. § 1-201(b)(3) (2001). Where a remote seller makes affirmations or promises to remote buyers through advertising or pass-through warranties, for example, there is no bargain between the seller and the remote buyer. Such affirmations or promises generally are not like that in Carill, [1893] 1 Q.B. 256 (1892), where the manufacturer could be perceived as bargaining for a buyer to purchase its product from a retail seller. No such bargaining occurs in most remote seller transactions. Rather, a seller depends on the price of a warranty being embedded in the price that remote buyers pay for their goods, at least part of which a remote seller obtains in the sale prices to immediate buyers. Cf. Holdych & Mann, supra note 127, at 794–801 (discussing warranties as product attributes that are included in a product's price).
remote buyer and the market would probably discount the seller’s commitment to a point where its price would equal zero. This result would be suboptimal if the seller had a comparative advantage in providing a warranty to a remote buyer and intended to do so. Thus, in the Touchet case, if the seller had included a merger clause in the contract with its immediate buyer, that clause should have had no effect on the affirmations and promises that the seller made in the advertising brochure distributed to remote buyers.

The same analysis should apply to remedy limitations and similar terms in the contract between the seller and its immediate buyer. Section 2-719 of the U.C.C. allows for modification or limitation of a buyer’s remedies for breach. Like section 2-202, it provides for such limitation or modification by “agreement,” which ought to be the terms of the seller’s representations to the remote buyer and not the agreement between the seller and its immediate buyer.140 With respect to other terms, such as choice of law provisions, the court’s opinion in Tex Enterprises, Inc. makes clear that the agreement between the seller and its immediate buyer does not govern the relationship between the seller and the remote buyer.141 In that case, the invoice provided by the seller to its distributor contained a choice of law provision specifying that Georgia law governed the agreement. In discussing the need to litigate on remand the question whether the seller made an express warranty to the remote buyer, the court said that because the seller had correctly conceded that the remote buyer’s express warranty claim was not dependent on the contract between the seller and the distributor, Washington law, not Georgia law, would determine whether the seller’s representations amounted to a warranty.142 In other words, the choice of law provision in the seller-distributor contract did not govern the express warranty, if any, by the seller to the remote buyer.

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140. For a remedy limitation to be effective under Washington law, it must be effectuated in a conscionable manner. See M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wash. 2d 568, 585, 998 P.2d 305, 314 (2000); Schroeder v. Fageol Motors, Inc., 86 Wash. 2d 256, 259, 544 P.2d 20, 23 (1975). A remedy limitation may be conscionable and enforceable even though there is no bargaining or individual negotiation of the limitation. See Schroeder, 86 Wash. 2d at 259, 544 P.2d at 23.
141. 149 Wash. 2d at 213–14, 66 P.3d at 630.
142. Id.
IV. IMPLIED WARRANTY OBLIGATIONS TO REMOTE BUYERS

A. The Uniform Commercial Code and the General Privity Requirement in Washington

Article 2 of the U.C.C. provides for two implied warranties: a warranty of merchantability and a warranty of fitness for a particular purpose. The warranty of merchantability is implied in a contract for the sale of goods if the seller is a merchant with respect to the goods involved. It requires that the goods at least meet certain criteria. The most common of these criteria are that the goods pass without objection in the trade under the contract description and that the goods be fit for their ordinary purpose. The warranty of fitness for a particular purpose arises if, at the time of contracting, a seller has reason to know any particular purpose for which a good is required and that the buyer is relying on the seller’s skill or judgment to provide a suitable good. The fitness for particular purpose warranty arises if the buyer’s purpose for the goods is peculiar or idiosyncratic to the buyer and not the purpose for which the goods are generally used. Although these implied warranties are not part of an “agreement” or “bargain in fact,” the U.C.C. indicates that there must be a contract between a seller and the person seeking to enforce an implied warranty.

In what appears to be a rather traditional case involving an implied warranty claim by a remote purchaser, the Washington Supreme Court in Baughn v. Honda Motor Co. held that, because of lack of privity of contract, a purchaser of a mini-trail bike could not sue the bike’s manufacturer for breach of an implied warranty for injuries sustained by his son. Although the facts are unclear from the court’s opinion, it appears

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144. Id. § 2-315 (2001).
145. Id. § 2-314.
146. Id. § 2-315.
148. See supra note 25.
149. See supra note 16. The privity requirement is subject to the exception for statutory third-party beneficiaries in section 2-318. See supra note 14.
that the purchaser was invoking an implied warranty from the manufacturer to the dealer from whom he purchased the bike, which he then, at least implicitly, claimed extended to himself. The court justified its holding by citing prior cases requiring privity of contract for a breach of implied warranty claim.\(^{152}\)

Despite the breadth of the Baughn opinion, Washington courts have allowed some remote purchasers to enforce implied warranties as third-party beneficiaries of the warranties. On the other hand, the Washington Supreme Court has rejected a much more pervasive exception to the privity requirement, one that would permit a remote purchaser to claim the existence of an implied warranty whenever a remote seller made an express representation about its goods to a remote purchaser.\(^{153}\)

\textbf{B. Third-Party Beneficiaries}

After the Baughn case, the court in Touchet\(^{154}\) reaffirmed a prior decision allowing a nonprivity buyer to maintain an action for breach of an implied warranty as a third-party beneficiary. In Kadiak Fisheries Co. v. Murphy Diesel Co.,\(^{155}\) the plaintiff fishing company contracted to purchase from an intermediary a motor manufactured by the defendant. The manufacturer knew the identity and requirements of the remote purchaser, built the motor to fit in the bed of one of the remote purchaser’s vessels, shipped the motor directly to the remote purchaser, made adjustments and corrections to the motor during its installation, and attempted to correct problems that occurred with the motor after its installation.\(^{156}\) The court concluded that under these circumstances, the intermediary had purchased the motor on the basis that the seller/manufacturer would provide a motor that was merchantable and fit for the remote purchaser’s purposes.\(^{157}\) As a result, the remote purchaser was a third-party beneficiary of any implied warranties of merchantability and fitness imposed on the manufacturer.\(^{158}\)

\textit{ supra} note 60, the court discarded this common law warranty in Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969), and adopted strict liability in tort. That liability was replaced by the Washington Tort Reform Act, WASH. REV. CODE § 7.72 (1981).


155. 70 Wash. 2d 153, 422 P.2d 496 (1967).


157. \textit{id.}

158. \textit{id.} at 165, 422 P.2d at 504.
Following the analysis in the *Kadiak* case, the court in *Touchet* held that the plaintiff purchaser of a grain storage building was a third-party beneficiary of implied warranties of merchantability and fitness for a particular purpose imposed on the building’s designer and component supplier.\(^{159}\) This status was in addition to the plaintiff being a third-party beneficiary of the express warranties discussed above.\(^{160}\) The court noted that the designer/supplier knew the remote purchaser’s identity, purpose, and requirements, designed the building to the remote purchaser’s specifications, delivered the building’s components to the remote purchaser’s site, and attempted to make repairs when the remote purchaser first encountered difficulties with the building.\(^{161}\)

In some instances, finding that a third-party beneficiary contract exists where there is an implied warranty is not difficult. For example, if a purchaser contracts with a seller for the latter to deliver a good to a third person, performance by the seller in delivering a good that conformed to an implied warranty would necessarily and directly benefit the third per-

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\(^{159}\) 119 Wash. 2d at 347–48, 831 P.2d at 731. In an unpublished opinion, the Court of Appeals held in *Evergreen* that the owner of a building was the third-party beneficiary of implied warranties arising out of a contract between a supplier of flooring material and a subcontractor that installed the flooring in the building. *Evergreen Inv. Group, L.L.C. v. Porter*, No. 30664-6-II, 2004 WL 1732373 at *4 (Wash. Ct. App. 2004). The court found the facts in the case to be materially indistinguishable from those in *Kadiak* and *Touchet*, noting that the supplier’s president and CEO inspected the place in the building where the flooring was going to be installed and learned the conditions to which the flooring would be subjected. *Id.* The CEO also provided detailed instructions for installing the flooring and personally delivered some of the flooring to the building. *Id.* On these facts, the court ruled the building owner to be a third-party beneficiary of the contract between the supplier and the flooring subcontractor. *Id.*

\(^{160}\) See supra text accompanying notes 80–86.

\(^{161}\) Support for the court’s decision may be found in Bobb Forest Prod., Inc. v. Mobark Indus., 783 N.E.2d 560, 576 (Ohio Ct. App. 2002) (remote buyer third-party beneficiary where manufacturer knew remote buyer and manufactured sawmill to remote buyer’s needs) and in Richards v. Goerg Boat & Motors, Inc., 384 N.E.2d 1084, 1092 (Ind. Ct. App. 1979) (boat manufacturer’s involvement in sale of boat by distributor to remote buyer sufficient to characterize manufacturer as seller to remote buyer). Further support may be found in People ex rel. Resnik v. Curtis & Davis, Architects & Planners, Inc., 400 N.E.2d 918 (III. 1980). There the defendant architectural firm contracted to provide architectural services to the Illinois Building Authority for its construction of a prison to be leased to the state. *Id.* at 918. Upon completion of the facility, the state sued the architects for breach of contract, a claim that was upheld by the Illinois Supreme Court on the ground that the state was a third-party beneficiary of the contract between the Authority and the firm. *Id.* at 920. In that case, however, the contract between the Authority and the firm required the architects to consult with the state concerning the project’s requirements and to revise their drawings to the user’s satisfaction. *Id.* It also warranted to the Authority and the state that the rights granted under the contract could be conveyed. *Id.* Moreover, the court cited the fact that the Authority was created by the state to circumvent debt limitations placed on the state by its constitution, which apparently precluded the state from issuing debt to construct the facility as opposed to leasing it from the Authority. *Id.* These facts make a stronger case for concluding that the state was a direct beneficiary of the contract between the Authority and the firm.
son, making that individual a third-party beneficiary. The facts in the Kadiak case are close to this example, although it appears that the intermediary discharged its contractual responsibility to the plaintiff by installing the motor, albeit with some manufacturer assistance. The facts in Touchet are more attenuated since there the metal building designed by the warrantor was apparently delivered to and erected by its immediate buyer in discharging the immediate buyer’s duty to the remote buyer of the building. Although the remote sellers in both cases knew the identities and purposes of the remote buyers and designed the goods for them, the immediate buyers could, prior to performance but in breach of contract with their buyers, have resold the goods to someone other than the remote buyers. In that case there would have been no direct obligation by the remote sellers to the remote buyers. Moreover, even if the immediate buyers had performed their contracts with the remote buyers by erecting or installing the goods, those contracts may have provided that the goods were sold with no warranties, in which case the remote buyers should have had no direct warranty obligations against the remote sellers and no third-party beneficiary status. In either of these hypothesized scenarios, the direct and necessary obligation of the remote seller to the remote buyer, which is required for third-party beneficiary status, is questionable at best.

Assuming that the remote buyers in the Kadiak and Touchet cases were correctly determined to be third-party beneficiaries, the question

162. See Powers, supra note 134, at 115.
164. See 119 Wash. 2d at 337–39, 345–47, 831 P.2d at 726, 730. In the Touchet case the supplier apparently delivered the building components to Opp & Seibold, the contractor that erected the structure. Id. at 338, 831 P.2d at 726. In Kadiak, the manufacturer shipped the motor to the remote buyer, although it is unclear whether the motor was delivered to the remote buyer as opposed to the intermediary. 70 Wash. 2d at 164–65, 422 P.2d at 503.
165. Under WASH. REV. CODE § 62A.2-716 (2000), the remote buyers would have had a right to specific performance of the contracts with their sellers if the goods were unique or there were other proper circumstances.
166. See infra text accompanying notes 321–323; Powers, supra note 134, at 143–44.
167. Comment 3 to section 2-318 indicates that Alternative A of that section, the alternative that has been adopted in Washington, WASH. REV. CODE § 62A.2-318, is not intended to restrict case law extensions of express and implied warranties to additional persons in the chain of distribution. See HAWKLAND, supra note 14, § 2-318:1; WHITE & SUMMERS, supra note 14, § 11-3. Thus the Touchet decision could simply be an extension of implied warranties to certain remote buyers consistent with comment 3 to section 2-318. That is not, however, what the court in that case or Kadiak purported to do. Both Kadiak, a pre-Code case, and Touchet invoked traditional third-party beneficiary principles to justify their decisions, the latter by invoking section 62A.1-103 of the Revised Code of Washington, and designating the remote buyer as an intended beneficiary. See Touchet, 119 Wash. 2d at 346, 831 P.2d at 730. Accordingly, both decisions need to be examined under third-party beneficiary law.
remains as to which facts were indispensable to those determinations. In Daughtry, for example, where the court held that privity of contract was required for a warranty claim, the manufacturer provided a new part for the remote buyer’s sewage treatment system when it failed. Moreover, given the character of the sewage treatment system, the manufacturer must have known the buyer’s purposes in using the system and that the buyer would benefit if the good conformed to the manufacturer’s warranties. Indeed, it has been contended that a manufacturer’s warranty is for the benefit of the end user or consumer whenever the manufacturer knows that the intermediary to whom it sells its goods will not use or consume them, a position largely inconsistent with the privity requirement and the reasons for retaining it.

Having appropriate and determinate criteria for deciding whether performance under a contract would necessarily and directly benefit a third party, and hence create enforceable contract rights in that party, is particularly important when evaluating implied warranty claims. Unlike express warranties, implied warranties are not part of the parties’ agreement in fact but are default obligations provided by the U.C.C. Because a warrantor incurs additional costs when a third party has enforceable warranty rights, it is important that the circumstances indicate that the promisee intends the promisor to assume direct contractual obligations to that party so that the promisor can price the increased obligation into the bargain. Unless those circumstances exist, a default term that

168. In its unpublished opinion in Evergreen, the Court of Appeals found a significant difference between the facts in the case before it and those in Kadiak and Touchet in that the provider of the flooring materials subject to the implied warranties did not attempt to repair the flooring after it began to fail. Evergreen Inv. Group, L.L.C. v. Porter, No. 30664-6-II, 2004 WL 1732373 at *4 (Wash. Ct. App. August 3, 2004). However, the court indicated that the supplier agreed to contact the flooring subcontractor on the building owner’s behalf about the problem with the flooring and noted that the supplier was not the manufacturer of the flooring material, only the distributor. Id. Why the latter factors were relevant the court did not explain.

171. See infra text accompanying notes 265–328.
172. See supra note 24 and accompanying text.
173. See infra text accompanying notes 272–322.
174. See Farnsworth, supra note 44, at 662. In explaining why the Restatement (Second) of Contracts § 302(b) (1981) requires the circumstances to indicate that the promisee intends to give the beneficiary the benefit of the promised performance, the author states:

[T]he Restatement Second’s . . . additional requirement that the promisee have an intention to benefit the third person seems curious at first. No such additional requirement is imposed in other situations in which a court is asked to supply a term. Nevertheless, it makes sense if it is regarded as a factor in determining the intentions of the parties, for, compared with such other situations, cases involving claims of beneficiaries are singular in an important respect. If the parties bargain freely before they make their contract, every additional term must be paid for . . . . If nothing is said about liability to a third person and a court is asked to supply a term making the other party liable to a third per-
creates rights in a third party is likely to result in an obligation to a remote buyer that the contracting parties would find suboptimal.\textsuperscript{175}

Since a seller may modify or disclaim an implied warranty or limit a remedy,\textsuperscript{176} a remote seller could, of course, modify or disclaim any implied warranty obligation to a third party or limit its remedy for breach to avoid any potential suboptimal obligation. The costs of making such a disclaimer, modification, or remedy limitation may be higher, however, than for similar terms not involving third-party beneficiaries.\textsuperscript{177} First, a remote seller will have to determine whether it is necessary to make a disclaimer, modification, or remedy limitation affecting a third-party beneficiary.\textsuperscript{178} This decision will depend, in part, on the nature of the criteria used in determining whether a remote buyer is a third-party beneficiary, and hence the likelihood that third-party rights might be found to exist. Second, if third-party beneficiary rights are likely to arise and a limitation of those rights is optimal, the manner of disclaiming or modifying an implied warranty or limiting remedies for breach may be more costly. A third-party beneficiary’s rights are measured by the terms of the

\textsuperscript{175} In Kadiak, for example, the manufacturer was held liable for lost profits and property loss suffered by the remote buyer when the motor started a fire and delayed the latter’s fishing operations. See Kadiak Fisheries Co. v. Murphy Diesel, Inc., 70 Wash. 2d 153, 167–68, 422 P.2d 496, 505 (1967). Ordinarily it is not efficient for a manufacturer to bear these third party consequential losses. See Cooter, supra note 31, at 427–30.

\textsuperscript{176} See supra notes 6 and 11.

\textsuperscript{177} In addition to affecting the costs of making a disclaimer, enabling a remote buyer to sue a remote seller for breach of warranty by removing the privity requirement is likely to prove costly, in determining the cause of the buyer’s loss, including increased error costs. See infra text accompanying notes 272–280. Removing the privity requirement is also likely to be more costly and less accurate in determining the existence and nature of any implied warranty than would be the case in an action between a remote seller and its immediate buyer. See infra text accompanying notes 299–310.

\textsuperscript{178} A remote seller may not wish to make a total disclaimer of all implied warranties since its immediate buyer may prefer an implied warranty should the immediate buyer be responsible to the remote buyer for any nonconformity in the goods. See supra notes 90–95 and accompanying text. Under the Magnuson-Moss Act, 15 U.S.C. § 2304(4) (1975), a warrantor that gives a FULL warranty may not restrict warranty rights to an immediate consumer buyer during the warranty period. But a warrantor may provide that the duration of the warranty lasts only during the ownership of the first purchaser. 16 C.F.R. § 700.6(b) (1977). If a warrantor provides for a FULL warranty of such limited duration, there is no violation of the statute by the warrantor in not extending warranty rights to a subsequent purchaser during the duration of the warranty since the warranty terminates on transfer of the good to the subsequent purchaser.
contract between the promisor and the promisee.\textsuperscript{179} Therefore, these rights ordinarily are subject to the defenses that a promisor has against a promisee.\textsuperscript{180}

Consistent with the above principles, the Washington Court of Appeals determined that the plaintiff in the \textit{Tex Enterprises, Inc.} case could not invoke implied warranty rights as a third-party beneficiary because of a disclaimer in the manufacturer’s invoice to its immediate buyer.\textsuperscript{181} Nevertheless, authority exists asserting that a disclaimer or warranty modification affecting a third-party beneficiary must be communicated to the beneficiary and not simply to the promisee.\textsuperscript{182} Such a process is more

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\bibitem{179} See \textit{Farnsworth}, \textit{supra} note 44, at 675-78.
\bibitem{180} \textit{Oman v. Yates}, 70 Wash. 2d 181, 188-89, 422 P.2d 489, 495 (1967).
\bibitem{181} \textit{Tex Enterprises, Inc. v. Brockway Standard, Inc.}, 110 Wash. App. 197, 39 P.3d 362 (2002), rev’d \textit{on other grounds}, 149 Wash. 2d 204, 66 P.3d 625 (2003); \textit{accord Powers}, \textit{supra} note 134, at 129-30 (remote buyer bound by modification or disclaimer of warranty in contract between remote seller and its buyer). The court’s determination is consistent with Comment 1 to section 2-318 dealing with statutory third-party beneficiaries. A seller may not exclude or limit third-party beneficiary rights under section 2-318, but it can disclaim or modify implied warranties or limit remedies. Comment 1 states that “[t]o the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries under this section.” U.C.C. § 2-318 (1966).

On appeal, the Washington Supreme Court refused to consider whether the warranty disclaimer in the contract between the manufacturer and the distributor would have been effective against the remote buyer given its decision that no implied warranty of merchantability existed from the manufacturer to that buyer. See \textit{Tex Enterprises, Inc.}, 149 Wash. 2d at 214 n.5, 66 P.3d at 630 n.5.

\bibitem{182} \textit{Hawkland}, \textit{supra} note 14, § 2:318; Nogay, \textit{supra} note 134, at 894-95. Dean Hawkland argues that direct notice to remote buyers is important because even though a remote seller may disclaim all warranties in selling to its buyer, “the ultimate consumer may still be relying on the manufacturer’s good reputation in buying the goods.” \textit{Hawkland}, \textit{supra} note 14, § 2:318. Moreover, he maintains that Comment 1 to section 2-318 allows warranty disclaimers against third-party beneficiaries protected by that section so long as the exclusion is permitted by section 2-316. \textit{Id.} Because section 2-316 treats a disclaimer as a bargained-for term, it is only effective against those who assent to it, including third-party beneficiaries. The problem with the first argument is that reliance on a manufacturer’s good reputation is not a basis for assuming that the entity purchasing from the manufacturer initially, and the consumer buyer ultimately, have purchased an implied \textit{legal} obligation that the goods will have certain attributes and will provide certain legal remedies if those attributes do not exist. Indeed, the opposite is the case. Dean Hawkland’s second argument assumes a third-party beneficiary is part of the bargain in fact that establishes the third-party beneficiary’s contractual rights, a status that is not consistent with a beneficiary’s relationship to the bargain between a promisor and promisee. See \textit{Farnsworth}, \textit{supra} note 44, at 657-64, 673-78. Indeed, Dean Hawkland’s argument would appear to preclude course of dealing or course of performance between a promisor and promisee from modifying or excluding an implied warranty extending to a third-party beneficiary although section 2-316(c) provides for such modification or exclusion. Finally, his argument does not account for the remainder of the comment quoted, \textit{supra} note 181, which states that disclaimers and remedy limitations in the initial contract of sale are equally applicable to third-party beneficiaries.

Perhaps implicit in at least some of the arguments for notice of a disclaimer to a third-party beneficiary is the assumption that the third-party beneficiary will not obtain what the beneficiary bargained for unless that party receives notification of a disclaimer. That assumption is incorrect. If there is an effective disclaimer or modification in the original contract between a remote seller and
\end{footnotesize}
costly for a remote seller than utilizing a disclaimer or remedy limitation in the agreement with its immediate buyer.\textsuperscript{183} Requiring a direct disclaimer to a third-party beneficiary would be even more costly in Washington because warranty disclaimers must be individually negotiated,\textsuperscript{184} requiring the remote warrantor to obtain negotiated assent to a disclaimer or modification.\textsuperscript{185}

Given the significant risk that an implied warranty for a third-party beneficiary may be suboptimal, it is preferable that the warranty be restricted to contracts in which a remote seller performs directly to the third party, a situation in which the seller clearly understands it is under-

\textsuperscript{183} Nogay, supra note 134, at 895, contends that a remote seller can provide for notice to the remote buyer by requiring that the seller to the latter include a disclaimer on the former’s behalf, requiring the seller to the remote buyer to indemnify the remote seller for any loss resulting from failure to make the disclaimer. Nogay does not discuss the enforcement costs of such a regime or how a disclaimer by the immediate seller would be communicated to someone such as the second-hand purchaser in Morrow v. New Moon Homes, 548 P.2d 279, 282 (Alaska 1976), discussed infra in text accompanying notes 272–276. Moreover, he fails to address the effect of a warranty modification or disclaimer by an initial remote purchaser on a secondhand purchaser. In the \textit{Lidstrand} case, for example, the original retail purchasers of a mobile home, manufactured by the warrantor, encountered difficulties with the home, and the warrantor attempted to effectuate repairs. Lidstrand v. Silvercrest Indus., 28 Wash. App. 359, 362, 623 P.2d 710, 713 (1981). Assume that the manufacturer and original retail purchasers disputed the efficacy of the repairs and the manufacturer paid the purchasers a sum of money in exchange for complete discharge of all of the manufacturer’s responsibilities under the warranty. When the mobile home was then sold to the second-hand purchasers, would the manufacturer have to inform those buyers, whose identity it may not know, that the warranty had been discharged, or could it rely on the terms of the discharge with the original retail purchasers? See Powers, supra note 134, at 143-44.


\textsuperscript{185} Similar to the argument by Nogay, supra note 134, at 895, one could contend that a remote seller can provide for negotiation of a disclaimer or modification of a warranty with a remote buyer by requiring that the immediate seller to the remote buyer conduct such negotiation on the remote seller’s behalf. The immediate seller would be required to indemnify the remote seller for any loss resulting from failure to negotiate a disclaimer with a remote buyer. One might assume that this process would be even more costly and subject to dispute than simple notification of a remote buyer of a remote seller’s disclaimer since more factual issues would surround the question of whether such a negotiation occurred.
taking a responsibility to a third party. If parties to a contract prefer remote seller responsibility to a third party, they can contract for the remote seller to provide a pass-through warranty to the remote buyer or include a term conferring third-party beneficiary status on a remote purchaser, as in the Jeffery case.\footnote{186}{39 Wash. 2d 855, 859, 239 P.2d 346, 348 (1952).} 

C. Implied Warranties Based on Express Representations to Remote Buyers

In Tex Enterprises, Inc.,\footnote{187}{110 Wash. App. 197, 39 P.3d 362 (2002), rev’d on other grounds, 149 Wash. 2d 204, 66 P.3d 625 (2003)} the Washington Court of Appeals found a basis for another exception to the privity requirement for an implied warranty claim. As indicated previously, the plaintiff purchased containers from a distributor after the defendant manufacturer’s representative met with and told him that the containers were as good as the ones the plaintiff was then using. Importantly, the manufacturer sold the containers to the distributor using an invoice that contained an express warranty against defects, a disclaimer of all other express and implied warranties, and a limitation of remedies. The appellate court held that the manufacturer’s contact with and direct representations to the plaintiff remote purchaser were sufficient not only to create an express warranty but also to create an implied warranty independently of the contract between the contractor and distributor.\footnote{188}{Id. at 203–04, 39 P.3d at 366. An analogous approach to finding a warranty of merchantability accompanying an express warranty is found in two cases and in a highly respected treatise. See, e.g., Century Dodge, Inc. v. Mobley, 272 S.E.2d 502, 504 (Ga. Ct. App. 1980); Blankenship v. Northtown Ford, Inc., 420 N.E.2d 167, 169–71 (Ill. App. Ct. 1981); WHITE & SUMMERS, supra note 14, § 12-3. According to those authorities a warranty by description involves a warranty that a good will have attributes consistent with merchantability. If, for example, an express warranty describes a good as a “hay baler,” and the good possesses the physical attributes of a hay baler, but the good does not bale hay, there is a breach of the express warranty even if it effectively disclaimed all implied warranties. Id. In Universal Drilling Co. v. Camay Drilling Co., 737 F.2d 869 (10th Cir. 1984), the court refused to apply this analysis to a contract for the sale of two used drilling rigs. Despite a disclaimer of all implied warranties, the buyer contended that the seller breached an express warranty by description in delivering two oil rigs that would not function. Id. at 873. Rejecting the purchaser’s argument, the court found that the warranty disclaimers clearly reflected the parties’ agreement to transfer equipment that may have needed to be repaired to be operable, that accepting the argument would preclude the parties from making such an agreement, and that the warranty by description assured the buyer that it would receive a good that possessed the physical properties contained in the description. Id. at 873–74. The court’s treatment of the warranty by description approach in Universal Drilling is correct. See Fletcher, supra note 43, at 416–17. The alternative approach makes it excessively costly for parties to bargain for warranty attributes they desire. As in Universal Drilling, the parties may desire to contract for a good that has certain physical attributes, such as being a drill or a car, but want to allocate to the purchaser all risks involving the fitness of the good for any ordinary or particular purposes.} Thus, the implied warranty did not emanate...
from the manufacturer to the distributor and then extend to the remote buyer. Rather, it was a warranty obligation dependent only on the manufacturer’s contact with and express representations to the plaintiff buyer.

The Washington Supreme Court rejected the Court of Appeals’ analysis on two bases. First, the court relied heavily on a textual analysis of U.C.C. sections 2-314 and 2-315, referring to the fact that the two sections specify respectively that the warranty of merchantability is “implied in a contract for their sale” and that the warranty of fitness for a particular purpose arises based on a seller’s understanding “at the time of contracting.” By contrast, the court noted that section 2-313, which deals with the creation of express warranties with less demanding privity requirements, does not mention the term “contract.” Thus, according to the court, the plain meaning of these sections require that a person seeking to enforce a warranty either be a party to a contract of sale or a third-party beneficiary of such a contract. From a policy perspective, the court maintained that an implied warranty must be based on an underlying contract because contractual relationships under the U.C.C. must be formed according to U.C.C. safeguards, “making contractual relationships comparatively formalized.” On the other hand, representations that may be deemed express warranties under section 2-313 require no formalities, making potential remote seller warrantors unable to predict when implied warranties would arise if the law were to permit such warranties to be based solely on representations constituting express warranties.

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189. *Tex Enterprises, Inc.*, 149 Wash. 2d at 204, 66 P.3d at 625. Support for the Supreme Court’s decision may be found in *Hyundai Motor America, Inc. v. Goodin*, 804 N.E.2d 775 (Ind. Ct. App. 2004). There, an automobile purchaser sued the manufacturer for breach of its standard written express warranty and the implied warranty of merchantability. *Id.* at 778. The purchaser argued that privity for the implied warranty existed based on the manufacturer’s express warranty. *Id.* at 788. Rejecting the argument, the court differentiated between warranty attributes for which there was privity between the manufacturer and the remote buyer, those in the express warranty, and those for which there was not, those in an implied warranty. *Id.* “[T]o the extent that a manufacturer’s express warranty of a product undoubtedly frequently acts as an inducement to purchase that product, such inducement only reasonably extends to the terms of the express warranty itself.” *Id.*


191. *Tex Enterprises, Inc.*, 149 Wash. 2d at 211–13, 66 P.3d at 629. The court distinguished the language in section 2-313 governing express warranties. The language of that section does not, according to the court, refer to an underlying contract. *Id.* The problem with the court’s analysis is that it does not analyze the terms “seller” and “buyer” in section 2-313, both of which indicate that the section restricts warranties to an entity in a contractual relationship with a warrantor. See note 16, supra.


193. *Id.* For the latter proposition the court cited section 2-201 which requires that all contracts for the sale of goods for more than $5,000 must be in writing to be enforceable. *Id.*

194. *Id.*
The court’s reliance on sections 2-314 and 2-315 to require privity of contract is consistent with the analysis of those sections discussed previously. The court’s invocation, however, of safeguards or formalities required by the Code to form a contract is less persuasive. The Code has discarded some of the common law’s formal requirements for contract formation. Offer and acceptance are no longer required to establish the existence of a contract, which under section 2-204 may be made in “any manner sufficient to show agreement.” Moreover, the terms in a written acceptance need not be the same as those in an offer to create a contract, so long as there is an expression of acceptance that is not expressly conditional on assent to additional or different terms. The only section cited by the court as a safeguard or formality for contract formation under the Code is section 2-201, which requires the existence of a writing to make enforceable a contract for the sale of goods whose price is $500 or more. But section 2-201(c) provides that a contract that does not satisfy the section’s writing requirement is enforceable with respect to goods for which payment has been made and accepted or which have been received and accepted. Such conditions are likely to exist in many, if not most, cases involving disputes over implied warranties.

A formality or safeguard that differentiates implied warranties from express warranties in Washington is the one required by the Tex Enterprises, Inc. court, an underlying bargained-for exchange. The bargained-for exchange that underlies a contract of sale may be perceived as cautioning a seller, not only that its promise is enforceable, but also that a variety of default terms, such as implied warranties and remedies, may accompany a transaction, governing issues not dealt with by the parties. On the other hand, a seller’s mere express representation, which, as the court points out in Tex Enterprises, Inc., may be made under informal circumstances, may not generate the same expectations with respect to the existence of collateral default terms.

Support for the Washington Court of Appeals decision in Tex Enterprises, Inc. may be found in an article by Professor Curtis R.

195. See supra notes 14–16 and accompanying text.
197. Consideration for the enforcement of a promise exists when there is a bargained-for exchange, which exists when 1) a promisor gives its promise in exchange for a return promise or performance and 2) the promisee gives its promise or performance in exchange for the promisor’s promise. Restatement (Second) of Contracts § 72 (1981).
199. The suggested amendments to new sections 2-313A and 2-313B might not alter the result in the Tex Enterprises, Inc. case itself. Section 2-313A deals with a representation contained in a record accompanying the goods, such as a label on or a warranty card in a package. Section 2-313B pertains to representations in an “advertisement or similar communication to the public.” The repre-
Reitz.\textsuperscript{200} Professor Reitz suggested amending proposed revisions to Article 2 of the U.C.C. on remote seller obligations\textsuperscript{201} to provide that a seller who makes a representation about its goods breaches its obligation to a remote buyer not only if the goods fail to conform to the representation but also if the goods are unfit for the ordinary purposes for which they are used.\textsuperscript{202} In other words, an implied obligation of fitness would arise whenever a remote seller makes a representation concerning its goods for which it would be responsible to a remote buyer.\textsuperscript{203} Although the proposal formally would pertain to representations in a record accompanying the goods or in a communication to the public, Professor Reitz suggested that the recommended change would apply more broadly to any representation made by a manufacturer to retail buyers.\textsuperscript{204} At least theo-

\begin{thebibliography}{9}
\item Reitz, \textit{supra} note 16.
\item See \textit{supra} note 105.
\item Reitz, \textit{supra} note 16, at 393.
\item Elsewhere Professor Reitz maintains that courts should differentiate between transactions in which a manufacturer is known to and extends an express warranty to consumer buyers and those in which a manufacturer's goods are sold under a retailer's brand name, the manufacturer's identity is not disclosed to retail buyers, and the manufacturer makes no express warranty to retail buyers. CURTIS R. REITZ, \textit{CONSUMER PRODUCT WARRANTIES UNDER FEDERAL AND STATE LAWS} § 8.03, at 118–25 (2d ed. 1987) [hereinafter \textit{CONSUMER PRODUCT WARRANTIES}]. In the former transactions the privity requirement ought to be eliminated for the implied warranty of merchantability as well as for any express warranty. \textit{Id.} In the latter, the privity requirement ought to be retained. \textit{Id.} The reason for the difference in treatment of the two situations appears to be predicated on the manufacturer's perceived involvement in the sale to the retail consumer and the latter's reliance on the manufacturer's identity in assuring that the goods are merchantable. There are two problems with Professors Reitz's differentiation. First, section 2-314 imposes no reliance requirement by a buyer on the identity or character of the seller. Second, under the comparative advantage theory of warranties, the question whether a warranty should arise in a transaction depends on whether a buyer values the attributes in question more highly than the cost of producing them and whether the warrantor can provide the attributes or insure against their absence more cheaply than can the buyer. See text accompanying \textit{supra} note 34. Thus, in determining whether it is efficient to eliminate the privity barrier and provide for an implied warranty of merchantability, the relevant questions include whether the warrantor can provide the attributes of merchantability in a cost effective manner and more cheaply than can the buyer and not whether the buyer knows the warrantor's identity.
\item \textit{CONSUMER PRODUCT WARRANTIES}, \textit{supra} note 203, § 8.03, at 118–25. As Professor Reitz points out, the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–12, precludes any warrantor, \textit{id.} § 2301(5), that gives a written Magnuson-Moss warranty, \textit{id.} § 2301(6), from modifying or disclaiming any implied warranties, \textit{id.} § 2301(7), that arise under state law, \textit{id.} § 2308(a). A disclaimer or modification in violation of the Act is ineffective, including under state law. 15 U.S.C. § 2308(c). The statute does not apply to oral warranties such as that in the \textit{Tex Enterprises, Inc.} case.
\end{thebibliography}
retically, therefore, it would apply to a manufacturer’s personal representation to a remote buyer as in *Tex Enterprises, Inc.* The rationale for the proposal is to give “fuller meaning to express warranties” made by manufacturers to protect remote buyers from nonconforming goods.\(^{205}\)

Although justified as giving a “fuller meaning” to a remote seller’s express warranty, Professor Reitz’s proposal does not involve ascribing a meaning to an express representation, for that is the process of interpretation.\(^{206}\) Rather, the proposal involves *adding* a default term. Unlike other default terms, however, this term would be added, not where the parties have failed to provide a term governing their relationship,\(^ {207}\) but to an express term whose attributes have been determined by a remote seller. Unless it reduced transaction costs, which is unlikely, this default term would make the use of discrete warranty terms more costly. A remote seller that simply seeks to warrant some limited attributes of a good, such

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The prohibition in 15 U.S.C. § 2308(a) against a disclaimer of an implied warranty if a warrantor makes a Magnuson-Moss warranty is premised on Congress’s perception that such disclaimers are deceptive. As stated by the court in *Abraham:*

Prior to passage of Magnuson-Moss, the common practice of many sellers was to provide a written warranty that offered minimal protection and disclaimed all implied warranties. This practice often placed the consumer in a worse contractual position than if no warranty at all had been given, because implied warranty protection under the Uniform Commercial Code is often more extensive than the express warranty given by a seller. Because the very term “warranty” implies an increase in contractual protection to consumers, warranties that were largely disclaimers were in a real sense misleading.

795 F.2d at 247.

The contention that any express warranty under section 23-313 would be misleading if accompanied by a disclaimer does not appear to be accurate, given the range of informal representations that constitute warranties under that section. Moreover, applying the deception rationale to all sales in which express warranties are given would preclude parties from allocating risks involving product attributes in a manner they deem optimal. For example, a sale by description that the good were a hay baler would preclude the seller from disclaiming the warranty that the good would function as an ordinary hay baler. See supra note 188.


207. *Id.* at § 204 (“when parties to a bargain . . . have not agreed with respect to a term . . . a term which is reasonable in the circumstances is supplied by the court”).
as its dimensions or physical description, would be deemed to incur a more pervasive implied obligation about the product's fitness, an obligation whose costs might exceed its benefits.

To avoid making this broader commitment, the seller would have two choices. First, the seller could disclaim the obligation, which would be quite costly generally for many informal representations, such as the one in Tex Enterprises, Inc., and particularly costly in Washington where individual negotiation of warranty disclaimers is required. Second, if a warranty disclaimer is too costly and the expected cost of providing the implied obligation exceeds the value of the desired express representation, the remote seller will not provide the latter representation, a consequence that will make both the remote seller and the remote buyer worse off. Given the fact that the proposed implied obligation would attach to an express term, the transaction costs should be low for a remote seller to simply add a fitness warranty to its express representation. Indeed, if such a fitness warranty is an optimal one between a remote seller and remote buyer, one would expect the seller to make it just as such sellers frequently make express guarantees against defects to remote buyers. A remote seller who fails to include such an obligation that is preferred by the market would be foregoing gains from trade just as it would if it failed to provide an express warranty against defects demanded by the market.

V. THE PRIVITY REQUIREMENT AND ITS UTILITY

As the foregoing analysis demonstrates, a remote buyer's ability in Washington to assert express and implied warranty claims against a remote supplier is based on exceptions to the privity requirement. In his dissent in Daughtry, Justice Rosellini argued for abolition of privity in warranty actions generally:

208. See Hyundai Motor America, Inc., 804 N.E.2d at 788 (refusing to find privity of contract between manufacturer and remote buyer for implied warranty of merchantability based on manufacturer's written express warranty because inducement to purchase by express warranty extends only to its terms).

209. See Priest, supra note 30, at 143-46 (discussing the reasons some manufacturers disclaim the implied warranty of merchantability).

210. See supra note 6; Reitz, supra note 16, at 394-95 (manufacturer express warranties that may be created in advertisements and communications to the public are not in form that permits meaningful negation of implied fitness obligation).

211. This cost should be particularly low for pass-through warranties contained on or in the container with the goods.

212. See R. H. Coase, The Choice of the Institutional Framework, 17 J. L. & ECON. 493, 494 (1974) (explaining why a monopolist or oligopolist will provide the same contract terms, other than price, as a seller in a competitive market in order to maximize its net return on sales).

I do think the time is appropriate to recognize that where a manufacturer makes express warranties about his product or places it on the market to be used for a certain purpose, his warranties, express or implied, should run to the consumer, the person who is expected to use the product.214

This Part examines arguments against the privity requirement. Prior to analyzing those by Justice Rosellini, this Part addresses several contentions concerning the continued viability of an immediate seller and incentives for strategic behavior and fraud purportedly generated by the privity requirement. This Part then evaluates the merits of Justice Rosellini’s arguments and examines the consequences of abolishing the privity requirement.

A. The Viability of an Immediate Seller and Incentives for Fraud and Strategic Behavior

The first two arguments against the privity requirement are interrelated, pertaining to the continued viability or availability of the immediate seller and the supposed incentive that that seller’s lack of availability or viability creates for the remote seller to engage in strategic behavior. The first argument is that eliminating the privity requirement protects remote buyers from product defect losses suffered when immediate sellers become insolvent or discontinue business.215 Although such losses may occur, the inability of a remote buyer to enforce a warranty claim against its seller does not mean that the privity requirement should be abolished. When a buyer purchases a product, he or she buys not only the physical good but also the seller’s or some third party’s warranty commitment.216 It is the credit of the seller or other warrantor that provides

214. Id. at 713–14, 592 P.2d at 635–36. At the end of his opinion, however, Justice Rosellini said that he would hold that a remote buyer could sue a manufacturer where the latter made representations by advertising, brochures, or otherwise when the customer suffered a loss caused by the failure of a good to perform as represented, a narrower ruling than that justified by preceding parts of his opinion. Id. at 720–21, 592 P.2d at 639. Justice Rosellini did not indicate that a remote buyer must have been aware of a representation in order to sue on an express warranty, which was the rule adopted in Boughn. The facts in the Daughtry case do not indicate whether the remote buyer was aware of a brochure and owner’s manual that contained the express warranties on which the remote buyer was suing.

The amended section 2-318(2) Alternative C provides for extension of an express or implied warranty to any immediate buyer who may reasonably be expected to use, consume, or be affected by the goods subject to the warranty and who is injured by breach of the warranty. A remote seller may, however, exclude or limit the operation of the section except with respect to personal injuries. See U.C.C. § 2-318(2), alt. C (2004). This extension of warranty is the position advocated by Justice Rosellini.

215. See Nogay, supra note 134, at 888.

216. See Holdych & Mann, supra note 127, at 794–96 (discussing warranties as product attributes); Bruce D. Mann & Thomas J. Holdych, When Lemons Are Better Than Lemonade: The Case
the warranty upon which the buyer at least implicitly relies in purchasing the warranty, and it is the value of a seller’s warranty that is embedded in the price that the buyer pays for the good. If a remote seller does not provide an express warranty to a remote buyer and the privity requirement bars other warranty claims by the latter against the former, there is no warranty constituting a credit obligation of the remote seller that is included in the price paid by the remote buyer.

In addition, as discussed below, it is not obvious that removing the privity barrier is optimal between a remote seller and a remote buyer. Moreover, to the extent removal of the privity limitation is optimal, including for reasons involving the potential unavailability of immediate sellers, remote sellers can provide express warranties to remote buyers, a phenomenon that is ubiquitous in today’s marketplace. As a corollary, if abolition of the privity requirement is appropriate to protect against immediate-seller solvency risks, it is questionable whether the law should allow remote sellers to disclaim warranties or include warranty modifications that preclude their extensions to remote buyers. Finally, remote buyers bear credit risks other than those pertaining to warranties with respect to their immediate sellers who become insolvent or are otherwise unavailable when they prepay for goods or lose the ability, derived from customer accommodation, to return conforming but personally undesirable goods to a seller for a refund.

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217. In the sale of used cars, buyers may purchase warranties sold by used car dealers or by third party warrantors. Mann, supra note 216, at 31–32. Quite obviously, a used car purchaser who obtains a warranty or service contract from a third party relies on the creditworthiness of that entity rather than the dealer in meeting its warranty obligations.


219. See infra text accompanying notes 272–320.

220. Manufacturer new car warranties clearly remove the risk of dealer insolvency as a matter both of contract law and of laws, such as the Washington Lemon Law, that place direct obligations on manufacturers that provide express warranties to consumer buyers. See WASH. REV. CODE § 19.118.041 (1987) (automobile manufacturer that makes a warranty and fails to conform a nonconforming vehicle to the warranty within a reasonable number of attempts must repurchase the vehicle or provide the consumer with a replacement).

221. See 16 C.F.R. § 700.6(b) (1977) (Magnuson-Moss warrantor may provide that the duration of a warranty lasts only during the ownership of the first purchaser); Lidstrand v. Silvercrest Indus., 28 Wash. App. 359, 361–65, 623 P.2d 710, 713–14 (1981) (express warranty extended to second hand purchasers since terms did not restrict warranty to original owner); BARKLEY CLARK & CHRISTOPHER SMITH, THE LAW OF PRODUCT WARRANTIES § 10.02(2) (1984) (warrantor able to restrict warranty to first purchaser).

222. The Bankruptcy Code, 11 U.S.C § 507(a)(6) (1994), grants priority to the unsecured claim of a buyer up to $1,800 for the deposit of money with a bankruptcy debtor in connection with the acquisition of property or services for personal, family, or household purposes that were not delivered or provided. The priority is limited to $1,800, is subject to other priorities, and, of course, depends in value on the assets in the debtor’s estate. Id. § 507.
The second argument was broached by the court in Nobility Homes of Texas, Inc. v. Shivers, in refusing to impose the privity requirement for the implied warranty of merchantability. "To hold otherwise," the court reasoned, "would encourage manufacturers to use thinly capitalized 'collapsible corporations' to sell their commercially inferior products leaving no one for the buyer to sue for his economic loss." In reality, this quasi-fraudulent behavior does not appear to be one in which many remote sellers would engage. Most sellers are interested in ongoing or repeat sales of their products to the market and would be concerned that knowledge of this buyer-injuring behavior would adversely affect such sales. Moreover, remote sellers frequently are creditors of their distributors, and the selection of poorly capitalized distributors imposes additional costs on the sellers. In addition, the argument has no validity to many remote sellers, such as component suppliers, who do not sell to distributors but to other manufacturers for inclusion of their product in another good. Finally, if the risk posited is a significant one, mere abolition of the privity requirement probably would be insufficient to protect against it. Rather, courts would have to invalidate remote seller warranty disclaimers as unconscionable, including those that are conspicuous and individually negotiated, to protect against the possibility that such disclaimers would be vehicles for the deceptive behavior.

The third argument for removing the privity barrier is that it allows manufacturers to hide behind the requirement to engage in unprovable fraud about product defects by misrepresenting or failing to disclose hidden defects. To the extent such behavior exists, however, the problem does not appear to result simply or even primarily from the privity requirement. Rather, the problem stems from the disclaimability of implied warranties. If a manufacturer with asymmetrical access to information

223. 557 S.W.2d 77, 81-83 (Tex. 1977).
224. Id. at 81-82. As authority for its assertion, the court cited E.F. Roberts, The Case of the Unwary Home Buyer: The Housing Merchant Did It, 52 CORNELL L. REV. 835, 836 (1967), which mentions the risk of dealing with a collapseable corporation that goes out of business, but does not discuss the strategic behavior to which the court referred.
225. Cf. George Akerlof, supra note 29, at 499-500 (sellers of brand name goods subject to consumer retaliation if the quality of goods does not meet expectations); Michael R. Darby & Ed Karni, Free Competition and the Optimal Amount of Fraud, 16 J.L. & ECON. 67, 73, 81-82 (1973) (fraudulent provision of services results in loss of goodwill and reduces price seller can charge for product).
226. HONNOLD, supra note 12, at 559.
227. See U.C.C. § 2-302 (2001); WHITE & SUMMERS, supra note 14, § 4-6 (discussing unconscionable warranty disclaimers).
228. See supra note 6 for warranty disclaimer requirements in Washington.
229. Speidel, supra note 8, at 47.
knows of latent defects in its goods and either lies or fails to disclose such information to buyers, disclaimers of warranties covering such defects are not efficient.\textsuperscript{231} Unlike some other types of transactions,\textsuperscript{232} however, manufacturers’ sales of goods do not generally involve asymmetrical access to information about existing product defects that would enable a manufacturer to engage in the fraudulent issuing of disclaimers.\textsuperscript{233} More importantly, the argument appears to ignore the existence of market forces to deter such fraud. Economists differentiate among product attributes based upon when they may be discovered.\textsuperscript{234} Search attributes are those product characteristics that a buyer can discover prior to purchase.\textsuperscript{235} Experience attributes are ones that can only be discovered through use of a product, and credence attributes are characteristics whose existence is very costly to ascertain.\textsuperscript{236} For latent defects of which a manufacturer is aware but that are discoverable by remote buyers through product use, that is, experience attributes, it is reasonable to believe that such buyers would discover the defects and discipline the miscreant manufacturer by refusing to purchase subsequent goods from it.\textsuperscript{237} As a result, such fraud is unlikely to be a long-term successful manufacturer strategy.\textsuperscript{238}

\textsuperscript{231} Id. That a disclaimer covers latent defects ordinarily is simply an allocation of the risk of such defects to a buyer. See Salt River Project Agr. Imp. & Power Dist. v. Westinghouse Elec. Corp., 694 P.2d 198, 213 (Ariz. 1984). Section 1-103(b), however, allows evidence of fraud under supplementary principles of law even though there is a disclaimer. See HAWKLAND, supra note 14, § 2-316:1; Torrance v. AS & L Motors, Ltd., 459 S.E.2d 67 (N.C. Ct. App. 1995) (disclaimer of implied warranty did not preclude evidence of misrepresentation constituting an unfair or deceptive trade practice).

\textsuperscript{232} Kronman, supra note 230, at 767–69 (arguing that asymmetries in access to information by lessor and lessees of real property justify a rule prohibiting disclaimers of the implied warranty of habitability in a lease of residential property).

\textsuperscript{233} Id. at 769 n.28 (indicating that asymmetry of information about product defects generally does not exist since a manufacturer’s knowledge about its defects is merely probabilistic, as is that of a consumer).

\textsuperscript{234} Darby, supra note 225, at 68–69; Phillip Nelson, Advertising as Information, 82 J. Pol. ECON. 729 (1974).

\textsuperscript{235} Darby, supra note 225, at 68–69.

\textsuperscript{236} Id.

\textsuperscript{237} See Akerlof, supra note 29, at 499–500; Darby, supra note 225, at 72 (the greater the discrepancy between promised and actually experienced attributes, the less likely customers will do business with firm); POSNER, supra note 198, § 4.1, at 94 (contracting party known to keep promises penalized by future refusals to deal).

\textsuperscript{238} A different case is presented if the fraud involves credence attributes whose existence is costly to ascertain. See Darby, supra note 225, at 70–77 (analyzing consumer and supplier behavior with respect to supplier fraud involving credence attributes). For these attributes, the relevant issue in the perpetration of fraud is not privity, but rather the ability of a seller, including an immediate seller with whom there is privity of contract, to make representations that are costly to verify.
B. Justice Rosellini's Dissent in Daughtry

In *Daughtry*, Justice Rosellini raised numerous objections to the privity requirement. He maintained that a loss from breach of warranty should be placed upon the party "to whom the ultimate gain inures," an argument apparently predicated on avoiding unjust enrichment. However, existing law already allows a remote buyer to obtain a restitutio- nary-like remedy against a remote seller in limited situations. This remedy is not strictly restitutio- nary since the remote buyer does not pay the price to the remote seller, and the amount for which the remote seller is liable is likely greater than the price received from its buyer. Under the Magnuson-Moss Warranty Act, a buyer who purchases a product with a "full" Magnuson-Moss warranty is entitled to a refund of the purchase price from the warrantor if the latter fails to remedy any defects in the product after a reasonable number of attempts at repair. Similarly, under Washington State's "Lemon Law," a new motor vehicle purchaser with a manufacturer's express warranty may obtain a replacement vehicle or refund of the purchase price from a warrantor if the warrantor is unable to conform the vehicle to the warranty after a reasonable number of attempts.

240. Id. at 719–20, 592 P.2d at 639.
241. Id. Professor Richard Speidel also posits unjust enrichment as one of the bases for extending a remote seller's warranty to a remote buyer. Speidel, *supra* note 8, at 46. He maintains that if a remote buyer has paid a "sound" price for unmerchantable goods to its seller, and the latter, through the chain of distribution, has paid a "sound" price for the unmerchantable goods to the remote seller, there are grounds for "reversing [the] unjust enrichment" obtained by the remote seller and extending its implied warranty of merchantability to the remote buyer. Id. Such extension is considered particularly appropriate where the immediate seller has gone out of business, is insolvent, or has disclaimed all warranties. Id.
A buyer’s right to recover back the price in the situations cited above differs in at least one crucial respect from eliminating the privity requirement to avoid unjust enrichment. When the remote buyer is able to recover the price, the remote seller either made a guarantee to the remote buyer against nonconformities in the goods or undertook to provide a remedy in case the goods failed to meet designated specifications. That commitment was embedded in the price paid by the remote buyer as one of the attributes purchased in the bundle of attributes sold with the goods. Where a remote seller makes no such express guarantee to the remote buyer, and the privity rule applies, no commitment from the remote seller is sold to the remote buyer. The remote buyer thereby assumes the risks of nonconformities for which the remote seller will not be responsible, undermining the unjust enrichment argument.

247. See 15 U.S.C. § 2301(6)(A) (defining written warranty as affirmation or promise which “affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time”); 15 U.S.C. § 2304 (providing for refund of price when warrantor that has given a full warranty fails to repair defects within reasonable number of attempts). WASH. REV. CODE § 19.118.041 (providing for return of price by new motor vehicle manufacturer who has made express warranty to consumer buyer). Of the cases allowing a remote buyer to revoke acceptance against a remote seller under section 2-608, most appear to involve an express warranty made by the remote seller to the remote buyer. See Durfee, 262 N.W.2d 349; Fode, 575 N.W.2d 682; Gochey, 572 A.2d 921; Murray, 265 N.W.2d 513. At least two, however, allow revocation based on a breach of an implied warranty of merchantability. See Harper, 671 F.2d at 1126; Guerdon, 531 So. 2d at 1206.

248. See 15 U.S.C. § 2301(6)(B) (defining written warranty as including “undertaking in writing . . . to refund, repair, replace, or take other remedial action with respect . . . in the event such product fails to meet the specifications set forth in the undertaking).


250. Although he concede that a remote buyer may bear the risks of not having a warranty claim against a remote seller, Professor Richard Speidel argues that the indirect marketing system reduces the chance that the remote seller and remote buyer will negotiate and properly allocate the risks of product defects. Speidel, supra note 8, at 47. The assumption that the risks involved will not be appropriately allocated because of the costliness of direct negotiations is misplaced. Remote sellers—manufacturers, for example—currently deal with risks encountered by remote buyers that such sellers can prevent or insure against more cheaply than buyers can by providing express warranties. See Priest, supra note 30, at 1307–13, 1328–43 (analyzing manufacturer express warranties under comparative advantage theory of warranties). Remote sellers that warrant products against defects in materials and manufacture, for example, would expressly guarantee remote buyers that their products were merchantable if the sellers could sell the warranty at a price exceeding their costs. See supra text accompanying note 212. Thus, the failure of remote sellers’ express warranties to include attributes such as merchantability implies an allocation of risk to remote buyers that any warranty of that nature is provided, if at all, by the remote buyer’s immediate seller.

As to the argument by Professor Speidel that a remote buyer has paid a “sound” price for unmerchantable goods, supra note 241, the buyer has not paid a price that includes a guarantee by the remote seller. Thus, when the seller to a remote buyer disclaims all warranties, becomes insolvent, or goes out of business, no right against the remote seller applies since the remote buyer has not purchased such a right. The argument that warranties ought to be extended to remote buyers to reallocate the risks involving immediate sellers means primarily that a new attribute should be included in the bundle of attributes sold by the immediate seller to the remote buyer. This attribute is a warranty obligation by the remote seller.
Justice Rosellini also maintained that the responsibility for a loss ought to be "upon the party whose product created the loss." Developing this argument from an efficiency perspective, Professor Richard Speidel has argued that a manufacturer is in the best position to ensure its goods conform to its express representations and that, as a merchant, the manufacturer is expected to know the relevant standards of merchantability and the probability that its goods will conform to those standards. As the entity in control of the goods, Professor Speidel has asserted, the manufacturer is the least cost avoider in assuring that the goods conform to these standards, and its failure to do so increases the total cost of loss avoidance and of any losses ensuing from failure of the goods to conform to these standards.

Although Professor Speidel is correct in his contention that a remote seller is in the best position to assure that its goods conform to its express warranty or insure the warrantee against loss, it does not necessarily follow that the privity requirement should be eliminated. Considerations discussed hereinafter indicate that privity is appropriate for a proper allocation of loss and that remote seller liability to remote buyers should be restricted to express commitments made from the former to the latter or to commitments of which the latter is a third-party beneficiary. Moreover, given Professor Speidel's efficiency analysis of the implied warranty of merchantability, it is curious that remote sellers so frequently disclaim the warranty and that such disclaimers persist in and are accepted by the market. Perhaps the best explanation for such behavior stems from the character of the warranty. U.C.C. section 2-314 provides that merchantable goods "must be at least such as," among other criteria, are fit for the "ordinary purposes" for which such goods are used. Absent some outside referent, the standard of merchantability is vague and indeterminate. It is therefore costly to determine whether the warranty has been breached. Furthermore, since the ordinary purposes of goods are determined by the trier of fact—frequently a jury—there is a substantial risk of error costs. The trier of fact may determine

252. Speidel, supra note 8, at 47.
253. See supra text accompanying notes 32–33 indicating that a seller will warrant certain product attributes when, in addition to other conditions, the seller can provide the attributes more cheaply than the buyer can. In that situation, the seller is the lowest cost provider of the attributes.
254. Id.
255. See infra text accompanying notes 272–322.
256. See supra text accompanying notes 62–105.
257. See Mann, supra note 216, at 37; E. ALLEN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 245–47 (4th ed. 1995) (recounting that the warranty of merchantability stated in section 2-314 is, according to one lawyer, "a very broad, subjective standard that juries can interpret to mean that buyer is entitled to relief if buyer is dissatisfied in virtually any way with the product").
that a nonordinary use is in fact an ordinary use. This risk is greater with products that have a range of potential uses, such as motor vehicles.258 With these costs, the warranty of merchantability is not efficient in many markets.259

Requiring privity of contract does not mean that the cost of or responsibility for a nonconforming good will not fall on a remote supplier. Market discipline, resulting in the loss of goodwill by remote suppliers who sell nonconforming goods, is likely to reduce their sales and cause such sellers to take cost-effective measures to avoid nonconformities.260 In addition, remote sellers may be subject to indemnification actions by their immediate purchasers to the extent the latter are responsible for losses caused by nonconforming goods.261 Further, section 2-607(5) allows a party with whom a remote buyer is in privity to vouch in262 a remote supplier who is responsible for the nonconforming goods.263

The preceding responses answer as well Justice Rosellini's contention that it is more appropriate to allow a remote buyer to proceed against a manufacturer than a retailer who has little knowledge of a product's attributes and has high inspection costs.264 This argument assumes a relationship in which a remote supplier, such as a manufacturer, sells a ready-to-market product to an intermediary that acts as a mere conduit to the ultimate buyer, selling the item to the ultimate user in the same condition in which it was received from the remote seller. This conception of the marketing of a good is inappropriate in many instances, especially for

258. See Priest, supra note 30, at 1344–46. Even if there is no implied warranty against a remote or any other seller, market discipline resulting from competition provides a strong incentive for the seller to provide goods that are in fact merchantable. See Holdych & Ferrell, supra note 6, at 271.

259. Professor George Priest found that disclaimers were more prevalent from the manufacturers of some goods than others. Priest, supra note 30, at 1345–46. He attributed that difference in the frequency of disclaimers to the different uses to which goods might be put, positing that disclaimers were more frequent with goods that have more potential uses. Id.

260. Cf: Akerlof, supra note 29, at 499–500; Darby, supra note 225, at 73, 81–82 (discussing loss of goodwill and reduced prices from fraudulent provision of services); Benjamin Klein & Keith B. Leffler, The Role of Market Forces in Assuring Contractual Performance, 89 J. POL. ECON. 615 (1981); Posner, supra note 198, § 4.1, at 94. The taking of cost-effective measures to eliminate nonconformities by remote sellers does not mean that remote sellers' products will be defect free. Defects will continue to exist that cannot be eliminated in a cost-effective manner. Moreover, disputes will continue concerning whether goods were defective when sold by remote sellers or whether problems with the goods arose from handling or use by a subsequent party, such as a retail seller. See infra text accompanying notes 272–274.

261. See supra notes 90–93 and accompanying text.

262. See supra note 97 and accompanying text.


goods for which there is likely to be an action for breach of warranty. In such circumstances, entities subsequent to the remote sellers in the chain of distribution frequently modify or prepare the goods for sale to the ultimate purchaser. Preparing a good for sale to the end purchaser may be undertaken at the direction and under the control of a remote seller, making the entity performing the preparations the remote seller’s agent. In that case any nonconformities arising from the preparation may properly be attributable to the remote seller. On the other hand, modifications or handling that produce problems with a good may not be pursuant to the direction or under the control of the remote seller and may occur at a number of places in the ultimate distribution of the good.

Such third-party processing or handling of goods occurred in both the Daughtry and Touchet cases. In Daughtry, the remote seller manufactured a sewage system that one of its distributors sold to a third party. The third party then sold the system to the remote purchaser and installed it on his property. In the suit against the remote seller for the system’s failure, the principal issue at trial was whether the plaintiff’s problems were attributable to a defect in the defendant’s system or to inadequate drainage, a problem that may have been caused by the system’s installation. In Touchet, the plaintiff contracted with an independent contractor to build a grain storage building, and the latter contracted with the remote seller to design the building and fabricate its parts. When the building began to collapse, there was evidence of faulty design or construction, the latter apparently performed by the plaintiff’s contractor.

265. Given the costs of suing for breach of warranty and the unavailability of attorneys’ fees except in limited circumstances, 15 U.S.C. § 2310(d)(2) (consumer who prevails in civil action under Magnuson-Moss Warranty Act); WASH. REV. CODE § 19.86.090 (2000) (person injured by violation of Consumer Protection Act), most actions will be brought where substantial economic loss is involved for items such as mobile homes, automobiles, boats, etc., and not for packaged goods on a remote seller’s shelf. See Reitz, supra note 16, at 358. For the prior items, a dealer may be likely to take actions in preparing goods for sale or store them in a manner that may affect the condition in which they are received by the ultimate purchaser.

266. See CONSUMER PRODUCT WARRANTIES, supra note 203, § 8.03, at 118–25. Professor Reitz concludes: “A manufacturer’s product, whether a component or a larger assembly, can and frequently does undergo change before the retail sale to the complaining buyer.” Id.


268. 91 Wash. 2d at 706–707, 592 P.2d at 632.
269. Id.
270. 119 Wash. 2d at 338, 831 P.2d at 725.
271. Id. at 338–39, 831 P.2d at 725.
The problem with abrogating the privity requirement involving the marketing of goods that are subject to later processing, modification, or handling is exemplified most vividly by *Morrow v. New Moon Homes, Inc.* There, the plaintiffs purchased a used mobile home from a mobile home retailer who did not appear to have any relationship to the manufacturer defendant. Someone, perhaps the original seller, modified the home, modifications that included installing a stove pipe for an oil furnace that had replaced the manufacturer’s electrical furnace. Shortly after purchasing the home, the plaintiffs noticed numerous problems, including windows and doors that were out of square, interior walls that did not fit together, and an exterior that had substantial leakage. In an action against the manufacturer for breach of the implied warranty of merchantability, the retailer having gone out of business, the court held that the plaintiffs could sue the manufacturer for breach of warranty despite an absence of privity. The court’s opinion contained no evidence of the condition of the home when delivered to the dealer who sold the home to the initial buyers. Moreover, it does not appear which, if any, of the problems were attributable to a breach of warranty by the manufacturer and which were caused or contributed to by the maker of the modifications or by the handling or processing of the home by either the original dealer or the retailer who sold the home to the plaintiffs.

Admittedly, at trial after remand by the Alaska Supreme Court, the plaintiffs had to prove that the manufacturer breached its warranty and that the breach caused the plaintiffs’ loss. The manufacturer could introduce evidence that the loss did not result from a breach of the manufacturer’s implied warranty of merchantability. Obtaining and producing evidence pertaining to these issues is, however, likely to be costly. This is particularly so when suit is brought by a secondhand purchaser, as in *Morrow*, and the issues involve not only the original condition of the goods when delivered by the manufacturer but also the nature of any modifications and usage of the goods and the extent to which they con-

272. 548 P.2d 279 (Alaska 1976). The case presents not only the problem of conduct by the initial or subsequent retail sellers who may have caused or contributed to the loss, but also that of intervening retail buyers whose conduct may have had similar consequences.

273. *Id.* at 281. Apparently, the retailer who sold the home to the plaintiffs acquired it sometime thereafter. Information about how long and under what conditions the retailer retained the home prior to sale to the plaintiffs does not appear in the court’s opinion.

274. *Id.* at 291-292.

275. As discussed *infra* in text accompanying notes 301-306, the manufacturer could also introduce evidence that the implied warranty of merchantability had been disclaimed or was limited by the manufacturer’s description of the home to the original purchaser.
tributed to or caused the loss.\textsuperscript{276} The cost of obtaining this evidence, together with the risk that a trier of fact will misassess the cause of the loss, increases the error costs in determining warranty claims against the remote seller. Forcing purchasers to sue their immediate sellers is likely to minimize these error costs by causing the parties who have the cheapest access to the relevant evidence to obtain it and then either vouch in\textsuperscript{277} or implead\textsuperscript{278} a remote seller. This reduction in error cost, together with other costs discussed hereinafter,\textsuperscript{279} is likely to reduce overall warranty enforcement costs.\textsuperscript{280}

\begin{itemize}
\item \textsuperscript{276} See Reitz, \textit{supra} note 16, at 380–81 (extending remote seller implied warranty of merchantability to second-hand purchaser in retail market might encourage claims by the latter that might be defended at considerable expense).
\item \textsuperscript{277} See \textit{supra} note 80 and accompanying text.
\item \textsuperscript{278} WASH. SUP. CT. CIV. R. 14.
\item \textsuperscript{279} See \textit{infra} text accompanying notes 288–319.
\item \textsuperscript{280} Professor Epstein points out that the relevant question is whether the privity rule increases or decreases total warranty enforcement costs. \textit{Richard A. Epstein, Modern Products Liability Law} 14–15 (1980). Those costs include not only the costs of litigating warranty claims but also the costs of erroneous decisions that different enforcement rules produce. See \textit{id.} Elimination of the privity requirement may minimize total litigation costs by reducing the number of suits. But in assessing those litigation costs, one has to take into account the effects of the vouching rule of section 2-607(5) and impleader rules such as Washington Superior Court Civil Rule 14. On the other hand, elimination of the privity requirement is likely to increase the costs of erroneous determinations. In another writing, Professor Epstein argues against the privity requirement for products liability cases:
\end{itemize}

The general attack on the privity limitation rests on an important error of undergeneralization. The typical cases in which the issue is raised involve ordinary consumer goods sold at retail. . . . Within this context the privity doctrine is quite unappealing because the immediate seller is typically a passive conduit of a product that is designed and prepared by others.


As can be seen, Professor Epstein's argument in favor of abolishing the privity requirement is premised on the immediate seller being a passive conduit for the sale of a good. He then maintains that privity is appropriate when a workman seeks to impose liability on a manufacturer of a machine tool purchased by his or her employer. In that instance it is rare for the employer to be a mere conduit between the manufacturer and the employee since machines frequently are customized or maintained by employers, \textit{id.}, phenomena comparable to that for many goods that are the subject of warranty suits by purchasers such as \textit{in Morrow}. If most purchaser warranty actions were for the sale of prepackaged goods for which the immediate seller was a mere conduit, then abolition of the privity requirement, at least on the basis of decreasing enforcement costs, would probably be justified. It is much less likely so when other parties have processed the goods.

Given these potential error costs, the question exists why a remote seller, such as a manufacturer, would make an express warranty to a remote buyer. Part of the answer turns on the nature of many if not most such warranties and the remedies they provide. Most manufacturer warranties are against defects in manufacture and workmanship, items limited and within the manufacturer's knowledge and control. Moreover, many durable goods warranties, for example by automobile manufacturers, require periodic inspection and maintenance of the good during the warranty period to protect against buyer misuse. Remedies are quite limited, generally to repair or replacement of defective parts or defectively installed parts, and they exclude liability for consequential damages. The first determination with respect to whether there has been a breach of warranty is made by either the manufacturer or an agent and not by some third party. Even if the manufacturer erroneously
The court in *Morrow*\(^2\) and Justice Rosellini in *Daughty*\(^3\) cited, as one of the reasons for allowing a remote buyer to sue a manufacturer, the desire to avoid circuitous litigation, that is, an action by a remote buyer against its seller followed by a suit by the seller against a remote supplier. For a number of reasons, however, a direct action by the remote buyer against a remote seller is not appropriate. First, the costs of circuitous litigation are reduced by U.C.C. section 2-607(5), which provides a significant incentive for a remote seller to defend the initial action by a remote buyer against its seller.\(^4\) These costs are further reduced by impleader rules,\(^5\) which allow an intermediate seller to impale the remote seller as a third-party defendant when sued by a remote buyer. Moreover, a remote seller can eliminate the costs of circuitous litigation by making an express warranty to a remote buyer, as the court recognized in *Tex Enterprises, Inc.*,\(^6\) or by making the remote purchaser a third-party beneficiary of its warranty to its immediate purchaser.\(^7\) Second, allow-

determines that the product conforming to the warranty, there is no liability for consequential damages unless the remedy limitation is deemed unconscionable or fails of its essential purpose. See U.C.C. §§ 2-302, 2-719(2) (2001).

281. 548 P.2d at 289. The Alaska Court objected to circularity of litigation on the ground of waste of judicial resources and not an increase in total overall costs. Id. From an efficiency perspective, the goal is to maximize total value minus total social costs and not simply judicial costs. Cf. George L. Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960, 962 n.5 (1982); NICHOLSON, supra note 182, at 521–22 (discussing need to include total social cost in determining efficient level of output); ROY F. RUFFIN & PAUL R. GREGORY, PRINCIPLES OF MICROECONOMICS 229 (2d ed. 1986) (discussing inefficiencies resulting from externalities when marginal benefit is less than total marginal social cost). Moreover, it is curious how the court would respond to a remote seller’s modification of the implied warranty of merchantability that limited its enforcement to the seller’s immediate buyer. Cf. supra note 178. If the modification complied with the requirements of section 2-316 and were not unconscionable under section 2-302, it is doubtful that a court could refuse to enforce the limitation even though it might lead to circularity of litigation as a result of a remote buyer having to sue its seller, which would then have to sue its immediate seller. To be sure, courts may adopt rules such as the one requiring that contract terms be reasonably certain, RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981), to prevent contracting parties from shifting negotiating costs onto the public, POSNER, supra note 198, § 4.2. Nonetheless, it is curious for courts to create contractual obligations that increase the costs to the parties in order to reduce public enforcement costs.

282. 91 Wash. 2d at 718, 592 P.2d at 638.

283. Under section 2-607(5), the seller to the remote buyer may give the remote seller notice of the suit by the remote buyer against it. If the notice informs the remote seller that it may come in and defend the action and that, if it does not, it will be bound in any action by the seller against the remote seller by any factual determination common to the two litigations, the remote seller is bound by those factual determinations unless the remote seller defends the action by the remote buyer against its seller.


286. One can expect a remote seller to make such an express warranty where, among other things, it reduces total costs to the remote seller, the immediate buyer, and the remote buyer—particularly the immediate buyer who otherwise might have to litigate two actions. To the extent none of the three bore the public expense of an additional lawsuit, one would not expect they would
ing a remote buyer to maintain a direct action against a remote seller is likely to decrease the value of defenses a remote seller otherwise would have against its immediate buyer, thereby increasing the cost of the sale to the immediate buyer in a potentially inefficient manner. Section 2-607(3) requires a buyer to give a seller reasonable notice of breach or be barred from any remedy. If a remote buyer is able to sue a remote supplier for breach of warranty, there is a substantial likelihood either that the reasonable notice period will be extended in a manner disadvantageous to the remote supplier or that notice to the remote supplier will be eliminated altogether. Either consequence, but particularly the latter, would be prejudicial to a remote supplier in seeking to minimize any losses resulting from nonconformities with its goods, in negotiating a settlement, in preparing to defend a suit, or in protecting against a stale

provide for such an express warranty to avoid such an expense. Cf. Posner, supra note 198, § 4.2 (parties try to shift negotiating costs onto courts)

287. The fact that a direct action by a remote buyer against a remote supplier would raise the costs of the original transaction between the supplier and its immediate buyer does not make such a direct action inefficient. Rather, such an action is inefficient only if it does not maximize total value and increases total social cost. See supra note 281. If such an action maximizes total value and lowers total social costs—for example by increasing appropriate incentives for remote suppliers to take cost-effective measures to provide conforming products, or by reducing litigation costs in amounts greater than the increased costs of direct remote buyer actions—direct actions by remote buyers would not be inefficient.

288. See supra note 9.

289. Comment 4 to section 2-607(3) states that a reasonable time for a consumer buyer is to be judged by a different standard from that applied to a merchant buyer. According to the comment, the purpose of the notice requirement is to defeat commercial bad faith and not deprive a good faith consumer of a remedy. The problem with the comment is that the section requires notice in a "reasonable time," not in a time consistent with good faith. The latter standard does not focus on the reasonableness or cost effectiveness of the notice in terms of the cost to the buyer of giving notice compared to the cost of not receiving timely notice to the seller, but rather on a consumer buyer's honesty in fact. Courts are more generous in excusing delays in notification by consumers. See Wal-Mart Stores, Inc v. Wheeler, 586 S.E.2d 83 (Ga. Ct. App. 2003) (two year delay in notification not unreasonable as a matter of law); Maybank v. S.S. Kresge Co., 273 S.E.2d 681 (N.C. 1981) (three year delay in notification not unreasonable as a matter of law). Harry G. Prince, Overprotecting the Consumer? Section 2-607(3)(a) Notice of Breach in Nonpriivity Contexts, 66 N.C.L. REV. 107, 126 (1987) (courts more generous with consumers in determining whether delay in giving notice is reasonable).

claim. \footnote{Cf. Prince, supra note 289, at 116 (articulating the specific purposes identified by the courts as being served by the section 2-607(a)(3) notice requirement).} Similarly, the statute of limitations in section 2-725(2) may be longer with respect to an action by a remote purchaser. Authority is divided on the question of whether breach of warranty occurs and the statute of limitations begins to run on tender of delivery of the goods to the remote purchaser or to the immediate purchaser. \footnote{See Heller v. U.S. Suzuki Motor Corp., 477 N.E.2d 434 (N.Y. 1985) (statute of limitations runs from date of tender by remote seller not tender to remote buyer). See, e.g., Berry v. G. D. Searle & Co., 309 N.E.2d 550, 554 (Ill. 1974); Redfield v. Mead, Johnson & Co., 512 P.2d 776, 778–79 (Or. 1973) (time of tender to remote buyer in action for personal injuries); Patterson v. Her Majesty Indus., Inc., 450 F. Supp. 425, 433 (E.D. Pa. 1978).}

More significantly, a remote seller may have sold the goods to its immediate buyer either with no warranty or with one significantly different from that contemplated by a remote buyer. With respect to an express warranty, a remote supplier’s affirmation or description under section 2-313 may not have been part of the basis of the bargain between the supplier and its immediate buyer if, for example, the latter knew the representation was false. \footnote{See Cipollone v. Liggett Group, Inc., 893 F.2d 541, 569 (3rd Cir. 1990); Coffee v. Ulysses Irr. Pipe Co., 501 F. Supp. 239, 242 (N.D. Tex. 1980).} \footnote{463 F.2d 34 (7th Cir. 1980).} For instance, in \textit{Royal Business Machines, Inc. v. Lorraine Corp.}, \footnote{Id. at 41, 45.} a buyer purchased copy machines from a manufacturer over an eighteen-month period to lease to its customers. The manufacturer made a number of representations concerning the copiers’ attributes. When the copiers failed to possess these attributes, the buyer sued for breach of warranty. On appeal from a judgment for the buyer, the appellate court held that the trial court erred in failing to ascertain the buyer’s knowledge concerning the veracity of the seller’s representations since the buyer may have acquired knowledge over the eighteen-month period that certain of the representations were false. \footnote{Id. at 44.} \footnote{See id.} According to the court, “[t]he same representations that could have constituted an express warranty early in the series of transactions might not have qualified as an express warranty in a later transaction if the buyer had acquired independent knowledge as to the fact asserted.” \footnote{Thus, as to each purchase, the buyer’s state of knowledge had to be established. If the buyer’s lessees or subvendees had been able to sue the manufacturer based on the representations, it would have been necessary to prove in which purchase from the manufacturer the copier in question had been acquired and what the buyer’s state of knowledge was at the time of that purchase. Such evidence probably would have been cheaper to obtain in an action be-}
tween the manufacturer and its immediate buyer than in an action between the manufacturer and a remote buyer.\textsuperscript{298}

With respect to an implied warranty, the contract between a remote seller and its buyer may affect both the existence and character of any such warranty. As discussed previously, authority is divided on the question,\textsuperscript{299} with the Court of Appeals in \textit{Tex Enterprises, Inc.}\textsuperscript{300} holding that a remote buyer is bound by a disclaimer of an implied warranty contained in the contract between a manufacturer and its immediate purchaser. To return to the facts in the \textit{Morrow} case, the mobile home manufacturer's contract with its purchaser may have contained a disclaimer of implied warranties that complied with the requirements of section 2-316(2),\textsuperscript{301} or the immediate buyer may have been given an opportunity to inspect the home.\textsuperscript{302} Such an inspection may have revealed some of the defects involved in the case. Further, the purchaser may have otherwise known of defects in the home prior to purchase,\textsuperscript{303} or a course of dealing might have modified or excluded an implied warranty.\textsuperscript{304}

If the Alaska Supreme Court in \textit{Morrow} followed the disclaimer rule adopted by the Washington Court of Appeals in \textit{Tex Enterprises, Inc.},\textsuperscript{305} any one of these factors should have modified or disclaimed an implied warranty to the remote buyers. Even if the original transaction did not result in a disclaimer of implied warranties, the manufacturer may have described the home in a manner such as "factory second,"

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\textsuperscript{298} Evidence pertaining to that issue may be more costly to obtain in an action by the remote buyer against the remote seller since it would involve evidence about the immediate purchaser, an entity that might no longer exist, as in the \textit{Morrow} case, or from whom evidence might be difficult to obtain.

\textsuperscript{299} See \textit{supra} note 182 and accompanying text.

\textsuperscript{300} 110 Wash. App. 197, 39 P.3d 362.

\textsuperscript{301} The court in \textit{Morrow} opined that: "Our decision today preserves the statutory rights of the manufacturer to define his potential liability to the ultimate consumer, by means of express disclaimers and limitations..." Morrow v. New Moon Homes, 548 P.2d 279, 292 (Alaska 1976).

\textsuperscript{302} U.C.C. § 2-316(3)(b) (2001) ("When the buyer before entering into the contract has examined the goods or the sample or model fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.").


\textsuperscript{304} § 2-316(3)(c).

\textsuperscript{305} Although the Alaska Supreme Court did not specify whether a disclaimer in a contract between a remote seller and its immediate buyer would be effective against a remote buyer, the court indicated that a disclaimer would have to meet the Code's requirements of conscionability. \textit{Morrow}, 548 P.2d at 292. On this issue, the court stated that "close judicial scrutiny is warranted when a manufacturer exacts a liability disclaimer or remedy limitation from a consumer who enjoys little or no bargaining power in the market place." \textit{Id.} at 292 n.43. The court's caution concerning unconscionability clearly suggests that a disclaimer affecting a remote buyer would have to be effectuated between a remote seller and that buyer and not in the contract between the remote seller and its buyer.
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which would have determined the character of the implied warranty
given to the immediate purchaser. 306 Abrogation of the privity require-
ment should have meant only that the remote purchasers could enforce
the implied warranty against the manufacturer based on the latter's de-
scription to its buyer and not on a different description in the buyer's
contract with the initial retail purchaser. 307 Although a remote purchaser
might not receive direct evidence of a remote seller's description or dis-
claimer and might develop different expectations concerning the remote
seller's warranty obligation, the price the remote buyer ought to pay
should, absent misrepresentation by its immediate seller, reflect and have
embedded in it the description or disclaimer by the remote seller. 308

Moreover, even if a remote buyer is restricted to the implied war-
ranty that is properly imposed on a remote seller, determination of any
issues concerning the nature of an implied warranty by a remote seller,
including potential course of dealing between that seller and its imme-
diate buyer, 309 probably is more accurately and cheaply accomplished in an
action between that seller and its immediate buyer. Finally, to the extent
a remote purchaser can successfully sue a remote seller for breach of an
express or implied warranty that did not exist or for an implied warranty
different from that purchased by the immediate buyer, the remote sup-
plier will include the expected cost of this warranty liability in the sale to
its immediate purchaser. Such a result will change their bargain in a
suboptimal manner. 310

A remote seller's damages might be substantially different in a
breach of warranty action by a remote buyer than they would be in an
action by an immediate buyer. Under section 2-714(2), a buyer suing for
breach of warranty is entitled to damages for direct economic loss mea-
ured by the difference in value of the goods accepted and the value they

Reitz, supra note 16, at 392.
307. See U.C.C. § 2-318, cmt. 2 (1966) (purpose of section on third-party beneficiaries is to
give certain beneficiaries the same warranty which the buyer received in the contract of sale). One
proposal to extend express and implied warranties to remote buyers would restrict a remote seller's
obligation to the remote buyer to the enforceable terms of the original warranty and preclude en-
forcement of a remote seller's warranty if the description of the goods in the contract between the
remote purchaser and its seller were inconsistent with the description in the remote seller's warranty.
Reitz, supra note 16, at 399. Determining the original description of the goods or the enforceable
terms given by the remote seller to its buyer might not be possible, as might have been the case in
Morrow, 548 P.2d 279.
308. See supra note 182 (discussing the effect of a remote seller's disclaimer of warranty on
the price paid by a remote buyer to its seller).
309. See § 2-314(3) (implied warranties may arise from course of dealing and usage of trade);
§ 2-316(3)(c) (implied warranty excluded by course of dealing or usage of trade).
310. If a full implied warranty or an express warranty were optimal, one would assume that
such terms would have been in the original contract.
would have had if they had conformed to the seller’s warranty. A remote seller could be liable for significantly higher damages if a remote buyer can maintain an action for breach of warranty, and the difference in value is based on the retail market and not on the market in which the remote seller sold the good. The appropriate value to measure damages resulting from direct economic loss is that based on the market in which the seller sells the goods, since that value provides the appropriate incentive for the seller to assure that the goods have the warranted attributes or to insure against their absence.

A further risk of increased damages to a remote seller derives from the fact that, as discussed previously, goods that may be subject to an action for breach of warranty frequently are modified or prepared for sale by those who are in privity with remote buyers. To the extent the value

311. "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." U.C.C. § 2-712(b) (2001).

312. See Reitz, supra note 16, at 118–19; White & Summers, supra note 14, § 11-5. This difference in the measure of damages under section 2-714 may, however, be reduced substantially by the immediate buyer’s right to consequential damages under section 2-715 or to indemnification for damages for which the buyer is obligated to a third party. See supra notes 90–97. Where a warrantor has reason to know that its breach of warranty will result in its buyer suffering losses on transactions with third parties or being liable to third parties for breach of contract, the warrantor may be liable for these losses by its buyer. See U.C.C. § 2-715, cmt. 6 (2001); Nat’l Controls Corp. v. Nat’l Semiconductor Corp., 833 F.2d 491 (3rd Cir. 1987) (buyer entitled to recover lost profits as consequential damages for breach of warranty where seller knows or has reason to know goods are being bought for resale); Rock Creek Ginger Ale Co., Inc. v. Thermnice Corp., 352 F. Supp. 522, 525, 530 (D.D.C. 1971) (manufacturer liable to distributor for damages for which distributor was liable to remote buyer); Dan B. Dobbs, Handbook on the Law of Remedies: Damages-Equity-Restitution § 12.3 (1973). This liability may include damages that the immediate buyer has incurred, measured by the remote buyer’s lost benefit of the bargain. See Rock Creek Ginger Ale Co., 352 F. Supp. at 525; Dobbs, supra. The liability for losses to an immediate buyer for its losses on collateral transactions involving remote buyers is likely to be reduced by a clause excluding liability for consequential damages incurred by the immediate buyer. See U.C.C. § 2-719 (2001) (allowing exclusion of liability for consequential damages). In addition, a warrantor may be subject to an implied obligation of indemnification arising when breach of its warranty causes the buyer to be liable to a third party. Supra notes 90–97. Although the dissent in Central Washington Refrigeration, Inc., maintained that the mere existence of a contract under the U.C.C. is sufficient to give rise to an implied right of indemnification, Central Washington Refrigeration Inc. v. Barbee, 133 Wash. 2d 509, 522 n.5, 946 P.2d 760, 767 n.5 (1997), the majority held that the right arises where there is a defect in the goods constituting a breach of an express or implied warranty. Id. at 516–17, 946 P.2d at 764. Accordingly, if there is no warranty, there should be no basis for the implied indemnity claim since the buyer obtained the performance for which it bargained. See Urban Dev., Inc., v. Evergreen Bldg. Pros., L.L.C., 114 Wash. App. 639, 646–47, 59 P.3d 112, 117 (2002) (no implied indemnity obligation against subcontractors providing services based on implied warranty). Similarly, if the parties effectively exclude any liability for consequential damages, including any damages for which the buyer may be liable to a third party, the buyer should have no implied right of indemnification since the contract negates that obligation. See Restatement of Restitution § 76, cmt. b (1937) (implied right to indemnification subject to terms of parties’ contract).

313. See supra text accompanying note 265.
of such modifications or preparations is reflected in the retail value of the goods, their inclusion in the claim against a remote seller might inappropriately increase the seller’s damages for direct economic loss.314

Significantly, both Lidstrand and Smith v. Behr Process Corp.315 hold that a remote purchaser can recover consequential damages for breach of express or implied warranties by a remote supplier.316 The Lidstrand decision is appropriate to the extent the buyers truly were third-party beneficiaries of the remote seller’s express warranty since the liability for such damages would be undertaken by the seller, absent an effective limitation of liability. More problematic is the result in Smith, where remote buyers who did not appear to be third-party beneficiaries recovered consequential damages.317 Recovery of consequential damages is subject to the limitation in section 2-715(a) that a seller have reason to know of any general or particular requirements or needs of the buyer at the time of contracting.318 Nevertheless, remote buyers have better information about such losses and are generally in a better position to take measures to protect or insure against them than remote sellers are.319 Requiring remote sellers to be responsible for such consequential losses is inefficient. It causes remote buyers with higher consequential losses to take fewer precautions or to underinsure against such losses and causes buyers with lower losses to reduce the quantity of the goods purchased.320

314. The difference in value is frequently measured by the cost of repair or replacement. See WHITE & SUMMERS, supra note 14, § 10.2(a). To the extent a good is repairable, the value of modifications or preparation may not be reflected in the measure of damages since the only damages should be the cost to repair. On the other hand, if the measure is the cost of replacement, the value of such modifications and preparations may be included in the determination of damages but should be excluded to base the buyer’s damages on the implicit bargain with the remote seller. Cf. id. (indicating that replacement value should be adjusted if a buyer is replacing a used good that has undergone deterioration with a new good).


316. In Kadiak, the manufacturer was held liable for consequential losses consisting of lost profits and property loss suffered by a remote buyer of one of its motors when the motor caught fire, delaying the buyer’s fishing operations. On appeal, the manufacturer contested only the trial court’s instruction to the jury on loss profits, contending that the instruction allowed conjectural or speculative damages by the jury, and not the award of consequential damages per se. See Kadiak Fisheries Co. v. Murphy Diesel, Inc., 70 Wash. 2d 153, 167–68, 422 P.2d 496, 505 (1967).

317. 113 Wash. App. at 345–46, 54 P.3d at 686.

318. See CONSUMER PRODUCT WARRANTIES, supra note 203 § 8.03, at 119 (remote seller probably unaware of retail buyer’s particular needs and requirements and may not know of general requirements as well). The foreseeability limitation does not apply to consequential damages consisting of injury to person or property. U.C.C. § 2-715(2)(b) (2001).


320. As indicated above, authority is divided on the question of whether a remote buyer can revoke its acceptance of goods against a remote seller and recover the price. See supra note 249 and accompanying text. In some instances, revocation may be a cost-minimizing remedy with the goods being more valuable in the hands of the remote seller than they are in the hands of the buyer. See
Finally, a seller to a remote buyer may have sold the goods to the buyer either with no warranty or with a warranty less extensive than that from the remote seller. In *Daoughty*, Justice Rosellini perceived the absence of a warranty by an immediate seller as a reason for allowing an action by a remote buyer against a remote seller since the remote seller might escape responsibility for its breach of warranty.\textsuperscript{321} In fact, however, the absence of a warranty or a more restrictive warranty from an immediate seller mandates that a remote buyer not have an action against the remote seller.\textsuperscript{322} If there is no warranty in the contract between the remote buyer and its seller, the remote buyer has not paid for any warranty, unless the remote seller has either made a representation directly to the remote buyer or has made a third-party beneficiary contract with its immediate buyer. In other words, a warranty is not part of the bundle of attributes for which the remote buyer paid when it purchased the good.\textsuperscript{323} Allowing a buyer to enforce a remote manufacturer’s warranty in such circumstances allows the remote buyer to obtain and enforce a better bargain than that for which it paid and imposes inefficient liability on the remote manufacturer.

If a buyer has no warranty from its seller and it is efficient for the remote seller to be legally responsible to the remote buyer for the attributes of goods, the solution is for the remote seller to make an express warranty to the remote buyer that the latter can enforce against the former. Indeed, in *Tex Enterprises, Inc.*,\textsuperscript{324} the court insightfully perceived this express warranty solution as the appropriate response to the perception that the privity requirement allows remote sellers to escape responsibility for their goods and promotes circuitous litigation.\textsuperscript{325} As the *Baughn*\textsuperscript{326} case demonstrates, a remote seller can make an enforceable express warranty, provided the buyer is aware of the representation prior to entering into a contract to purchase the goods. Moreover, a remote seller can make a remote buyer a third-party beneficiary of an express warranty to its immediate buyer in a manner consistent with third-party

\textsuperscript{321} *Daoughty*, 91 Wash. 2d at 718, 592 P.2d at 638.

\textsuperscript{322} Cf. Reitz, supra note 16, at 398 (under proposed revision to section 2-318 remote buyer who took goods from its seller with different terms from remote seller’s warranty would not obtain benefit of remote seller’s warranty).

\textsuperscript{323} See Holdych & Mann, supra note 127, at 794–96 (discussing warranties as product attributes and the inclusion of those attributes in a product’s price).

\textsuperscript{324} 149 Wash. 2d 204, 66 P.3d 625 (2003).

\textsuperscript{325} Id. at 213–14, 66 P.3d at 630.

\textsuperscript{326} 107 Wash. 2d at 151–52, 727 P.2d at 669.
beneficiary principles.\textsuperscript{327} Either a direct express warranty to a remote buyer or a third-party beneficiary contract is a preferable solution to problems emanating from the privity requirement since a remote seller’s express warranty can establish efficient limitations not only on the attributes being warranted but also on the remedies available for breach.\textsuperscript{328}

\textsuperscript{327} See supra text accompanying notes 62–66 and 100–101.

\textsuperscript{328} Other than the formation issues mentioned in the text, (see supra text accompanying notes 123–130) several objections exist to relying on remote sellers’ express warranties to establish such sellers’ product quality obligations to remote buyers. The first is premised on the superior economic bargaining or market power of remote sellers such as manufacturers. It is posited that such sellers will use their superior power vis-à-vis remote buyers to provide inferior warranties, warranty disclaimers, and remedy limitations on a take-it-or-leave-it basis. See, e.g., Henningen v. Bloomfield Motors, Inc., 161 A.2d 69, 87 (N.J. 1960). This argument is refuted by theoretical analysis demonstrating that a seller with market power is better off selling a buyer terms for which the latter is willing to pay so long as the price exceeds the seller’s cost. See Coase, supra note 212, at 494. Moreover, empirical data show no correlation between warranty and remedy terms and market power. Priest, supra note 30, at 1325.

The second objection is based not on sellers’ bargaining power but on buyers’ limited shopping capacities. Given the large number of product attributes buyers confront in shopping for products and comparing product attributes, buyers only shop for and price product attributes they consider important, i.e., salient. Russell Korobkin, \textit{Bounded Rationality, Standard Form Contracts, and Unconscionability}, 70 U. CHI. L. REV. 1203, 1216–44 (2003). Sellers will provide the salient terms that buyers prefer, but sellers will include suboptimal non-salient terms to increase their profits at the expense of unknowing buyers. \textit{Id.} at 1234–35. Although it is suggested that warranty terms and remedy limitations are not salient contract terms, \textit{id.} at 1238, that conclusion is questionable, particularly with respect to the kinds of products that are likely to become the subject of lawsuits. Were buyers not concerned about warranty terms, one would expect sellers to sell their products with no warranties since the inclusion of a warranty imposes costs on a seller, at a minimum in processing warranty claims. Yet in markets for comparatively expensive items, including consumer goods such as mobile homes, automobiles, recreational vehicles, and appliances, warranties by both sellers and third parties are quite common, if not ubiquitous. See Mann, supra note 216, at 27–32 (analyzing dealer and third party warranties for used automobiles); Priest, supra note 30, at 1320–43 (comparing warranties of 62 consumer products); George L. Priest, \textit{Special Statutes: The Structure and Operation of the Magnuson-Moss Warranty Act} 246, 267–74 in \textit{Kenneth W. Clarkson \& Timothy J. Muris, The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior} (1981) (analyzing the content of warranties for 43 consumer durable goods).

VI. CONCLUSION

With the exception of some decisions applying a third-party beneficiary analysis to express and implied warranties to immediate purchasers, Washington cases have adhered to a privity of contract requirement consistent with the analysis in this article. In Tex Enterprises, Inc., the Washington Supreme Court appropriately refused to abrogate the privity requirement for an implied warranty of merchantability or fitness for purpose when a remote seller makes an express representation about a good to a remote buyer. Had the court allowed a buyer to make an implied warranty claim in such a circumstance, its decision would probably have produced an anomalous result. A remote buyer who does not learn of a remote seller's representation prior to purchase, or to whom a remote seller does not make a representation made to other buyers, would not have been able to enforce an implied warranty against the remote seller, whereas a remote buyer who knew of the representation could have done so. The result would have been anomalous at least with respect to the implied warranty of merchantability since that warranty is based on a seller's being a merchant with respect to goods of that kind and not on a seller's representations about the qualities or attributes of the goods. Moreover, under the comparative advantage theory of warranties, a seller will not disclaim an implied warranty of merchantability if a buyer values the attributes of merchantability more than the cost of providing them or of insuring against losses resulting from their absence.

Ferrell, supra note 6, at 260–65. Although some of the biases and heuristics found in the literature suggest such underestimation might take place, there is also scholarship questioning the pervasive- ness and uniformity of the conclusions from this literature. See Gregory Mitchell, Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence, 91 GEO. L. J. 67 (2002); Gregory Mitchell, Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of the Law, 43 WM. & MARY L. REV. 1907 (2002). Among other things, people are less likely to use heuristics but rather engage in systematic processing of information when making a high involvement decision, i.e., one that has a relatively high degree of importance or significance. Kazuhisa Takemura, Personal Involvement, Task Complexity and the Decision Making Process: An Information Search Analysis in 36 JAPANESE PSYCHOL. RES. 41, 44–45 (1994). As indicated previously, most situations in which a warranty is legally significant involve items such as mobile homes, automobiles, boats, etc., where substantial potential economic loss is involved. For transactions involving such items, one might anticipate more systematic and less biased processing of information than for low-priced, less significant goods.

330. 149 Wash. 2d at 211–13, 66 P.3d at 629.
331. The former buyer might have been precluded because the creation of an express warranty requires that a representation was the basis of the bargain between the parties, which mandates that a buyer knew of a representation prior to purchase. See Baughn v. Honda Motor Co. Ltd., 107 Wash. 2d 127, 151–52, 727 P.2d 655, 669 (1986).
333. The character of the implied warranty does, of course, depend on a seller's description of the good. See id. § 2-314(2)(a); supra notes 306–307 and accompanying text.
and the seller can provide the attributes or insure against their absence more cheaply than the buyer can. Whether an implied warranty of merchantability satisfies these criteria does not depend on express representations about a good's attributes.

More importantly, a contrary decision by the court would have increased the cost to remote sellers of making representations that constitute express warranties. This would cause express, bargained-for terms to be less attractive. Yet, as the court's opinion correctly indicates, the ability of remote buyers to sue remote sellers for breach of express representations made to them alleviates the problems both of remote sellers not being responsible for the quality of their goods and circuitous litigation.

Despite the Washington Supreme Court's perception of the utility in enforcing express warranties and its generally correct decisions on privity issues, some decisions by Washington courts, treating remote buyers as third-party beneficiaries of representations made to immediate buyers, increase the costs of making express warranties. The courts failed to inquire whether an express warranty for a period of time might have been for the benefit of an immediate purchaser to protect it from product nonconformity claims by its buyer. Instead, the courts concluded that a warranty for a period of time is a third-party beneficiary contract if the immediate buyer does not possess the goods during the warranty period, a conclusion that is not necessarily correct. Finally, the courts appeared to treat as a third-party beneficiary the promisee to whom an express warranty is made.

The decisions allowing remote buyers to sue remote sellers as third-party beneficiaries of implied warranties are even more difficult to justify. These decisions are difficult to reconcile with contract law and do not establish determinate criteria for deciding whether a remote buyer is a third-party beneficiary. Furthermore, they increase the cost of implied warranties both through the potential increased costs of disclaiming the warranties or limiting liability and through the expanded liability to remote purchasers, particularly in the form of consequential damages.

334. See supra text accompanying note 32.
335. See supra text accompanying notes 207–210.
337. See supra text accompanying notes 288–298 and 312–320.
338. See supra notes 89–93 and accompanying text.
339. See supra text accompanying notes 99–104.
340. See supra text accompanying notes 315–319.
Part of the solution\textsuperscript{341} to the perceived problems with the privity requirement is that recognized by the court in \textit{Tex Enterprises, Inc.}: the enforcement of express warranties by remote sellers to remote buyers. The difficulty with the solution, however, is the basis of the bargain test articulated in \textit{Baughn}, which appears to require a buyer to be aware of a remote seller's representation prior to purchase.\textsuperscript{342} Adoption of new U.C.C. section 2-313A would provide a solution for those affirmations, descriptions, or promises since the section does not require that remote buyers be aware of remote seller representations prior to purchase. Thus, the remote buyers could enforce the apparent pass-through warranties in \textit{Schroeder} and \textit{Flaegol} without a court having to invoke a third-party beneficiary analysis. Unfortunately, new section 2-313B, which governs remote seller representations made to the public, continues the knowledge requirement and hinders remote sellers' creation of enforceable obligations in remote buyers.\textsuperscript{343} Thus, if that section were adopted, remote buyers would have to be aware of representations not packaged with or otherwise accompanied by the goods to enforce them against remote sellers. Whether new section 2-313B is adopted or the previous section 2-313 is retained, the ex ante knowledge requirement should be eliminated to facilitate the creation of express warranties in a manner more consistent with the way in which such warranties are generated in markets for goods.\textsuperscript{344}

\textsuperscript{341} The other solution is for remote sellers to make remote buyers third-party beneficiaries of express warranties given to their immediate buyers. \textit{See supra} text accompanying notes 61–62.

\textsuperscript{342} \textit{See} 107 Wash. 2d at 151–52, 727 P.2d at 669.

\textsuperscript{343} There is also a question whether the amendments cover nonpublic, private representations. \textit{See supra} note 199.

\textsuperscript{344} \textit{See} Holdych & Mann, \textit{supra} note 127.