

FREEDOM OF WARRANTY: THE CASE AGAINST APPLICATION OF ALABAMA'S UCC TO EXPRESS WARRANTIES OF REMOTE MANUFACTURERS

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I. INTRODUCTION

Alabama law does not allow courts to make product manufacturers who are not in privity of contract with the buyers of the manufacturers' goods liable to those buyers for more economic damages¹ than the manufacturers have voluntarily made themselves liable via their express warranties in the event of a breach of such an express warranty. Even so, Alabama courts are routinely asked to create and impose on manufacturers duties not found in their warranties and not found elsewhere in Alabama law. Unartful language in court opinions has fostered these arguments, but they are not legal arguments in the most literal sense; in other words, they do not have a source in the law, and they should be soundly and clearly rejected at the earliest opportunity.

By way of background, consider the following:

Experiences common to all of us as consumers teach that manufacturers of products from across the entire spectrum of the marketplace often attempt to enhance the value of those products by providing express warranties. These promises often contain two essential components: (1) a statement regarding the

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1. Malfunctions causing personal injury are beyond the scope of this Article. The distinctions with which this Article is concerned are between the governance of the sale of goods and the governance of promises made by persons other than the seller. These distinctions are, for the most part, absent in situations involving physical injury because of the Alabama legislature's abolition of the requirement that a buyer be in privity with a manufacturer in order to make a warranty-based, personal-injury claim. ALA. CODE § 7-2-318 (1997).

character of the product, for instance, "this product is warranted to be free from defects in material or workmanship . . .;" and (2) a prescription of remedy which the ultimate buyer may expect to receive from the manufacturer if the product is found not to be of the promised character, for example, "in the event of a defect in material or workmanship, the manufacturer will, at its option, either repair or replace the product, or refund its purchase price."²

Buyers routinely obtain such promises from manufacturers with whom the buyers have had no contact or dealing whatsoever. An ordinary consumer product purchased at a retail store rarely involves a transaction with the manufacturer of the product. Rather, the buyer often discovers the manufacturer's warranty in the form of a printed text inside the packaging, although it might be summarized on the product's outer packaging. Anyone who has purchased something as ordinary as a toaster has surely experienced this. For the purposes of this Article, a manufacturer who gives a warranty to an ultimate buyer with whom that manufacturer has had no transaction and with whom it is therefore not in privity will be referred to as a "remote manufacturer."

Unfortunately, common experience also teaches us that products malfunction from time to time. When this happens, and when the malfunction causes only economic damage to the buyer,³ and, further, when the buyer sues a remote manufacturer for breach of an express warranty containing the two components illustrated above (either in combination with or in lieu of a suit against the seller of the product for breach of express and/or implied warranties), the courts must determine the na-

2. See WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1609-10 (Portland House 1989) (definition of "warranty"). Specifically, definition number three describes the typical consumer warranty and provides etymological information indicating that "warranty" and "guarantee" derive from the same french word, "guarantie." See also ALA. CODE § 7-2-313 (1997) (providing that a warranty is a promise that goods will conform to certain characteristics).

3. "An action for damages for physical harm to the plaintiff's property is one for 'property damage'; and an action for damages for 'inadequate value, costs of repair, and replacement of defective goods or consequent loss of profits is one for 'economic loss.'" Rhodes v. General Motors Corp., 621 So. 2d 945, 947 n.3 (Ala. 1993) (quoting JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: PRACTITIONER'S EDITION § 11-4, at 534 (3d ed. 1988)).

ture and scope of the remedy available to the buyer against the remote manufacturer. There are only three real choices: (a) no remedy at all; (b) only such remedy as is prescribed in the warranty; or (c) a hodgepodge set of remedies imported from sources of law beyond those which legitimately govern the manufacturer's promise; in effect, an implication of duties not willingly created by the manufacturer.

The correct choice is "b." Answer "a" is wrong because there is something unsettling about the notion of allowing a manufacturer to make promises about its product while at the same time pronouncing, as a matter of law, that the promise is meaningless. In this instance, Alabama law follows feeling and the common law in preserving the concept of promissory estoppel as a means of enforcing a remote manufacturer's express warranty despite the lack of privity and the consequent lack of a contractual framework within which to operate. Less obviously, though, "c" is also wrong. There is no legitimate source in the positive law of the state of Alabama from which a court might acquire the power, in essence, to rewrite a remote manufacturer's express warranty to include promises not contained in the warranty itself. This should be reason enough for any court to refrain from doing so. Fortunately, however, there is more. The laws which allow a remote manufacturer to create as much or as little warranty protection for the buyer as the remote manufacturer wishes (a concept which will hereinafter be termed "freedom of warranty") are good laws which flow from sound economic policy.⁴

There are two major fronts on which freedom of warranty is under attack. Both find their ultimate source in misapplications of Alabama's version of the Uniform Commercial Code (UCC).⁵

One is an attempt to apply UCC principles explicitly limited to express warranties made a part of a contract between a buyer and a seller to the decidedly non-contractual warranty of the remote manufacturer. This sortie is aimed at the remote manufacturer's limitation or description of the remedy which it promises to provide in the event of a breach of its promise regarding the character of the product. In short, the buyer wishes

4. See *infra* Part IV.

5. ALA. CODE §§ 7-1-101 to 7-11-108 (1997).

to recover against the remote manufacturer as if it were the seller of the product with whom the buyer has a contract and therefore from whom the buyer has a right to seek the full range of contractual and extra-contractual damages sanctioned by the UCC.⁶ Quite naturally, the buyer wants as much as he can get, and mere repair, replacement or refund may not satisfy.⁷

The other charge is against the remote manufacturer's ability to conclusively describe the characteristics that it warrants its product to have. Again by twisting UCC principles, the argument is made that there is some broad, all-encompassing standard of product acceptability capable of employment by the courts without reference to the manufacturer's description of product characteristics.⁸ Under this theory, that a manufacturer may have said no more about its product than that it is promised to be free from defects in material or workmanship is a statement to be cast aside. Instead, the court is asked to treat the manufacturer as if it had made an open-ended promise that the product would perform exactly as the buyer subjectively *wanted it to*.⁹

It is useful for ease of analysis to refer to these two affronts to freedom of warranty as attempts to erode, on the one hand, the standard by which the product's conformance or non-conformance to promised characteristics is to be measured; and on the

6. See generally ALA. CODE §§ 7-2-711 to -717 (1997) (detailing a buyer's remedy against a seller for breach of an agreement for the sale of goods); *id.* § 719 (establishing circumstances in which a seller's attempt to limit remedies against it may be voided).

7. See *infra* section II.D. and cases cited therein.

8. Of course, there is such a source of law. It is called "tort law," and it is specifically inapplicable to instances in which a product malfunctions and creates only economic damages in the form of harm to the product itself, as opposed to a malfunction which damages other property or a person (the so-called "economic loss rule"). *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 876 (1997); *East River Steamship Corp. v. TransAmerica Delaval, Inc.*, 476 U.S. 858, 868 (1986); *Wellcraft Marine v. Zarzour*, 577 So. 2d 414, 418 (Ala. 1991); *Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671, 674 (Ala. 1989); *Weaver v. Dan Jones Ford, Inc.*, 679 So. 2d 1106, 1113 (Ala. Civ. App. 1996).

9. See *Tucker v. General Motors Corp.*, No. 2960768, 1998 WL 178780 (Ala. Civ. App. Apr. 17, 1998), *cert. granted*, (Ala. Aug. 12, 1998) (No. 1971318) (plaintiff in action for breach of express warranty was not required to prove the existence of a defect in the product, but could establish breach by proving that he took the product to be repaired on several occasions [for unspecified problems] and that it still did not function as he desired).

other hand, the manufacturer's ability to limit the remedy available to the buyer in the event of non-conformance. In simpler terms, the argument is about both the scope and source of the manufacturer's duty and the damages available in the event of a breach of that duty.

Alabama's UCC is not a legitimate basis from which to argue for these erosions. These arguments likewise find no source in any other aspect of Alabama's law. Moreover, attacking freedom of warranty serves no useful policy incentive. As long as a remote manufacturer may obligate itself to provide only a specific remedy to an economically damaged buyer, but no more, competition in the marketplace will see to it that manufacturers provide the maximum, economically efficient amount and type of remedy. If the law were to require, however, that a remote manufacturer's promise merely to refund the price of a product in the event that it were found to be defective meant it was exposing itself to unpredictable and potentially infinite liability in the form of a buyer's damages suffered from loss of use of the product, a tremendous disincentive to the provision of any express warranty at all would have been created. There is nothing in the whole of Alabama law that requires a remote manufacturer to give any warranty of any type or degree. It is perfectly free to leave all such questions of "standing behind the product" to the entity which actually completes the contract of sale with the buyer. That so many manufacturers provide some type of promise regarding their products is a function of market pressures to do so, not legal ones. Legal pressures which would ultimately drive manufacturers to refrain from giving warranty protection would therefore be contrary to the interests of buyers in a rather obvious way.

A court's creation of such legal pressures would be a pure form of judicial activism—a legislation of rights and duties found in neither the principles of the common law nor Alabama's statutes. This Article will demonstrate that Alabama law, as enacted by the legislature and upheld by the common-law tradition, requires freedom of warranty for remote manufacturers and does not allow wholesale creation of liabilities from extra-legal sources. It will do so first by demonstrating that UCC provisions which allow, in certain circumstances, the voiding of a *seller's* limitation of remedies available to a buyer in the event of breach

have, and should have, no application to the description of remedies which a remote manufacturer voluntarily creates and obligates itself to provide. This Article will then show that these same UCC principles, which even in the context of the buyer-seller relationship have no application to the question of whether the product conforms or does not conform to its promised characteristics, cannot be legitimately used to obliterate the power of the manufacturer to predicate its warranty obligations on its own description of the product. In other words, if the manufacturer says only that the product will be free from defect, then the presence of a defect is the only product characteristic that can trigger the manufacturer's obligations under the warranty. Finally, the Article will argue that freedom of warranty is sound economic policy deserving of protection by the courts.

II. THE "FAILURE OF ESSENTIAL PURPOSE DOCTRINE" IS NOT APPLICABLE TO REMOTE MANUFACTURERS

A. *The Effect of Treating a Remote Manufacturer as a "Seller"*

If a remote manufacturer, with whom the buyer of the product is not in privity, may nonetheless be treated as a "seller" with respect to that buyer, a rather wide door may be flung open on a roomful of statutorily created remedies in addition to those created by the remote manufacturer's warranty. The portal is found at section 7-2-719 of Alabama's version of the UCC.¹⁰ This provision governs limitations of remedy contained in a seller's express warranty.¹¹ In paragraph two, the statute provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title."¹²

10. ALA. CODE § 7-2-719 (1997).

11. The whole of Article Two of Alabama's version of the UCC may be confidently said to apply only to rights and duties of buyers and sellers of goods. See *id.* § 7-2-102 ("This article applies to transactions in goods . . ."). More specifically, section 7-2-719, by virtue of subparagraph 1(a), governs limitations of remedies which appear in an "agreement," a term defined in section 7-1-201(3): "Agreement" means the bargain of the parties . . ."

12. *Id.* § 7-2-719(2).

The only remedies provided to buyers "in this title" are found at sections 7-2-711 through 717.¹³ Sections 711 through 713 concern a seller's failure to deliver the product and are inapplicable to the analysis of a remote manufacturer's express warranties. Section 714, however, governs a buyer's damages when the seller delivers goods the buyer accepts, but which do not conform to the description of those goods provided in the seller's express warranty. Paragraph two of section 714 states:

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 amount¹⁴

Paragraph three of section 714 states that "[i]n a proper case any incidental and consequential damages under section 7-2-15 may also be recovered."¹⁵

Section 715(1) defines "incidental damages" as including, among other specific items, "any other reasonable expense incident to the delay or other breach."¹⁶ Section 715(2) includes in the definition of "consequential damages:"

- (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (b) Injury to person or property proximately resulting from any breach of warranty.¹⁷

By virtue of section 714's "proximate damages of a different amount;" section 715(1)'s "any other reasonable expense;" and section 715(2)'s "[a]ny loss resulting from" and "[i]njury to person or property proximately resulting from," there can be no doubt that a failure of essential purpose under section 719(2) works to void any attempt *by a seller* to prescribe only a limited remedy in the event of breach and instead sanctions damages on a tort-like, proximate-cause standard.

13. *Id.* §§ 7-2-711 to -717.

14. *Id.* § 7-2-714(2).

15. ALA. CODE § 7-2-714(3) (1997).

16. *Id.* § 7-2-715(1).

17. *Id.* § 7-2-715(2).

B. A Remote Manufacturer Is Not a "Seller"

As we have just seen, then, under Alabama's version of the UCC, a "seller" may only limit the "buyer's" remedies in the event that the goods sold do not conform to the promises contained in the seller's express warranty if the remedy, so limited, does not "fail of its essential purpose." Thus, a seller which gives an express warranty of the type explored in this Article (one that promises the product will be free from defect in material or workmanship and one that limits the remedy for a breach of that promise to repair, replacement or refund (but not incidental or consequential damages)) may find that its attempt to limit the scope of remedy to repair, replacement or refund will give way to a computation of damages based on the tort-like standards of sections 7-2-714 and 715 of Alabama's version of the UCC.¹⁸ This may happen if the remedy prescribed by the seller fails of its essential purpose, a loose concept which includes numerous circumstances but which may be generally understood as involving situations in which the remedy offered by the seller fails to return the buyer to the economic position he occupied prior to the transaction.¹⁹ An example could be made from a seller's express warranty which limited the remedy for breach to replacement of the product. Assuming the product is found to be defective, and that the defect runs through the entire product line, it will do the buyer no good to keep receiving from the seller an endless series of replacement products which are also defective. Such a limitation would cause the remedy to fail of its essential purpose and would leave the buyer with no real remedy at all.²⁰ Similarly, a limitation of remedy to repair of the

18. See ALA. CODE §§ 7-2-714, -715 (1997).

19. The Supreme Court of Alabama's ever-expanding rendition of circumstances in which limited remedies have been deemed to fail of their essential purpose is beyond the scope of this Article. The curious should consult the following opinions for guidance: *Lipham v. General Motors Corp.*, 665 So. 2d 190 (Ala. 1995); *Liberty Truck Sales, Inc. v. Kimbrel*, 548 So. 2d 1379 (Ala. 1989); *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259 (Ala. 1983); *Volkswagen of America, Inc. v. Harrell*, 431 So. 2d 156 (Ala. 1983); *Tiger Motor Co. v. McMurtry*, 224 So. 2d 638 (Ala. 1969).

20. See, e.g., *Volkswagen of America, Inc. v. Dillard*, 579 So. 2d 1301, 1305 n.3 (Ala. 1991) (noting that when the sole remedy is to repair or replace the defective product the remedy fails of its essential purpose when repair or replacement cannot be performed adequately).

product would fail of its essential purpose if, after a reasonable opportunity to do so, the seller proved unable to effect meaningful repairs.²¹

But a remote manufacturer is not a "seller." There has been no transaction in goods between the ultimate buyer and the remote manufacturer; otherwise, the manufacturer would not be "remote" at all. This is not based solely on *ipso facto* reasoning. "Buyer" and "seller" are defined terms: "Buyer" means a person who buys or contracts to buy goods.²² "Seller" means a person who sells or contracts to sell goods.²³ "A 'sale' consists in the passing of title from the seller to the buyer for a price . . ."²⁴ In the example provided in the introduction to this Article and which frames its scope, there is no transaction in goods—no "sale"—between the remote manufacturer/warrantor and the buyer.

*C. The Supreme Court of Alabama Has
Acknowledged That Article Two's Provisions Aimed
at Sellers Do Not Apply to Non-Sellers*

The UCC, including Alabama's version of it, does not create extra-contractual duties for the seller merely in the context of limited remedies in express warranties which fail of their essential purpose. It also sets minimum levels of seller responsibility by creating implied warranties and consequent rights of buyers to recover damages in the event of breach. These apply to all transactions in goods unless sellers take affirmative steps to disclaim them in their agreements with buyers.²⁵

Thus, the UCC makes the seller responsible for implied warranties unless it specifically disclaims them; and it makes

21. See, e.g., *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1264 (Ala. 1983) (holding that the remedy which required seller to repair any defects in the product failed of its essential purpose because the product was never repaired to the customer's reasonable satisfaction).

22. ALA. CODE § 7-2-103(1)(a) (1997).

23. *Id.* § 7-2-103(1)(d).

24. *Id.* § 7-2-106(1).

25. *Id.* § 7-2-314 (implied warranty of merchantability); *id.* § 7-2-315 (implied warranty of fitness for particular purpose); ALA. CODE § 7-2-316 (1997) (seller's exclusion or modification of implied warranties).

the seller responsible for incidental, consequential and other tort-like damages unless the seller specifically limits the remedy for breach in its agreement with the buyer, but even then only if the limitation does not cause the remedy to fail of its essential purpose. These two statutory functions are almost identical; each sets a minimum or default level of responsibility that the seller owes to the buyer in the event that the seller provides goods that do not conform to its promises. These defaults apply unless the seller takes specific and statutorily-prescribed steps to avoid such responsibilities, all of which the buyer must agree to.²⁶

The Supreme Court of Alabama has addressed one of these functions repeatedly and has always held that the statutory basis for creating a minimum level of seller responsibility in the implied warranty context may not be applied to remote manufacturers precisely because they are not in privity with the buyer and are therefore not "sellers."²⁷ Moreover, the Alabama Supreme Court has expressly confronted and rejected the argument that a remote manufacturer's provision of an express warranty creates "privity" sufficient to deem the remote manufacturer a "seller" with respect to the buyer:

The Rhodeses contend that in extending a written warranty, General Motors created privity of contract with the Rhodeses. When presented with a similar contention in *Wellcraft*, we held: "Regardless of any express warranties that a manufacturer may wish to give with a product, by their very language the commercial code's implied warranty sections apply to the *seller* of the product."²⁸

26. See *id.* § 7-2-316 (forcing the seller, if it wishes to exclude or modify implied warranties which would otherwise arise in its sale of goods, to bring such exclusions or modifications to the buyer's attention in the form of conspicuous type in a written instrument); *id.* § 7-2-719 (allowing the seller to limit the remedies available to the buyer in the event of a breach of warranty and expressly stating that the "agreement" must contain the limitations in order for them to exist).

27. See *ex parte* Miller, 693 So. 2d 1372, 1375 (Ala. 1997); *Rhodes v. General Motors Corp.*, 621 So. 2d 945, 947-48 (Ala. 1993); *Kidd v. Kilpatrick Chevrolet, Inc.*, 613 So. 2d 336, 338 (Ala. 1993); *Wellcraft Marine v. Zarzour*, 577 So. 2d 414, 419 (Ala. 1990); *State Farm Fire and Cas. Co. v. J.B. Plastics, Inc.*, 505 So. 2d 1223, 1227 (Ala. 1987).

28. *Rhodes*, 621 So. 2d at 947. *But see* *Johnson v. Anderson Ford, Inc.*, 686 So. 2d 224, 228 (Ala. 1996) (holding that the extension of express warranty to ultimate buyer created sufficient privity for enforcement of express warranty).

Alabama's high court has also ruled that a buyer may not invoke "revocation of acceptance" under section 7-2-608²⁹ against any party other than the seller.³⁰

*D. The Apparently Inadvertent Application of the
"Failure of Essential Purpose Doctrine"
to Remote Manufacturers*

Against the backdrop of *Rhodes* and the other opinions in that line, as well as *Miller*, it would seem impossible to make a good-faith argument for the application of the "failure of essential purpose" doctrine of section 7-2-719(2)³¹ as a means of expanding and rewriting a remote manufacturer's express warranty. Section 719 applies only to the buyer-seller relationship in the same way that sections 314,³² 315,³³ 316³⁴ and 608³⁵ apply only to the buyer-seller relationship. Indeed, section 719 does nothing more than void a seller's limitation of remedy in the event of breach and provide that the buyer may have the remedies "provided in this title," all of which are remedies that the buyer may have against *the seller*.³⁶

Despite this, there is a long line of Alabama cases, identified and discussed below, in which the "failure of essential purpose" doctrine has been applied against manufacturers.³⁷ Not one of these cases included, for ought in the written opinions, any issue regarding the applicability of that doctrine to a *remote* manufacturer.³⁸ Because the issue of whether a remote manufacturer may be treated as a "seller" for the purpose of the "failure of essential purpose" doctrine appears never to have been argued in Alabama and therefore never decided, the factual recitations

29. ALA. CODE § 7-2-608 (1997).

30. *Ex parte Miller*, 693 So. 2d at 1375.

31. ALA. CODE § 7-2-719(2) (1997).

32. *Id.* § 7-2-314.

33. *Id.* § 7-2-315.

34. *Id.* § 7-2-316.

35. *Id.* § 7-2-608.

36. ALA. CODE § 7-2-719(2) (1997).

37. *See infra* text accompanying notes 40-78.

38. *See infra* text accompanying notes 40-78.

in these opinions are often, but not always, silent regarding whether the manufacturer was indeed "remote" or whether in fact it may have been in privity with the buyer and therefore a "seller."³⁹

Indeed, a reading of these cases in chronological order betrays a high degree of confusion by the various courts regarding the nature of a remote manufacturer's express warranty and its enforceability.

First is *General Motors Corp. v. Earnest*,⁴⁰ an opinion decided prior to the adoption of the UCC in Alabama.⁴¹ Because this was not a UCC case it may not be entirely fair to credit this opinion with much of what came after; however, it is tempting to do so because therein the Supreme Court of Alabama acknowledged that General Motors was not a seller,⁴² but also stated (in dicta) that an inability of the true seller to repair an automobile would have "unquestionably" provided the basis for "a case for damages, if proven, against General Motors Corporation for breach of warranty."⁴³ With these statements, the court laid the groundwork for the erroneous application of the "failure of essential purpose" doctrine against entities other than "sellers."

A few years later, the United States Court of Appeals for the Fifth Circuit, purporting to apply Alabama law, decided *Riley v. Ford Motor Co.*⁴⁴ The Fifth Circuit applied the "failure of essential purpose" doctrine to the defendant product manufacturer, but also noted the trial court's reversible error in stating that the seller (a dealership) was the agent of the manufacturer when instead the trial court should have allowed the jury to resolve this issue based on the substantial evidence of agency.⁴⁵ It seems clear that the issue of whether the "failure of essential purpose" doctrine could legally have been applied to the manufacturer's express warranty *absent* a finding that the manufacturer was in privity with the buyer via the agency of its dealership was not raised by either party. Even so, it is equally

39. See *infra* text accompanying notes 40-78.

40. 184 So. 2d 811 (Ala. 1966).

41. See *Earnest*, 184 So. 2d at 814 (referring to the Uniform Sales Act).

42. *Id.*

43. *Id.*

44. 442 F.2d 670 (5th Cir. 1971).

45. *Riley*, 442 F.2d at 672.

clear that the court had before it a record which would have supported a finding that the manufacturer was a "seller" vis-a-vis the ultimate buyer.

The next significant treatment of this issue came in *Volkswagen of America, Inc. v. Harrell*.⁴⁶ In many respects, *Harrell* is the root of all the confusion that follows. In this opinion, the Supreme Court of Alabama made two contradictory statements about the status of the manufacturer regarding whether it was also the seller. The majority first stated that:

Plaintiffs/Appellees . . . initiated this cause . . . seeking compensatory damages from Defendant/Appellant Volkswagen of America, Incorporated. The crux of Plaintiffs' complaint was premised upon allegations of breach of a new vehicle limited written warranty by Defendant in its sale to Plaintiffs of a 1981 Volkswagen "Vanagon" camper.⁴⁷

It then stated, in a portion of the opinion labeled "FACTS," that "[t]he Harrells purchased a 1981 Volkswagen (VW) 'Vanagon' camper on April 1, 1981, from Ted Avrett Volkswagen, Inc. in Enterprise, Alabama"⁴⁸

The court then applied the "failure of essential purpose" doctrine to the manufacturer's express warranty as a means of voiding its stated limitations of remedy in the event of breach.⁴⁹ As support for the application of this doctrine, it cited *Burbic Contracting Co. v. Cement Asbestos Products Co.*,⁵⁰ an opinion which explicitly dealt with a seller's express warranty.⁵¹ The majority in *Harrell* even quoted, without apparent concern for the issue of whether Volkswagen was the "seller" with respect to the Harrells, the following passage from *Burbic*: "A limitation of remedies to repair or replace goods fails in its essential purpose if the seller does not provide goods which conform to the contract within a reasonable time."⁵²

That same year, the Supreme Court of Alabama decided

46. 431 So. 2d 156 (Ala. 1983).

47. *Harrell*, 431 So. 2d at 157 (emphasis added).

48. *Id.* at 158 (emphasis added).

49. *Id.* at 164.

50. 409 So. 2d 1 (Ala. 1982).

51. *Burbic*, 409 So. 2d at 5-6.

52. *Harrell*, 431 So. 2d at 164 (emphasis added) (quoting *Burbic*, 409 So. 2d at 5).

Massey-Ferguson, Inc. v. Laird.⁵³ In similar fashion to the Fifth Circuit's treatment in *Riley*, the *Massey-Ferguson* court applied the "failure of essential purpose" doctrine to an express warranty given by the manufacturer of a farm combine while simultaneously finding that the combine manufacturer was in privity with the buyer, and therefore a "seller," via an agency relationship between the manufacturer and the selling dealer.⁵⁴ Just as in *Riley*, however, there was no discussion in *Massey-Ferguson* of the necessity of such a finding as a prerequisite to application of the "failure of essential purpose" doctrine.

Perhaps these earlier opinions created an impression throughout the Alabama bar that there was no legal distinction between (1) an express warranty given by a seller as part of the basis of a bargain and (2) an express warranty given by a remote manufacturer as a gratuitous enhancement of product value. How else to explain *Peterbilt Motors Co. v. Martin*,⁵⁵ in which a seemingly remote manufacturer⁵⁶ conceded the application of the UCC's "failure of essential purpose" doctrine and its consequent reference to remedies "as provided in this title"⁵⁷ to its express warranty?⁵⁸

With the ball now rolling crazily down the hill, *Ag-Chem*

53. 432 So. 2d 1259 (Ala. 1983).

54. *Massey-Ferguson*, 432 So. 2d at 1262-64.

55. 521 So. 2d 946 (Ala. 1988).

56. There is no discussion in the opinion of whether Peterbilt Motors Co., as manufacturer, was in privity with the buyer via an agency theory or otherwise. Justice Shores did make one reference in her recitation of facts to a possible basis for a claim of agency between the manufacturer and the selling dealership: "The Martins noted that the order form, as well as various other objects around the dealership, prominently displayed the logo of the Manufacturer, Peterbilt Motors Company." *Peterbilt*, 521 So. 2d at 948. This fact is not, however, discussed elsewhere in the opinion as central to any portion of the holding.

57. ALA. CODE § 7-2-719(2) (1997).

58. *Peterbilt*, 521 So. 2d at 949. The court noted:

As the Manufacturer concedes, § 7-2-719(2), Code of Alabama 1975, allows recovery of damages other than those provided by the remedy described in [its] warranty, where circumstances cause an exclusive or limited remedy to fail of its essential purpose.

. . . .
 . . . All parties conceded, and the trial court instructed the jury, that the measure of damages applicable 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.

Id. at 949 (emphasis added) (citing ALA. CODE § 7-2-714(2), (3) (1997)).

*Equipment Co. v. Limestone Farmers Cooperative, Inc.*⁵⁹ perhaps should not be viewed as surprising in its failure to note any distinction between the seller and a non-seller with regard to whether the UCC might be used to expand the non-seller's duties under its express warranty beyond the promises and limitations within it. The status of the manufacturer as either "seller" or "non-seller" was confused at the outset by the majority's statement that "Limestone Farmers Cooperative, Inc. ("Limestone"), bought a fertilizer applicator machine from Ag-Chem Equipment, Inc., and its subsidiary, Big A Equipment Company."⁶⁰ There is no explanation anywhere in the opinion of how Limestone, as buyer, managed to create in *both* the manufacturer and its subsidiary corporation the status of "seller" within the context of a single transaction. We might speculate that Big A was an agent of Ag-Chem, but in such instance, Ag-Chem, and not Big A, would be the selling entity on the general principle that an agent does not become liable on a contract entered into on behalf of its (disclosed) principal.⁶¹

Regardless, the court did not hesitate to apply the "failure of essential purpose" analysis to the manufacturer's express warranty in order to determine whether its statement of limitation regarding remedies available to the buyer in the event of breach might be voided. It did find as a matter of law, however, that the warranty had not failed of its essential purpose.⁶²

Next in line is *Liberty Homes, Inc. v. Epperson*.⁶³ There, the Supreme Court of Alabama treated the manufacturer as if it were a "seller" and applied the "failure of essential purpose" doctrine to the manufacturer's express warranty.⁶⁴ The majority also found, in a separate portion of the opinion, that there was sufficient evidence for a jury to conclude that the selling dealership was an agent of the manufacturer and therefore that the manufacturer was in privity with the buyer.⁶⁵ As with the prior

59. 567 So. 2d 250 (Ala. 1990).

60. *Ag-Chem*, 567 So. 2d at 251 (emphasis added).

61. See, e.g., *Shirley v. Lin*, 548 So. 2d 1329, 1333 (Ala. 1989) (holding that the agent is not personally liable on a contract he enters into on behalf of the principal).

62. *Ag-Chem*, 567 So. 2d at 251-52.

63. 581 So. 2d 449 (Ala. 1991).

64. *Liberty Homes*, 581 So. 2d at 453.

65. *Id.*

decisions in which the manufacturer was made into a "seller" by virtue of an agency theory, however, there was no discussion of the need to find such agency *before* finding that the "failure of essential purpose" doctrine could be applied to the manufacturer. Indeed, the majority summarily concluded that the limitations of remedy contained in the manufacturer's express warranty were no barrier to the plaintiff's recovery of full, tort-like damages under the remainder of Article Two before it even discussed the evidence that it deemed sufficient to give rise to an inference of agency between the manufacturer and the true seller.⁶⁶

By 1995, the confusion regarding applicability of the "failure of essential purpose" doctrine had spread beyond the complicated question of whether it should be applied to non-sellers to a complete misunderstanding of the distinction between the questions of (1) whether an express warranty had been breached and (2) whether an attempt to limit *the remedy* in the event of such a breach could survive. Thus, in *Lipham v. General Motors Corp.*,⁶⁷ Justice Kennedy wrote that "[i]n order to establish a breach of an express warranty, such as the alleged breaches at issue here, the plaintiff must show that 'the warranty failed of its essential purpose'"⁶⁸

This is a remarkable statement, and it has no source in the law. The "failure of essential purpose" doctrine is explicitly directed at the second stage of a breach-of-warranty analysis involving the issue of whether, *once a breach has been established*, the buyer's remedy should be limited to (a) the remedy described in the warranty or (b) the full range of remedies available to the buyer under the remainder of Article Two.⁶⁹ Indeed, the court's language, specifically the internal quotation in the language quoted above, is entirely inaccurate. Section 7-2-719(2) says nothing about *a warranty's* failure of essential purpose. It refers only to "circumstances" which "cause an exclusive or limited *remedy* to fail of its essential purpose"⁷⁰

By proclaiming that the question of whether the manufac-

66. *Liberty Homes*, 581 So. 2d at 453.

67. 665 So. 2d 190 (Ala. 1995).

68. *Lipham*, 665 So. 2d at 192.

69. ALA. CODE § 7-2-719(2) (1997).

70. *Id.* (emphasis added).

turer breached its express warranty turned on the issue of whether the limited remedy contained within that warranty had "failed of its essential purpose,"⁷¹ the court pretermitted any analysis of whether "failure of essential purpose," whatever its effect on a warranty might be, should have any application to a warranty given by a party not governed by the UCC by virtue of its non-seller status. There is no indication in the opinion that General Motors raised this issue on appeal.

By 1997, the cognitive dissonance of this line of cases had reached full force. In *Ex parte Miller*,⁷² the Supreme Court of Alabama initially confronted the question of whether a manufacturer, indisputably *not* in privity with the buyer of the product, could be subjected to Article Two's remedial provisions concerning implied warranties and revocation of acceptance under sections 7-2-314, 315 and 608, respectively.⁷³ It properly concluded that because the manufacturer was not a "seller," none of these remedial features of the UCC could apply.⁷⁴

In the next paragraph, the majority commenced a discussion which culminated in the application of the "failure of essential purpose" doctrine of section 7-2-719 to an express warranty from the indisputably remote manufacturer of a component part of the product.⁷⁵ As with the previous opinions, however, there is nothing in the *Miller* opinion to suggest that the manufacturer argued to the court that its status as a "non-seller" prevented application of the "failure of essential purpose" doctrine, even though it had correctly avoided the other remedial provisions of Article Two on this basis.

And finally, there is *Tucker v. General Motors Corp.*,⁷⁶ in

71. *Lipham*, 665 So. 2d at 192.

72. 693 So. 2d 1372 (Ala. 1997).

73. *Miller*, 693 So. 2d at 1375.

74. *Id.*

75. *Id.* at 1375-79. Beginning at page 1375, Justice Almon noted the lack of any evidence that the undisputed seller, Kennemer Manufacturing, was the agent of Pettibone, the product manufacturer. *Id.* Justice Almon also referred to the manufacturer of the component part which made the express warranty as "a division of Pettibone," meaning that it was not a separate corporate entity and thus was merely another manifestation of Pettibone. *Id.* Thus, it is clear from the opinion that the express warrantor was not a "seller" with regard to the buyer in this action.

76. No. 2960768, 1998 WL 178780 (Ala. Civ. App. Apr. 17, 1998), *cert. granted*, (Ala. Aug. 12, 1998).

which the Alabama Court of Civil Appeals made the same mistake that the Supreme Court of Alabama made in *Lipham*. Specifically, it treated the manufacturer as a seller without any discussion of agency or any other theory under which the manufacturer might be in privity with the buyer.⁷⁷ Additionally, it applied the "failure of essential purpose" doctrine to the question of whether the manufacturer breached its warranty rather than to the question of whether the manufacturer would be entitled to limit its remedy to the buyer in the event of a breach.⁷⁸

And so the Alabama courts have come to the edge of the precipice, but as of the writing of this Article, they have yet to fall over. The "failure of essential purpose" doctrine has been used in an all-out assault on freedom of warranty to force entities to provide greater remedies than they promised to provide. As long as the warranting entity is a "seller" under Article Two, use of the doctrine is in keeping with that statute. If the warranting entity is not the "seller," however, there is no basis in law for such an expansion of duties and remedies. In order for an Alabama court to apply a provision of Article Two of the Alabama version of the Uniform Commercial Code to a remote manufacturer, there must be some basis for doing so somewhere within the statute. There is no such basis. So far, no Alabama court has directly confronted the issue of whether, contrary to the Supreme Court of Alabama's holdings in the implied warranty and revocation of acceptance contexts, a manufacturer not in privity with the buyer may be deemed a "seller" for the purposes of section 7-2-719(2).⁷⁹ It is to be hoped that any future Alabama court which confronts this issue will properly consider itself bound by the language of the statutes enacted by the Legislature.

III. A REMOTE MANUFACTURER/WARRANTOR SHOULD BE THE MASTER OF ITS OWN PRODUCT DESCRIPTION

In part two of this Article, the primary portion of the remote manufacturer's express warranty under discussion was that

77. *Tucker*, 1998 WL 178780, at *4.

78. *Id.* at *5.

79. ALA. CODE § 7-2-719(2) (1997).

portion which prescribed the type and degree of remedy available to a buyer in the event of breach. The assault on freedom of warranty, however, is occurring not only with regard to the right of remote manufacturers to limit remedies. Also under attack is the right of a remote manufacturer to be the master of its own product description. A claim that a warrantor has breached its warranty is, at its essence, a claim that the warrantor has promised that the product has some particular characteristic and that the product does not in fact have that characteristic: "In Alabama, the crux of all express warranty claims is that the goods did not conform to the warranty."⁸⁰ Thus, unless and until a promise regarding the character of the product is found to have been broken, there is no breach of warranty.

This seeming truism has recently been confirmed by the Supreme Court of Alabama in *Ex parte Miller*.⁸¹ There, Justice Almon wrote that:

If a company such as Pettibone wishes to warrant only defects in material and workmanship, then it may do so; with such a warranty, the plaintiff would have to show that the product was defective in order to show that the goods did not conform to the warranty.⁸²

Despite this seemingly clear holding, the Alabama Court of Civil Appeals held in *Tucker v. General Motors Corp.*,⁸³ a case decided *after Miller*, that there is no requirement that a plaintiff prove the existence of a defect in order to prove the breach of a remote manufacturer's express warranty.⁸⁴ Instead, the inter-

80. *Ex parte Miller*, 693 So. 2d 1372, 1376 (Ala. 1997) (citation omitted).

81. 693 So. 2d 1372 (Ala. 1997).

82. *Miller*, 693 So. 2d at 1376 (footnote omitted). There is, of course, a substantial body of law regarding the elements necessary to prove the existence of a product defect which have arisen in the context of the Alabama Extended Manufacturer's Liability Doctrine. See, e.g., *Taylor v. General Motors Corp.*, 707 So. 2d 198, 202 (Ala. 1997) (noting the various requirements under Alabama law necessary to prove a product defect).

83. No. 2960768, 1998 WL 178780 (Ala. Civ. App. Apr. 17, 1998), *cert. granted*, (Ala. Aug. 12, 1998).

84. *Id.* at *4. It is impossible to determine from the opinion whether General Motors' warranty contained language to the effect that it warrants only that the vehicle will be free from a defect in material or workmanship. This author is aware of no warranty from any automobile manufacturer, however, which does not contain this language.

mediate appellate court opined that the proof needed to establish a breach of the manufacturer's express warranty is proof that "the warranty failed of its essential purpose."⁸⁵ Said Judge Crawley:

To establish breaches of these warranties,⁸⁶ Tucker does not need expert testimony. He does not have to prove, as the dealership and GM contend, exactly what caused the car to continually stall. . . . Tucker need only prove that the car did stall, that, when the car was presented for repair under the warranty, the car was not repaired, and thus that the car was not fit for the ordinary purposes for which cars are used.⁸⁷

And so we see that the mistake made in *Lipham v. General Motors Corp.*⁸⁸ has been picked up and made worse in *Tucker*, even beyond what was discussed in section II.D. Not only is the "failure of essential purpose" doctrine being applied to an entity that has not been established as a "seller;" not only is the doctrine being misapplied to the question of whether the warranty has been breached (instead of to the appropriate question of what remedy might be had in the event of a proven breach); but now it is also being used to obviate the need to determine what characteristics the warrantor promised the product would have.⁸⁹ Under the court of civil appeals' formulation, it would make no difference whether the remote manufacturer promised the product would be free of defects in material and workmanship or promised nothing other than that the product would be blue in color. Under this theory, the warrantor will be deemed to have warranted that the product will be fit for its ordinary purpose, *even if the warrantor has made no such promise.*⁹⁰ Fur-

85. *Tucker*, 1998 WL 178780, at *3 (quoting *Lipham v. General Motors Corp.*, 665 So. 2d 190, 192 (Ala. 1995)).

86. *Id.* In the preceding paragraph of the opinion, Judge Crawley compared the express and implied warranty theories at issue in the case. *Id.*

87. *Id.*

88. 665 So. 2d 190 (Ala. 1995).

89. *Tucker*, 1998 WL 178780, at *5.

90. This is of course an application of the implied warranty of merchantability found in ALA. CODE § 7-2-314 (1997) to all express warranties. As was discussed in section II.C, however, remote manufacturers are not subjected to UCC implied warranties in Alabama. See *supra* notes 27-30 and accompanying text. Judge Crawley acknowledged this fact later in the *Tucker* opinion, 1998 WL 178780, at *6, but apparently saw nothing inconsistent with using this standard to impose liability on

ther, the plaintiff will be able to prove that the product does not conform to the conditions promised in the warranty (which are now deemed to be "fit for ordinary purpose" regardless of what promise *actually* appears in the warranty) merely by proving that he submitted the product for repairs which proved to be unsuccessful.⁹¹ This is a far cry from allowing the warrantor to make specific promises about its product and to become liable for breach only if those promises are broken.

The Supreme Court of Alabama has recently granted certiorari in *Tucker*.⁹² The state's highest court will, therefore, have an opportunity to confront whether the court of civil appeals has created duties for General Motors that General Motors did not create for itself in its warranty and which are not contained in Article Two. If the Supreme Court of Alabama is to be consistent with its holding in *Miller*, in which it acknowledged the right of a warrantor to promise as much or as little as it wishes regarding the characteristics of its product,⁹³ it must reject the intermediate appellate court's attempt to create an objective "fitness for ordinary purpose" element to be implied in all express warranties, even those of remote manufacturers.

Rather, the court should (1) correct its earlier mistakes; (2) rule, consistent with its line of cases which refuse to apply Article Two provisions aimed at "sellers" to non-sellers, that the "failure of essential purpose" doctrine applies only to sellers and not to remote manufacturers; and (3) clarify that even when the "failure of essential purpose" doctrine is properly invoked against a "seller," it affects only the question of whether the seller's attempt to limit the buyer's remedy will survive, *not* the question of whether the warranty was breached in the first instance.

General Motors for breach of an *express* warranty.

91. *Tucker*, 1998 WL 178780, at *5.

92. *Supra* note 83.

93. Of course, a warrantor which also happens to be a "seller" must be responsible for at least the "fitness for ordinary purpose" standard of ALA. CODE § 7-2-314 (1997) unless it takes steps to exclude that implied warranty pursuant to section 7-2-316, which it may properly do as long as it adheres to the statute in doing so.

IV. INFRINGEMENT ON FREEDOM OF WARRANTY IS BAD LAW AND BAD ECONOMICS

A. Legal Considerations

Inherent in the process of discovering that Alabama's version of the UCC does not govern express warranties given by remote manufacturers is the logically following question regarding the source of law that *does* govern such a warranty. It is inconceivable (1) that a manufacturer could make explicit promises regarding its product's freedom from defects in material and workmanship; (2) that the manufacturer could make additional promises that it will do certain things (repair, replace, refund, etc.) if the product is found to be defective; (3) that an ultimate buyer could make a decision to purchase the product from an intermediate "seller" influenced, even if only in part, by the existence of those promises; and then (4) the buyer would be unable to enforce those promises in a court of law because the promises were not made in a contractual setting.

This scenario is inconceivable because the common law (more properly "equity") expressly provides for enforcement of such promises even when no contract exists. The UCC is not needed to enforce such warranties. Rather, the doctrine of promissory estoppel is available as a source of law from which the remote manufacturer/warrantor may be held to account if it breaches its warranty. A promisor may be bound by his promise, even when no contract is formed, if the promise is one "which the promisor should reasonably expect to induce action or forbearance of definite and substantial character and which does so . . . if injustice can be avoided only by enforcement thereof."⁹⁴

A remote manufacturer which seeks to enhance the value of its product to ultimate buyers by including an express warranty with that product is, without question, making a promise which the manufacturer/promisor should reasonably expect to induce the buyer's definite and substantial action of purchasing the product. Justice requires enforcement of such a promise, given

94. *Davis v. University of Montevallo*, 638 So. 2d 754, 758 (Ala. 1994).

that product sellers are perfectly free to disclaim all express and implied warranties, leaving the buyer with recourse against only the manufacturer if the manufacturer has given a warranty.⁹⁵

As the name implies, however, there is nothing in the case law regarding "promissory estoppel" which allows enforcement of anything other than the promise. In other words, if the promisor promises that a product will be free from defect in material or workmanship, the promisor cannot be deemed to have promised that the product will be fit for all ordinary purposes. If the promisor promises that if the product does have a defect, it will do no more than replace the product, then the promisor cannot be treated as if it had promised to make the buyer whole for any damages "proximately resulting" from the product's failure to perform as the buyer might wish. Promissory estoppel is consistent with freedom of warranty, and it has the added advantage of being a legitimate theory of law rather than something that emanates from a penumbra of the UCC.

The law is not well served by stretching and twisting statutes to make them apply to matters expressly excluded from their coverage. Article Two of the UCC has nothing to say about warrantors who are not also sellers, and no court interested in preserving respect for the legal process should pretend otherwise.

B. Economic Policy: A Pure Commentary

As if pure respect for the law should not be sufficient motivation to protect freedom of warranty from the misapplication of the UCC, responsible economic policy also dictates that remote manufacturers not be shanghaied into taking on unexpected and extra-legal responsibilities whenever they give warranty protection to consumers.

The concept is simple and self-evident: Remote manufacturers, because they are not "sellers," may be entirely silent on the issue of warranty protection. There is nothing in the law that forces them even to take steps to disclaim otherwise implied

95. See ALA. CODE § 7-2-313 (1997) (providing that a seller's express warranty is only created by specific acts of the seller); *id.* § 7-2-316 (stating that implied warranties and remedies for all warranties may be excluded).

warranties. Such warranties simply do not arise.⁹⁶ Manufacturers provide such warranty protection because it helps them sell their products. If buyers did not prefer products covered by warranties to those not covered by warranties, there would be no reason for manufacturers to incur the expense of making such promises.

Thus, the pressures of competition in the marketplace force manufacturers to give added value to consumers in the form of warranty protection. It is not the law which directly creates this duty; rather, it arises from the free market which itself is a product of strict adherence to the *rule of law*. Were the law to say, in essence, to remote manufacturers who are free to give no warranty at all, "if you give even the slightest warranty you will be subjecting yourself to liability for the full range of 'proximately-caused' damages which are the responsibility of sellers under the UCC, even if you affirmatively state that you are *not* promising to be responsible for such damages," it seems doubtful that very many manufacturers would voluntarily choose to give warranty protection.

Thus, by infringing on freedom of warranty, the courts risk creation of a serious disincentive to the provision of any warranty at all. This would be a classic case of killing the goose that laid the golden egg. What possible societal interest could be served by such action on the part of Alabama courts? To create a legal atmosphere hostile to remote manufacturers' giving of express warranties is simply to deprive the people of Alabama of the economic value of such warranties. Alabama courts have no mandate to act contrary to the interests of the citizens of Alabama. They should therefore refrain from deterring the provision of express warranty protection by remote manufacturers.

96. The reader is again reminded that all references in this Article to warranty liability are to liability for *economic* damages. The implied warranty theory is available to persons physically injured by product malfunctions by virtue of ALA. CODE § 7-2-318 (1997), which allows the physically injured plaintiff, regardless of whether he is a "buyer" of the product, to maintain an action against the manufacturer of the product based on his ability to step into the shoes, as a third-party beneficiary, of any party to whom the manufacturer sold its product. Because it is impossible for the manufacturer to bring its product to market without selling it to *someone*, there is always a "sale" on which the physically injured plaintiff can base his claim of breach of implied warranty. Thus, privity is irrelevant in the context of physical injury.

V. CONCLUSION

Alabama has come dangerously close to obliterating freedom of warranty for remote manufacturers. Opportunities to turn back from this dangerous course will undoubtedly arise. The Supreme Court of Alabama should view these as opportunities to enhance the economic well-being of the citizens of Alabama by holding that the Uniform Commercial Code is not available as a means of writing into a remote manufacturer's warranty promises that the remote manufacturer never made.

