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Vouching to Quality Warranty: Case Law and Commercial Code

*Ronan E. Degnan** and *Alan J. Barton***

Section 2-607(5)(a) of the Uniform Commercial Code provides:

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.

This language has not yet been construed or applied, but there has been a sufficient number of recent cases applying an analogous, judicially evolved notice-and-opportunity-to-defend technique (hereafter referred to as vouching) to assure that the Code will soon be invoked. Yet these cases are still too few and too superficial to have worked out the problems that will arise in its application. Nor will the very general language of the Code be of much assistance.

The substance of the present language first appeared, in conjunction with an authorization for third party practice, in section 119 of the Uniform Revised Sales Act. Both features were carried over into the Uniform Commercial Code as section 2-718.¹ Apparently there was little specific opposi-

* B.S.L., University of Minnesota, 1950; LL.B., University of Minnesota School of Law, 1951; Professor of Law, University of California School of Law, Berkeley.

** A.B., University of California, Berkeley, 1960; LL.B., University of California School of Law, Berkeley, 1963; Member, California Law Review, 1962-63.

¹ In the Proposed Final Draft of 1950 it read:

(1) Where a buyer resells and is sued for any breach with regard to which he would have an action over against his seller he may

(a) implead his seller in like manner and with like effect as is or may be provided in the [Rules of Civil Procedure of this State] [Federal Rules of Civil Procedure]; or

(b) seasonably notify his seller to come in and defend the action.

(2) Failure of a seller to defend after receiving such notification renders any adverse judgment in the action conclusive against him and makes him liable for all costs of the action including reasonable attorney's fees.

UNIFORM COMMERCIAL CODE § 2-718 (Proposed Final Draft 1950).

tion to the vouching clause but both it and the impleader proviso were attacked by those who thought an omnibus commercial code ambitious enough without including efforts at procedural reform as well.² Further cause for resistance was that manufacturing interests were alarmed by the even limited inroads upon the privity doctrine proposed in sections 2-318 and 2-719.³ They opposed anything that threatened to involve the manufacturer directly in warranty litigation with consumers or injured persons, whether the manufacturer was brought in as a defendant under section 2-318 or indirectly by vouching or impleading.⁴ The opposition was effective: the privity inroad was narrowed⁵ and, despite assurances that the vouching technique was well established in case law,⁶ it and its companion impleader provision disappeared in the 1951 Proposed Final Draft.

It seems clear that vouching was deleted not because of specific opposition to it but because of its close link with impleader. It seems equally clear that when vouching (although not impleader) was restored to the Code in 1955 it was as a noncontroversial companion to part (b) of subsection 5. Part (b) is designed to allow a seller who warrants against "infringement or the like" to assume control of the litigation against his buyer upon demand and provides that a buyer who does not surrender such control, under proper assurances, loses any claim for indemnification from an adverse judgment. Subsection 5, including the vouching provisions of part (a), got its impetus not from the draftsmen of the Code nor from the New York Law Revision Commission (which was responsible for much of the 1955 revision)⁷ but from the patent bar of that state. The

² For example, Mr. Jenner of Illinois indicated that he personally approved of third party practice but feared that an attempt to include it would provoke unnecessary opposition to the whole Code in state legislatures. *Transcript of Discussion, Joint Meeting on the Commercial Code* 315-18, 329 (1950).

³ Section 2-318 made warranty recovery available to any member of the family or household of the purchaser, to his guests and to those "whose relationship to him is such as to make it reasonable to expect that such person may use, consume or be affected by the goods . . ." Section 2-719 allowed these persons, and the purchaser, to seek recovery from the seller or "any person subject to impleader under the preceding section." This opening of both sides of the privity protection provoked substantial opposition. See Braucher, *The Uniform Commercial Code—A Third Look?*, 14 W. RES. L. REV. 7, 14-15 (1962).

⁴ See generally *Transcript*, *supra* note 2, at 319-22; Malcolm, *The Proposed Commercial Code*, 6 BUS. LAW. 113, 187-92 (1951). The objection of the packers and processors of perishable foods was that these sections together provided a method for plaintiffs to "go back to the solvent and large processor rather than to concentrate at the end of the transaction on which really he should concentrate on in 95 or 99 out of 100 cases." *Transcript*, *supra* at 326.

⁵ Section 2-719 was deleted entirely and the clause quoted in note 3 *supra* stricken from section 2-318. But the victory was only temporary; section 2-318 has been omitted from the California enactment as too restrictive and is presently the subject of study by the Editorial Committee. See Braucher, *supra* note 3, at 15-16.

⁶ *Transcript*, *supra* note 2, at 327.

⁷ See Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 802-04, 806 (1958).

justification there given for vouching, and accepted almost verbatim by the official Comment, is that subsection 5(a) merely "codifies for all warranties the practice of voucher to defend."⁸

This brief history of the Code provision may suggest that vouching is not very significant. When deleted, it was because related procedural provisions were found noxious, and when restored it was passed over as a mere adjunct of another feature which was of great importance only to the limited group that had any interest in the problem at all. Because vouching provisions were not contained in the original Code which the New York Law Revision Commission and its consultants reviewed, they did not become the subject of the critical study to which other aspects of the sales article were exposed.

I

THE EVOLUTION OF VOUCHING

The practice of summoning one under obligation to indemnify to assume the defense of an action has both a lengthy history and wide application. More narrowly, the technique of vouching a warrantor of title of real or personal property to assume defense of an action, at peril of being bound by adjudications in which he had taken no part, is almost as old as warranties themselves.⁹ To the extent, therefore, that section 2-607(5)(a) makes vouching available to a buyer of goods, it merely codifies a long recognized doctrine. Extending its application to quality warranties, however, was an adventure quite opposed to the judicial attitude expressed in the few cases which had been decided when the original proposal was put forth.¹⁰

The first attempted resort to vouching in a quality warranty setting appears in a Tennessee decision of 1852.¹¹ The buyer of a female slave, warranted "sound," sold her to another, giving a like warranty. She "wasted away" and died, and the first buyer was found liable for breach of his warranty. His attempt to use this judgment as evidence of breach in an action against his seller failed; no notice or demand for defense had been served in the first action, and, as an additional reason, the issues were not the same

⁸ UNIFORM COMMERCIAL CODE § 2-607, comment 7. See Professor Honnold's comments in N.Y. LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 530-31 (1955), and the analysis of Professor Hesson, *id.* at 709-13.

⁹ An excellent Note in 34 VA. L. REV. 321 (1948) traces employment of the technique to medieval times.

¹⁰ This is reflected in the RESTATEMENT OF JUDGMENTS (1942), which in § 108 states the vouching rules for title to property and validity of choses in action but says nothing of quality cases. Quality vouching would, however, come under the more general language of § 107, See comment *b*.

¹¹ *Morgan v. Winston*, 32 Tenn. 336 (1852).

—"It might well be that the slave was sound at the one time, and unsound at the other."¹²

Failure to give notice of the action and demand assumption of its defense would alone have been enough to justify the ruling. In the next two attempts to invoke a prior judgment, notice and demand had been served, but both cases found the additional reason given by the Tennessee court sufficient to prevent giving the judgment any effect; the possibility of change in condition of the articles in question (in one baled cotton¹³ and in the other a stallion¹⁴) made the finding in the earlier trial of a defect in the goods at the time of the second sale not even admissible as evidence of the condition at the time of the first sale.

Not until 1929, in *London Guarantee & Accident Co. v. Strait Scale Co.*,¹⁵ did an American court give effect to a vouching letter when the breach involved was of a warranty of quality rather than of title. Strait, a Missouri corporation, manufactured a coal scale and sold it to a contractor that installed it for a railroad in Minnesota. The scale collapsed in its initial tests because of an alleged defect in a casting. Employees of the railroad who were injured sued the installer in a federal court in Minnesota, alleging negligent failure to inspect for and discover the defect in the casting. Although properly notified, Strait declined to assume defense of the claim. The resulting judgment was satisfied by the installer's liability insurer, London Guarantee & Accident Co., which then sued Strait in Missouri to recover the amount and costs of the defense, alleging breach of an implied warranty. The Supreme Court of Missouri found that a warranty had been given and that "the judgment of the United States District Court conclusively determines for the purposes of this action that the Construction

¹² *Id.* at 338.

¹³ *Smith & Melton v. Moore*, 7 S.C. (n.s.) 209, 223-24 (1876). Counsel for the buyer recognized that he was advocating an expansion of vouching and argued carefully for it. *Id.* at 210-12.

¹⁴ *Booth v. Scheer*, 105 Kan. 643, 185 Pac. 898 (1919).

The soundness of a horse is so much a matter of opinion, and is so easily affected by change of care, or change of work, or of feed, water, or weather . . . that it would never do to extend or apply the doctrine of warranties of title, if that doctrine be well founded, to warranties of soundness to run with so changeable a form of property as a stallion.

Id. at 646-47, 185 Pac. at 900.

An alternative ground was that while warranties of title ran with the goods or land, warranties of quality were "personal" and did not run to a sub-vendee. The dissent pointed out the fallacy in this, *id.* at 647-48, 185 Pac. at 900, but other courts have followed the majority reasoning. *Burns v. Baldwin-Doherty Co.*, 132 Me. 331, 170 Atl. 511 (1934); *Bonwit Teller & Co. v. Frank Staub Furs*, 208 Misc. 589, 143 N.Y.S.2d 801 (Sup. Ct. 1955). The error of the *Booth* court was perpetuated by Freeman. 1 FREEMAN, JUDGMENTS § 454 n.4 (5th ed. 1925).

¹⁵ 322 Mo. 502, 15 S.W.2d 766 (1929).

Company was legally liable for the damages suffered by the Railroad Company's employees through the breaking of the lever beam, and the amount of that liability."¹⁶

This case would fit the language of section 2-607(5)(a): there had been a sale, of goods, by a seller, to a buyer, and the buyer had been sued for a breach of "other obligation" (although not of warranty) for which the seller would be answerable over under his warranty that the casting was fit for the intended purpose. Although there had been scattered dicta¹⁷ supporting the use of vouching in quality warranty cases, the *London Guarantee* case was at the time of the original debates the only holding which did. What record is available does not reflect that this case was relied upon by, or even known to, the draftsmen. They depended rather upon the general vouching law in other indemnity settings. On the other hand, the opposition to section 2-607(5)(a) was not on the ground that there was no case authority, or even that the proposal was a bad one, but simply that it was a matter of procedure and outside the scope of a commercial law revision.

By the time the slightly altered vouching provision was re-inserted in 1954¹⁸ there was a case which, building upon *London Guarantee*, would have provided support for the new subsection—*Liberty Mut. Ins. Co. v. J. R. Clark Co.*¹⁹ Clark, a Minnesota manufacturer, sold some ladders to a Missouri retailer, who in turn sold one to Kayser, giving an express warranty that the ladder was safe and strong and of good material and workmanship. Kayser was injured when the ladder collapsed. Clark was given timely notice of Kayser's suit against the retailer and was tendered the defense of it. Although Clark apparently provided some assistance in the defense of the Missouri action, it declined to undertake the defense and refused to pay the resulting judgment or the costs of the defense. Liberty Mutual satisfied the judgment and, as subrogee, sued Clark in the Minnesota courts. The jury found for Clark, but the trial court ordered judgment notwithstanding the verdict, which was sustained on appeal. The supreme court set out, in broad language, what would suffice to create a *prima facie* case and what defenses would be available. It did not go behind the *London*

¹⁶ *Id.* at 514, 15 S.W.2d at 770.

¹⁷ See *Robert A. Reichard, Inc. v. Ezl. Dunwoody Co.*, 45 F. Supp. 153, 156 (E.D. Pa. 1942); *Martin v. Great Atlantic & Pacific Tea Co.*, 301 Ky. 429, 434, 192 S.W.2d 201, 203 (1946); *Lord & Taylor v. Yale & Towne Mfg. Co.*, 230 N.Y. 132, 136-37, 129 N.E. 346, 347 (1920); *H. W. Butterworth & S. Co. v. B. F. Sturtevant Co.*, 176 App. Div. 528, 531-32, 163 N.Y. Supp. 314, 316 (Sup. Ct. 1917).

¹⁸ UNIFORM LAWS ANNOT., UNIFORM COMMERCIAL CODE, AMENDMENTS APPROVED BY ACTION OF THE A.L.I. AND THE NAT'L CONF. OF COMM'RS ON UNIFORM LAWS AT THEIR RESPECTIVE MEETINGS IN 1954 10-11.

¹⁹ 239 Minn. 511, 59 N.W.2d 899 (1953).

Guarantee decision nor did it discuss any of the objections which had made the earlier courts wholly reject the use of prior adjudications. Furthermore, despite evidence offered on the point,²⁰ the court did not treat the most serious of those objections—that the condition of the article might have changed between the time of the first and second sales.

Perhaps because of its very newness, this decision seems to have played no part in the restoration of vouching to the Code. As noted above, the return of vouching seemed to originate with the New York patent bar, which was concerned wholly with warranties against infringement, not with those of quality. The subsequent New York studies largely pass over the use of vouching, although they clearly notice its procedural implications.²¹ Professor Honnold's statement²² refers to a warranty of title case and cites a note in the *Michigan Law Review* and an annotation in *American Law Reports*. The latter is a report on the earlier cases holding that vouching is ineffective in quality cases;²³ the former purports to find only one square holding in support of vouching.²⁴ This decision, *Carleton v. Lombard, Ayers & Co.*,²⁵ has been relied upon by others as well.²⁶ But one critical point has been overlooked—the case did not hold the vendor precluded by the judgment because he had been *tendered* the defense but because he had in fact responded to the demand and undertaken control of the case. He was bound not because of his refusal to litigate but because he had in fact litigated.²⁷ The decision scarcely stands in support of the efficacy of vouching letters.

²⁰ *Id.* at 516, 59 N.W.2d at 903. Defendant's expert testified that the ladder collapsed not because of defective materials but because of damage caused to it later.

²¹ See Professor Hesson's analysis in N.Y. LAW REVISION COMM'N, STUDY OF UNIFORM COMMERCIAL CODE 709-713 (1955).

²² *Id.* at 530-31. Compare the treatment in HONNOLD, CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING 39 (1954), where much the same references are found in Chapter 2, section 2: "Implied Warranty of Title." The second edition, published in 1962, has a slightly enlarged note still in the title section but a reference back at the end of the warranty chapter suggests a more general application. *Id.* (2d ed. 1962) at 140.

²³ 8 A.L.R. 667 (1920). The case annotated is *Booth v. Scheer*, *supra* note 14.

²⁴ 40 MICH. L. REV. 872 (1942). The Note is useful on the scope of preclusion but careless in the reading of the cases upon which it relies.

²⁵ 149 N.Y. 137, 43 N.E. 422 (1896).

²⁶ Note, 34 VA. L. REV. 321, 333 (1948), notices the fact of actual participation by the seller but finds indication that the court would have reached the same result without it.

²⁷ *Carleton v. Lombard, Ayers & Co.*, 149 N.Y. 137, 43 N.E. 422 (1896):

Notice was given to the defendant to come in and defend the action, and it complied with the notice. It participated in the preparation of the defense, the production of proofs, and at the trial was represented by counsel, and had every opportunity to resist the claim. *Id.* at 142, 43 N.E. at 423.

Cf. Hoskins v. Hotel Randolph Co., 203 Iowa 1152, 211 N.W. 423 (1926), *cert. denied*, 275 U.S. 566 (1927), discussed *infra* notes 76-78 and accompanying text.

II

SOME PROBLEMS INVOLVED IN VOUCHING

Outlined above are the highlights of the development of the present version of the vouching procedure of the Code. We propose now to examine some of the problems that will arise as resort to the vouching technique in quality cases increases. That it will increase seems clear; there are already several decisions, even though the meaningful history is only a decade old and the Code provision even younger than that.

A. The Question of "Jurisdiction"

None of the early cases rejecting vouching in quality settings gives any indication that the buyer-defendant resorted to vouching because he was unable to obtain service of process upon his seller; so far as appears, the seller in each instance was within the state in which the first action was commenced. But a procedural consideration was nevertheless involved. There then existed no equivalent of modern third party practice under which a defendant may bring into the litigation a person "who is or may be liable to him for all or part of the plaintiff's claim against him."²⁸ The obstacle was not that process could not be served but that none could issue.

The draftsmen of the original provisions of the Uniform Commercial Code acknowledged the significance of the kinship between the vouching letter and the third party complaint by including the two in a single section. Unlike vouching, the third party provision was never restored. Procedural advances in most states, however, have made third party practice available to such an extent that a seller who is subject to service of process within the state in which his buyer is sued for breach of warranty can usually be brought into the action by that technique.²⁹ Should a manufacturer prove reluctant to honor a vouching letter, he may be sure that his next communication will be in the form of a summons. The advantage of

²⁸ FED. R. CIV. P. 14. The source of this rule is described in 3 MOORE, *FEDERAL PRACTICE* ¶ 14.02, at 407-09 (1948); Note, 7 U. CHI. L. REV. 359 (1940). California courts have construed section 442 of the California Code of Civil Procedure to permit third party claims against indemnitors. *Roylance v. Doelger*, 57 Cal. 2d 255, 368 P.2d 535, 19 Cal. Rptr. 7 (1962) (liability insurance); *Dreybus v. Bayless Rents*, 213 A.C.A. 535, 28 Cal. Rptr. 825 (1963) (product liability claim). This interpretation is criticized in Friedenthal, *The Expansion of Joinder in Cross-Complaints by the Erroneous Interpretation of Section 442 of the California Code of Civil Procedure*, 51 Calif. L. Rev. 494 (1963).

²⁹ From the buyer's viewpoint, vouching may still have advantages. The buyer may recover his expenses in defending the action if the seller refuses to accept a proper tender. See notes 47-50 *infra* and accompanying text. But he is not entitled to recover his expenses in obtaining indemnity, and the difficulty in apportioning expenses between defendant's cost of resisting the claim against the buyer and the cost of asserting his own claim against the third party defendant may lead to denial of recovery of any expenses. *Sun Indem. Co. v. Landis*, 119 Colo. 191, 201 P.2d 602 (1948).

responding to the vouching letter is obvious—it allows him to litigate anonymously, while as a third party defendant his identity is disclosed to everybody, including the jury. But until third party practice becomes as widespread as vouching is destined to become, there may remain some need for vouching even when the manufacturer can be reached by process issuing from the court in which the original suit is brought.

That need, however, may be more theoretical than real. Quality warranty litigation is primarily personal injury litigation. An injured plaintiff will himself normally join a seller who can be reached,³⁰ and neither a vouching letter nor a third party complaint is necessary to bring the seller in as a party. Once in, a cross-claim is sufficient to make the issues decided conclusive between the seller and his co-defendant buyer.³¹ Plaintiffs have several reasons to join the seller, including the recent near disappearance of the privity doctrine³² (a development which parallels in time the evolution of vouching, making the interrelationship of the two difficult to assess) and the fact that the injured person may have negligence grounds for recovery against a manufacturer which he would not have against a retailer-buyer. For these reasons, extensive concern about third party practice is no longer warranted.

There is one additional question about jurisdiction which we regard as more imaginary than real. One commentator recently equated the vouch-

³⁰ The expanding reach of state court process has been extensively commented upon. See EHRENZWEIG, *CONFLICT OF LAWS* 95-98 (1962); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 1003-04 (1960). Generally, third party process is subject to the same restraints as original process. But see the recent amendment of section 4(f) of the Federal Rules of Civil Procedure, extending service of third party process to places "not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial." 83 Sup. Ct. No. 7 (Supp. p. 8 1963).

Of special interest are recent attempts to enlarge the reach of process for product liability cases. See CONN. GEN. STAT. ANN. § 33-411(c)(3) (1960); N.C. GEN. STAT. § 55-145(a)(3) (1960); WIS. STAT. § 262.05(4)(b) (Supp. 1963). The North Carolina act, the oldest of the three, has not received a very generous interpretation. See *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956); *Moss v. City of Winston-Salem*, 252 N.C. 480, 119 S.E.2d 445 (1961).

Illustration of the relationship between original process and vouching is provided by a comparison of *American Radiator & Standard Sanitary Corp. v. Titan Valve & Mfg. Co.*, 144 F. Supp. 841 (N.D. Ohio 1956), an ineffective effort by American to obtain indemnity from Titan by use of vouching, and *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), where on an identical fact pattern the injured person's service upon Titan was upheld.

³¹ Although the traditional rule is to the contrary, some courts hold the judgment preclusive even in the absence of a cross-claim if the co-defendants litigated adversely on the issues involved. See *Gleason v. Hardware Mut. Cas. Co.*, 324 Mass. 695, 88 N.E.2d 632 (1949); *Wright v. Schick*, 134 Ohio St. 193, 16 N.E.2d 321 (1938); Note, 27 MINN. L. REV. 519 (1943).

³² See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960).

ing letter with process and said: "Concerning the non-appearing manufacturer, jurisdiction remains a requisite, for without this base a court cannot conclude a party's rights or liabilities."³³ He concluded that the Code section could not be applied to out-of-state sellers unless new process statutes, which extend the reach of process, can be sustained, which in turn would require "rejection of the *Pennoyer v. Neff* principle that jurisdictional due process for an individual requires either personal service or domicile coupled with sufficient notice."³⁴ We regard this as untenable. The letter is not process;³⁵ the seller warrants not only the quality of the goods but that he will either defend actions against his buyer charging that the goods were not of that quality or be bound by the result.³⁶ It is this aspect of warranty that makes the judgment obtained against a buyer binding upon a seller who has been tendered and has refused the defense. The seller is precluded not because the court had jurisdiction over him but because he agreed with his buyer to defend or abide the result.

Indeed, if our assumptions above are correct, it is only when the manufacturer-seller is beyond the reach of third party complaints (if available in the state in question) or of suit by the injured person that there is any practical need for vouching. That our assumptions are not wholly unfounded is evidenced by the fact that all of the recent vouching cases do involve offering judgments of one state in the courts of another. A few of them go further and mention that the manufacturer-seller had also been

³³ Note, 36 CONN. B. J. 288, 289 (1962).

³⁴ *Id.* at 291.

³⁵ *St. Joseph & G.I. Ry. v. Des Moines Union Ry.*, 180 Iowa 1292, 162 N.W. 812 (1917): "This is not because such notice brings the person notified within the jurisdiction of the court. . . . The suit by plaintiff against the defendant in this action is not in fact or effect a suit upon the Duncan judgment." 18 Iowa at 1304, 162 N.W. at 817.

The United States Supreme Court has held that one who appears to defend in response to a vouching letter does not make a general appearance and subject himself to a direct claim by the plaintiff. *G. & C. Merriam Co. v. Saalfeld*, 241 U.S. 22 (1916); *cf. Schnell v. Peter Eckrich & Sons*, 365 U.S. 260 (1961).

³⁶ The Code language applies to a "buyer" and "his seller" but extends to breach of both warranty and "other obligation." We would not, however, make too much of the contractual nature of the obligation to indemnify. It may be express, as in liability insurance contracts, where clearly an effective notice may cross state lines. See Degnan, *Semi-Direct Action Against Liability Insurers: Current Problems*, 13 VAND. L. REV. 871, 892-93, 895 (1960). It may be implied, as under the Code provision. Or it may be derived from quasi-contract principles. RESTATEMENT, RESTITUTION §§ 93-98 (1937); RESTATEMENT, JUDGMENTS § 107, comment b (1942).

One seeming consequence of this characterization is that the duty to defend could be disclaimed or the right to it waived. *Cf. Maryland Cas. Co. v. Owens-Illinois Glass Co.*, 116 F. Supp. 122 (S.D. W. Va. 1953); *But cf. Liberty Mut. Ins. Co. v. J. R. Clark Co.*, 239 Minn. 511, 520-21, 59 N.W.2d 899, 905 (1953). See generally Note, *Limitations on Freedom to Modify Contract Remedies*, 72 YALE L. J. 723 (1963).

named as a party defendant in the first action but was not amenable to service.³⁷

B. Choice of Law

Cases of the future, like those of the immediate past, will usually arise because vouching letters can cross state lines when process cannot. An incipient choice of law question is presented; one of the states involved may give greater or lesser effect to such letters than does the other. It would have been appropriate for the Missouri court in *London Guarantee* to have asked whether a vouching letter from a Minnesota buyer invoked any Minnesota rule that would have obliged a Minnesota seller to assume defense of the action. Unaware of the earlier cases denying letters this effect, the court assumed the universality of the doctrine and seemed to regard the question as one wholly of local Missouri policy. (Knowing that there were prior contrary cases might have alerted the Missouri court to a possible conflicts problem; this would not have aided its solution, however, because those cases did not involve crossing state lines.)

The wholly fortuitous fact that the next case arose in a Minnesota court which was asked to respect a Missouri judgment because of a Missouri vouching letter received in Minnesota again obviated the necessity for asking the question. Missouri did honor such letters, as the *London Guarantee* case showed, and Minnesota had only to decide whether its policy was to do the same. Since the decision was that it would, there was no conflict and no need to choose. Because all courts since have overlooked the prior contrary authority, and have assumed both the propriety and universality of giving effect to vouching letters, no case has even hinted that there may be conflicting views about the obligation to honor a demand to defend an action. Very likely this will continue to be true. In the past there has been too little law to create much conflict; in the future the increasing prevalence of the Code provision will tend to insure uniformity, at least in general application if not on the periphery of the doctrine.

Should a case arise, however, several possible solutions may be ad-

³⁷ E.g., *Grummons v. Zollinger*, 189 F. Supp. 64, 65 (N.D. Ind. 1960).

A by-product of the distance factor is diversity, and the later cases are predominantly in the federal courts. Since *Liberty Mut. Ins. Co. v. J. R. Clark Co.*, 239 Minn. 511, 59 N.W.2d 899 (1953), the origin of the modern doctrine, we find only one state case. *U.S. Wire & Cable Co. v. Ascher Corp.*, 34 N.J. 121, 167 A.2d 633 (1961). Because the courts have been unaware of the early cases repudiating vouching, there has been no discussion of the application of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Although it is clear that the right to indemnification is a matter of substance, the procedure of impleader may be used when state law allows indemnification even if the state does not permit impleader in its courts. See 1A BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 426 (Wright rev. 1960). But vouching goes to substance, not procedure; it is an incident of the relationship between the parties, not the relationship of a party to the court.

vanced. The red herring most to be avoided is that of full faith and credit to foreign judgments. As noted in the previous section, there is some tendency to equate the vouching letter with process. The corollary suggestion would be that the judgment is binding, if at all, as a form of collateral estoppel. The greater plausability of this corollary has led to discussion of the effect of vouching in terms of *res judicata*.³⁸ The slip is an easy one, since most of the considerations which determine the *scope* of the preclusion in vouching are the same as those which operate in collateral estoppel. But the *reason* for the preclusion is different; the seller is bound not because the court has adjudicated certain facts as against him, but because he has impliedly agreed to be bound by their adjudication against another. There is thus no compulsion of collateral estoppel or full faith and credit operating when the judgment is offered against the distant seller.

If this position is correct, and the obligation to defend does arise out of implied warranty, it might be urged that the so-called "center of gravity" standard applies, and that the effect of a letter is "determined by the local law of the state with which the contract has its most significant relationship. . . ."³⁹ But whatever may be said for this view when applied to other aspects of the contract of sale, it seems inapposite to the problem presented by vouching letters. The question is one well within the province of the state in which the second action is brought. The effect that that state wishes to give to prior adjudication elsewhere is, at least in the first instance, its concern. In the overwhelming majority of cases, that concern will be strongly reinforced because the vouching letter was also received in that state. This view seems to be supported by the choice of law section of the Commercial Code⁴⁰ itself and appears to have been the assumption of the courts in the decided cases.

C. The Use of the Prior Judgment

To recover in an action for indemnity after an unsuccessful but proper effort to vouch in his seller, the buyer must allege and prove that the rela-

³⁸ See *Liberty Mut. Ins. Co. v. J. R. Clark Co.*, 239 Minn. 511, 520-21, 59 N.W.2d 899, 905 (1953). A Note in 40 MICH. L. REV. 872 (1942), treats the whole problem as one of application of the doctrine of *res judicata*.

³⁹ RESTATEMENT (SECOND), CONFLICT OF LAWS § 332b(b) (1960).

⁴⁰ Absent agreement by the parties on the controlling law, "this Act applies to transactions bearing an appropriate relation to this state." UNIFORM COMMERCIAL CODE § 1-105. For a brief statement of the development of this section, see Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 810-12 (1958).

The only closely analogous case we have found is *Lowrance Buick Co. v. Mullinax*, 91 Ga. App. 865, 87 S.E.2d 412 (1955), in which a Georgia seller was vouched into Tennessee litigation over the title of an automobile. The court emphasized that the recovery was sought under the Georgia vouching statute but also said that it was giving full faith and credit to the Tennessee judgment, at least in the absence of a showing that the Georgia seller would not have been permitted to defend in the Tennessee court.

tion of buyer and seller exists;⁴¹ that there has been a breach of warranty or "other obligation" owed by the seller to the buyer; that the buyer has suffered damage as a consequence of the breach; and the amount of those damages. This may be no more than the burden of any ordinary lawsuit, but it is aggravated in indemnity cases because, as previously pointed out, the buyer is usually litigating far from home and from his principal sources of proof. Proving the sale normally will be easy; records will suffice if admissions cannot be obtained. The existence of express warranty may present some minor difficulty, but overwhelmingly the warranty will be an implied warranty of merchantability, and thus primarily a question of law rather than of fact. Passing over breach for the moment, damage is easily shown by record or documentary evidence that the buyer has satisfied the adverse judgment⁴² or, more rarely, made a reasonable settlement of the claim.⁴³

There is occasional suggestion that the judgment is "res judicata" as to the damages.⁴⁴ This is inaccurate although generally harmless usage. Talk of establishing the damage by the judgment tends to suggest that the liability in question is that of the manufacturer-seller to the injured consumer, which has been determined by the earlier litigation. That is not

⁴¹ Section 2-607(5)(a) appears to have a built-in privity requirement; the buyer gives written notice to "his seller." How deliberate this is is not clear. When the Code was first proposed, privity was in the natural order of things. When vouching was restored at the instigation of New York interests the wording could have been influenced by New York law. The language of subsection 5(a) is patterned on that of section 3-803, providing for vouching of persons answerable over on commercial paper. *N.Y.* had held that only those directly liable to the defendant could be vouched. *Hartford Acc. & Indemn. Co. v. First Nat. Bank & Trust Co.*, 281 N.Y. 162, 22 N.E.2d 324 (1939). Section 3-803, comment, indicates an intention to preserve the limitation of the *Hartford* case.

⁴² See *Friedman v. Typhoon Air Conditioning Co.*, 205 F. Supp. 22 (E.D.N.Y. 1962), dismissing for failure to allege satisfaction of the judgment, and the same case in 31 F.R.D. 287 (E.D.N.Y. 1962), allowing a supplementary complaint alleging that the judgment had been satisfied. That the amount paid is the loss must be admitted, but that it must have been paid before the action is commenced seems an unnecessary requirement. Awaiting the time of payment raises the risk that limitations will have expired. There is danger in California that the buyer's cause of action accrues when he learns of the defect, as through customer complaints, although his liability has not then "been finally determined." See *Riesen v. Leeder*, 193 Cal. App. 2d 580, 14 Cal. Rptr. 469 (1961).

⁴³ We find no quality case in point on settlement. *Illinois Cent. R.R. v. Blaba*, 3 Wis. 2d 638, 89 N.W.2d 197 (1958), allowed recovery of a settlement at three-fourths of the judgment. The indemnitor had been given notice of the settlement. *Ingalls v. Meissner*, 11 Wis. 2d 371, 105 N.W.2d 748 (1960), a product liability case, properly held that the reasonableness of the settlement could be inquired into.

⁴⁴ Note, 40 MICH. L. REV. 872, 878, 879 (1942). *H. W. Butterworth & S. Co. v. B. F. Sturtevant Co.*, 176 App. Div. 528, 163 N.Y.S. 314 (1917), involved a suit in which part of the damages paid were attributable to defects in the buyer's own components and part to components supplied by his seller. The first court purported to determine how much was attributable to the seller's but the second court declined to accept this determination.

involved. What is involved is the loss of the retailer-buyer, which consists of his compulsory payment. It also seems clear enough, although one minor case is to the contrary,⁴⁵ that the buyer's remedy is for the amount he had to pay to the claimant.⁴⁶

Nor is the buyer's recovery limited to the amount paid out to the injured person.⁴⁷ It includes attorney fees and other costs reasonably⁴⁸ incurred in defense of the action. There has been little challenge to the right of the vouching buyer to be reimbursed for his expenses in defending the action, apart from one ingenious but unavailing protest that the fees should be apportioned in the ratio that the actual recovery against the buyer bore to the amount originally claimed. The argument was based on the assumption, accepted by the court, that if the claimant failed to recover at all there could be no liability by the seller to the buyer for costs of defending.⁴⁹ The proposition is not all that clear. If defeat is taken as proof that the claim was baseless in the beginning, denial of expenses seems proper; the seller warranted that his product was good, not that the buyer's customers would not assert baseless claims. But not every unsuccessful claim is baseless, and a buyer may defeat claims by defenses personal to him even when the third party's injury is real and the product is defective. The customer may have failed to give timely notice to the buyer, or allowed limitations to expire. The buyer may have disclaimed warranty, or the claim may have been in negligence but the third party unable to show that the buyer knew or should have known of the defect. There may be, in such cases, a rather delicate question about whether the expenses of defending were "caused" by the breach on the part of the seller. We are disposed to think that much will turn upon the facts of given cases, and that there should be no hard and fast rule that costs of a successful defense are not recoverable. If it is shown that there was a breach of seller's warranty or

⁴⁵ *Bonwit Teller & Co. v. Frank Staub Furs*, 208 Misc. 589, 143 N.Y.S.2d 801 (Sup. Ct. 1955).

⁴⁶ Relying on 3 WILLISTON, SALES § 614b (rev. ed. 1948), some courts have called recovery against the buyer only *prima facie*. See, e.g., *Robert A. Reichard, Inc. v. Ezl. Dunwoody Co.*, 45 F. Supp. 153, 157 (E.D. Pa. 1942). But we find no case in which a vouched seller was permitted to contest the amount of the recovery against the buyer.

⁴⁷ We are concerned solely with indemnity and do not consider damage to the buyer other than the claims against him and the costs of defending them. For other damage problems, see, e.g., *Grupe v. Glick*, 26 Cal. 2d 680, 160 P.2d 832 (1945).

⁴⁸ *Robert A. Reichard, Inc. v. Ezl. Dunwoody Co.*, *supra* note 47, disallowed the cost of retaining admittedly necessary experts because there was no showing of the reasonableness of their fees. We find no challenge to the reasonableness of attorney fees although some to the quality of the defense conducted by the buyer. But the courts content themselves with answering that the seller was offered the opportunity to defend if he wished. See *Hessler v. Hillwood Mfg. Co.*, 302 F.2d 61, 63 (6th Cir. 1962); *Frank R. Jelleff, Inc. v. Pollak Bros. Inc.*, 171 F. Supp. 467, 472-73 (N.D. Ind. 1957).

⁴⁹ *Robert A. Reichard, Inc. v. Ezl. Dunwoody Co.*, *supra* note 47, at 158.

"other obligation" to the buyer, the costs of defending the claim should generally be recoverable, whether or not the defense is successful. But there is no direct authority either way, and analogous holdings are easily distinguishable.⁵⁰

The Code's failure to mention attorney's fees and other costs of defense cannot be regarded as meaningful either for or against the rule suggested above.⁵¹ Section 2-607(5)(a) does not create the right to indemnification as such; it purports merely to give effect to vouching letters when the seller "is answerable over." Further, it merely makes the seller "bound . . . by any determination of fact common to the two litigations. . . ." Neither fees nor costs will be considered in the first action. They are recoverable as consequential damages caused by the seller's breach,⁵² but whether he breached is also beyond the scope of issues posed in the first case.

D. Change in Condition

In the preceding section the condition of the goods was passed over and the other issues treated. It seems to us that only in very unusual cases—we have discovered none—will there be more than two issues "common to the two litigations." These are whether the goods were defective at the time of the re-sale and whether the buyer was liable to the person harmed by the defect.⁵³

Even on these points the early cases were unwilling to grant any effect to the prior judgment. This may have been in part because of a difference in the factual patterns; the pre-*London Guarantee* cases involved goods not manufactured by the seller (a slave, cotton and a stallion), while

⁵⁰ Real property covenant cases preponderantly hold that the vendee cannot recover expenses of a successful defense because the success demonstrates that there was no breach. See Annot., 105 A.L.R. 729 (1936). But when the claim was defeated, not because the claimant lacked title but because of laches, the costs of the defense were recoverable from the warrantor. *Smith v. Keeley*, 146 Iowa 660, 125 N.W. 669 (1910).

⁵¹ Section 2-718(2) of the 1950 draft (quoted *supra* note 1) expressly provided for counsel fees and costs. The absence of this provision from the existing form seems not an intentional deletion, since the present section derived from quite another source and was not merely a revival of the earlier vouching section.

⁵² See UNIFORM COMMERCIAL CODE § 2-714; UNIFORM SALES ACT § 69(6). Prior to 1931 section 3312 of the California Civil Code read:

The detriment caused by the breach of a warranty of title of personal property sold, is deemed to be the value thereof to the buyer . . . together with any costs which he has become liable to pay in an action brought for the property by the true owner. The section was repealed upon adoption of Section 1789(6) of the Civil Code. (UNIFORM SALES ACT, § 69(6)).

⁵³ We would find even the latter not the same; in the first action the question is whether he was liable, while in the second it should be sufficient that he was found to be liable and obliged to pay. And the courts do in fact so treat the matter, as is evidenced by asking whether a settlement of the claim was reasonable rather than determining liability on the merits. See note 43 *supra*.

those since have predominantly involved defects allegedly arising out of the manufacturing process. Thus the Missouri court in *London Guarantee* may be forgiven for not discussing the possibility that the casting became defective (the walls were thinner than specifications called for) after the sale occurred. Less charity is owed the Minnesota court, which found in *Liberty Mutual* that the Missouri judgment prevented the manufacturer from attempting to show that the ladder in question had suffered a "sharp blow" and that it had been "twisted . . . 'out of line'."⁵⁴ The testimony of the same witness had been offered in Missouri; the opinion implies that its rejection there precluded a reconsideration of the point. But surely this does not follow. The ladder might well have been sound when delivered by Clark but damaged in transit or while in the custody of Central Hardware, the buyer. If so, Central's warranty would have been breached but Clark's would not. The Minnesota jury's verdict for Clark might have been sustained for this reason.

Since *Liberty Mutual*, however, two important federal district court opinions have struck what seems the proper balance between the old rule of total rejection of the first judgment and the *London Guarantee* and *Liberty Mutual* rule of total preclusion of the issue of condition. In the first,⁵⁵ the court noticed the issue but received a stipulation that there had been no change and in the second⁵⁶ the court denied summary judgment and set the issue down for trial. In addition to the mentioned older cases that reject any use of the prior judgment, there are a few which indicated that they might approve the vouching technique but only when the wrong or breach of the seller was drawn in issue in the first case.⁵⁷ In our view, this will never happen.

Counsel and insurers of buyers, however, have not been unaware of this point. They have been successful in several cases in obtaining an answer to an interrogatory or a finding by the judge in the first action that the defect was one attributable to the manufacturer. But the second court in each instance has declined to accept the finding because not "necessary" to the determination of the first action.⁵⁸ Where the finding is merely

⁵⁴ 239 Minn. 511, 516, 59 N.W.2d 899, 903. The issue is also minimized when the seller delivers to the buyer's sub-purchaser rather than to the buyer himself. See *Carleton v. Lombard, Ayers & Co.*, 149 N.Y. 137, 43 N.E. 422 (1896).

⁵⁵ *Frank R. Jelleff, Inc. v. Pollak Bros., Inc.*, 171 F. Supp. 467 (N.D. Ind. 1957).

⁵⁶ *Grummons v. Zollinger*, 189 F. Supp. 64 (N.D. Ind. 1960).

⁵⁷ *Pfarr v. Standard Oil Co.*, 165 Iowa 657, 671-72, 146 N.W. 851, 856 (1914); *U.S. Wire & Cable Co. v. Ascher Corp.*, 34 N.J. 121, 126-27, 167 A.2d 633, 636 (1961); *Lord & Taylor v. Yale & Town Mfg. Co.*, 230 N.Y. 132, 138, 129 N.E. 346, 347 (1920).

⁵⁸ *Siebrand v. Eyerly Aircraft Co.*, 196 F. Supp. 936, 939 (D. Ore. 1961); *Grummons v. Zollinger*, 189 F. Supp. 64, 66 (N.D. Ind. 1960). *Standard Oil Co. v. Daniel Burkhartsmeier Cooperage Co.*, 333 Ill. App. 338, 77 N.E.2d 526 (1948), involved an unsuccessful effort to show the basis of the verdict through affidavits of the jurors.

gratuitous it may properly be disregarded. But more may be said. Borrowing from the doctrine of collateral estoppel (although still denying its direct applicability), there are some types of findings that serve a purpose in the first action but which should nevertheless be disregarded in the second. *Grummons v. Zollinger*⁵⁹ illustrates this. Zollinger, an Indiana manufacturer of house trailers, sold one to Grummons, a New York retailer, who in turn sold to a consumer, Fotch. Grummons installed a bottle of gas in the trailer's heating system; on the first use an explosion occurred, causing serious injuries to the Fotches. They sued Grummons for negligence and breach of warranty of merchantability, recovering on the latter ground. Having vouched Zollinger, Grummons then sued Zollinger in Indiana, alleging breach of warranty of merchantability, and moved for summary judgment on the basis of the New York judgment and findings. Although granting the motion as to some of the issues, the court reserved the question of whether the trailer was in the same condition when sold by Grummons as when he bought it from the defendant. That the New York judge had so found did not dispose of this issue.

[W]e are of the opinion that he was deciding a fact question not necessary to his determination of the controversy before him. It is a well settled principle of law that only a determination of questions material to a recovery in the prior suit is conclusive in the subsequent action.⁶⁰

That finding may, however, have served a valuable purpose in the New York proceeding; it might have exonerated the dealer from responsibility for introduction of the defect through negligent installation of the bottle, and it might also (depending on the nature of the negligence alleged) have served as the basis of a finding that there was a defect of manufacture which the dealer negligently had failed to discover. In either of those variations, one excusing the dealer from liability and the other fastening it upon him, the finding of whether there was a defect when the dealer received the article is not, strictly speaking, either immaterial or unnecessary. It is, rather, a finding of "mediate data" instead of "ultimate fact," to use the terminology of Judge Learned Hand in *The Evergreens v. Nunan*.⁶¹ That the manufacturer caused the defect (or that it existed when he sold the article) shows, in our first example, that the dealer did not. In the second, it establishes that a defect existed at a time when the dealer should have discovered it. Yet the "ultimate fact" on which liability turns

⁵⁹ *Supra* note 58.

⁶⁰ 189 F. Supp. at 66.

⁶¹ 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). See *Yates v. United States*, 354 U.S. 298, 338 (1957); RESTATEMENT, JUDGMENTS § 68 (1942); Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 237-39 (1954).

is not that the manufacturer caused it, but that the dealer did not, or that the dealer failed to discover it. On this reasoning, some findings not merely gratuitous in the first action and well within the power of that court to make may nevertheless be disregarded in the second, since they probably were not litigated with sufficient intensity because precision in the finding was not critical to resolution of the case.⁶² It might be urged, of course, that this limitation is suitable to collateral estoppel law but not to vouching because the manufacturer could have assumed the defense and litigated as intensely as he wished. But this is not satisfactory; the issue would remain subsidiary regardless of who defends.⁶³ The vouched seller is not entitled to transform the case into one designed to exonerate him.

A related point, also derived from *res judicata* law but potentially present in vouching cases, is the effect to be given in the second action to a finding in the first of negligence of the buyer. A slight alteration of the facts of *Grummons v. Zollinger* demonstrates how certain such cases are to arise. Had the New York court found for the trailer purchasers on both negligence and warranty, as well it might have, the Indiana court would have had two additional problems. One is whether the finding of the buyer's negligence in failure to inspect would relieve the seller of liability for the defect. The one case holding that it would seems wrong.⁶⁴ The other problem is whether a judgment based upon two alternative grounds which are consistent as against the retailer-buyer, in that both support the judgment against him, but inconsistent against the manufacturer-seller, in that one would excuse him from liability and the other would not, should be preclusive on any point. There are solid reasons, derived from *res judicata* doctrine and equally applicable here, which urge that such findings be given no effect at all.⁶⁵

⁶² This is especially true when one of the parties to the prior litigation, the buyer, is anxious to obtain a finding of manufacturer fault and the other, the plaintiff, is indifferent to who caused the defect unless he can establish that his opponent did. See *Siebrand v. Eyerly Aircraft Co.*, 196 F. Supp. 936 (D. Ore. 1961), where the buyer sought but one interrogatory to the jury: "Do you find from the evidence in this case that the accident was caused by a defect in the construction of said Octopus by the manufacturer?" *Id.* at 939.

⁶³ See cases cited *supra* note 58.

⁶⁴ *American Radiator & Standard Sanitary Corp. v. Titan Valve & Mfg. Co.*, 144 F. Supp. 841 (N.D. Ohio 1956). The duty owed by a buyer to his customers or to third persons is not the same as the duty he owes to his seller. See *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N.E. 657 (1901); *London Guar. & Acc. Co. v. Strait Scale Co.*, 322 Mo. 502, 15 S.W.2d 766 (1929). The *American Radiator* case also wrongly held that the finding of the jury in the first action that American Radiator had inspected precluded a warranty recovery for any defects which the inspection should have disclosed. *Cf. General Acc., Fire & Life Assur. Corp. v. Goodyear Tire & Rubber Co.*, 132 F.2d 122 (2d Cir. 1942).

⁶⁵ See *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 845-46 (1952). Views on this do differ. RESTATEMENT, JUDGMENTS § 68, comment *n* (1942).

E. The Functions of the Vouching Letter

Our primary concern is the consequences visited upon a seller who does not respond to a vouching letter. We mention only briefly the one who does. A seller who assumes the defense will be bound in a subsequent indemnity action by his buyer for reasons quite apart from section 2-607(5)(a); any adjudication of the first proceeding that is adverse to the seller may be employed against him in the second because in fact he did litigate the points.⁶⁶ This will be true whether he came in response to a vouching letter or by a less formal arrangement. Sellers, particularly manufacturing sellers, have many motives to undertake the defense of actions, such as keeping a valued customer or defending the reputation of their product.

When the seller does not respond, however, several questions of importance attend the letter itself. Section 2-607 contains two notice provisions. Subsection 3(a) provides that a buyer who has accepted goods "must within a reasonable time after he discovers or should have discovered any breach *notify* the seller of breach or be barred from any remedy." (Emphasis added) Of course, the "written notice" of subsection 5(a) may also "notify" the seller of the breach. But the two are not identical. Notification of breach need not be written, nor need it actually come to the attention of the seller; it may be lost in the mail and still be effective.⁶⁷ It must, however, be given within a "reasonable time" after discovery of the breach. In contrast, the vouching notice must be written, presumably cannot be given until the action has been commenced, and is not effective unless "seasonable receipt" is shown.⁶⁸ Another difference is in particularity; according to the Comment, notification of breach need merely warn the seller "that the transaction is troublesome and must be watched,"⁶⁹ while the vouching letter must identify the litigation and inform the seller that

⁶⁶ *Carleton v. Lombard, Ayers & Co.*, 149 N.Y. 137, 43 N.E. 422 (1896). A related but important point is that the seller who defends and loses will equally be bound in a subsequent action against him by the injured person. *Ocean Acc. & Guar. Corp. v. Felgemaker*, 143 F.2d 950 (6th Cir. 1944); RESTATEMENT, JUDGMENTS § 84, comments *b* and *c* (1942); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 856-57 (1952).

⁶⁷ UNIFORM COMMERCIAL CODE § 1-201(26).

⁶⁸ *Id.* at § 1-201(25). See *U.S. Wire & Cable Co. v. Ascher Corp.*, 34 N.J. 121, 167 A.2d 633 (1961). Early notices were held ineffective because they contained no tender of the defense; the one which finally did came only 17 days before trial and after pre-trial steps were concluded. In *Illinois Cent. R.R. v. Blaha*, 3 Wis. 2d 638, 89 N.W.2d 197 (1958), an action for indemnity under the save-harmless clause of a trackage agreement, the defendant-indemnitor objected that it had been given but five days notice. The court agreed that this was insufficient but held it excused because the railroad had good reason to assume that a demand would not have been honored. The explicit Code language would seem difficult to avoid in this manner.

⁶⁹ UNIFORM COMMERCIAL CODE § 2-607, comment 4. The evident purpose is to repudiate such holdings as *Texas Motorcoaches v. A.C.F. Motors Co.*, 154 F.2d 91 (3d Cir. 1946). See Comment, 51 CALIF. L. REV. 586 (1963).

if he does not defend he will be held bound.⁷⁰ It is not impossible that one document could serve both purposes, but conditions of form, content and timeliness differ markedly.

The written notice of litigation commenced may be required to serve an additional function not directly covered by the Code. The case law of warranty damages establishes that if re-sale of the article by the buyer is contemplated, a claim against the buyer by third persons is also within the contemplation of the parties.⁷¹ The case law of indemnity recognizes that the costs of defending such claims are recoverable as consequential damages.⁷² But some cases have imposed as a condition that the buyer seeking indemnification of costs have given his seller notice of the litigation and an opportunity to defend.⁷³ This requirement has been criticized⁷⁴ but has enough case law support to be taken seriously.

Probably more important than what the letter must contain is what it may not. A buyer may be reluctant to surrender control over an action which may conclude with a judgment enforceable against him. Can he impose as a condition of such surrender a requirement that the seller undertake to satisfy any resulting judgment, whatever may be the grounds upon which it is based?

F. Conflict of Interests Between Buyer and Seller

The analogies relied upon for extension of vouching invoke certain assumptions in the title cases which may not extend to quality cases. One assumption of the title cases is that a unity of interest between seller and buyer assures that whichever of them conducts the defense will be acting on behalf of the other; there is apt to be but a single issue—does claimant have a title paramount to the ownership of either seller or buyer? The seller's interest in defeating the claimant is as strong as that of the buyer, for if the buyer loses so does the seller.

⁷⁰ This seems unnecessary explication but is found also in the parallel § 3-803. The case law of indemnity is divided on how express the warning that the indemnitor will be bound by the judgment must be. See Annot., 73 A.L.R.2d 504, 518-20 (1960).

⁷¹ See McCORMICK, DAMAGES 675-76 (1935); 3 WILLISTON, SALES § 614a (rev. ed. 1948). The same is true of injuries to employees and third persons when the product is not re-sold.

⁷² Hammond v. Bussey, 20 Q.B.D. 79 (Court of Appeal 1887). The court held that costs of defending a claim for breach of warranty of steamer coal were "contemplated" within the rule of Hadley v. Baxendale, 9 L.R. Ex. 341, 156 Eng. Rep. 145 (1854), and recoverable, despite some earlier indications, even in the absence of an express indemnity agreement. See Annot., 88 A.L.R. 1439, 1452 (1934).

⁷³ Bridwell v. Gruner, 212 Ark. 992, 209 S.W.2d 441 (1948); Wilson v. McGowand, 192 Ky. 565, 234 S.W. 17 (1921); Wiggins v. Pender, 132 N.C. 628, 44 S.E. 362 (1903). These cases involve covenants of title to real property. We have located none involving chattel warranties.

⁷⁴ McCORMICK, DAMAGES 252 (1935).

There are quality cases in which the issues posed will be equally uncluttered. A seller may warrant merchantability to a buyer, who in turn warrants the same to a sub-purchaser. But this becomes increasingly untypical of product liability cases. The grounds upon which a retailer may be liable to his customers, and even to those not directly his customers, have vastly increased in number. The complaint may allege that the buyer himself brought about a defect in the article, or that he failed to warn of certain dangers in its use, or that he should have inspected for and discovered the defect, or that, even if not negligent, the buyer warranted to his customer expressly that the product was sound or impliedly that it was fit for the customer's purpose, or was merchantable. There may be allegations that the dealer is absolutely liable under regulations such as pure food and drug acts. Although these allegations are here stated in the alternative because they are independent grounds of liability, modern rules of pleading and joinder permit them to be stated in a single complaint even if some are inconsistent with others, and they may be stated in most general and conclusory form.⁷⁵

Suppose that a manufacturer-seller receives a vouching letter and a copy of such a complaint. Some of the allegations might render the seller liable to his buyer if the complainant recovered from the buyer on those counts. On others the responsibility would be visited solely upon the buyer. Read literally, the Code would require the dealer to assume the defense, at peril of being bound, because the buyer is sued "for breach of a warranty or other obligation for which his seller is answerable over. . . ." But the buyer is sued at the same time on obligations for breach of which the seller would not be answerable over. Is the seller obliged to provide a defense on the latter as well as on the former? If he attempts to do so, will he not almost inevitably defend most vigorously on the counts on which he would be answerable over and perfunctorily, if at all, on the others?

*Hoskins v. Hotel Randolph Co.*⁷⁶ is shocking on first reading. Otis Elevator Co. had installed an elevator in the hotel and had, for some time, serviced it under contract. The hotel, however, had also done some repair and servicing. A patron was injured when the hoisting cable parted and the cage dropped down the shaft, none of the safety switches or arresting devices working. On demand, Otis assumed defense of the patron's action which charged negligence "in the construction, inspection, maintenance, repair, and operation of the elevator." The defense of the design and replacement allegations was thorough. But of course the claim could

⁷⁵ See, e.g., FED. R. CIV. P. 8(a), (e) (2).

⁷⁶ 203 Iowa 1152, 211 N.W. 423 (1926), *cert. denied*, 275 U.S. 566 (1927).

scarcely have been defeated outright, and the only gesture by Otis to serve the interests of the hotel was an attempt to show that the proximate cause of the failure was negligent replacement of a circuit breaker by the hotel's chief clerk. Although the clerk was next in line of authority to the manager, Otis preposterously contended that the clerk had acted beyond the scope of his authority. Over the protest of the hotel, Otis asked for and got interrogatories to the jury on this defense and, at Otis's objection, counsel for the hotel was denied an opportunity to address the jury on these points. At the judge's own instance, however, additional interrogatories were submitted, including questions about negligence for which Otis clearly would have been responsible. The jury found for the injured patron on all of the interrogatories. The Supreme Court of Iowa held that the trial judge should have granted the hotel's motion to enter an order that "the liability [was] primarily that of the Otis Company."⁷⁷

The conduct of Otis was of course outrageous. But its plight was not an easy one. Will we ever have enough confidence in a defense assumed under such conditions to allow a judgment to operate in favor of the seller? Surely not when the buyer was excluded, as was the hotel, from any participation in the case. And if not, only when the third party's claim is wholly defeated can the seller profit by responding to a vouching letter when the complaint includes claims for which the seller would not be answerable over. Any victory of the third person will either bind the seller on common points or be open to relitigation against him by the buyer. The seller could lose but could not win.

There is a possibility that because of the seller's defense the buyer may be found liable to the third party, and yet have no claim for indemnity against the seller. Fears aroused by this possibility have led some buyers to include in the vouching letter not only a demand for assumption of the defense but for assumption as well of any resulting liability. Indeed, this was attempted in the *Hoskins* case, and an alternative holding there was that, despite disclaimers of any liability greater than the law imposed upon

⁷⁷ *Id.* at 1164, 211 N.W. at 429. *Hoskins* had originally sued both Otis and the hotel in the federal court, but the hotel was dismissed because of improper joinder. The federal case culminated in a finding that Otis was not liable to *Hoskins*. *Hoskins v. Otis Elevator Co.*, 16 F.2d 220 (8th Cir. 1926). The Iowa court seemed undisturbed that its order that Otis was primarily liable conflicted with the federal judgment that Otis was not liable at all.

Summarily entering judgment against Otis seems only technically improper if Otis is to be held liable. It was present in the state and could be sued there. The Supreme Court has held, although not on constitutional grounds, that one who undertakes a defense in response to vouching does not thereby make a general appearance and subject himself to the jurisdiction of the court. *Merriam v. Saalfeld*, 241 U.S. 22 (1916); *cf. Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260 (1961). But other courts have entered judgments against participating, controlling non-parties even when not vulnerable to service. See *Ocean Acc. & Guar. Corp. v. Felgemaker*, 143 F.2d 950 (6th Cir. 1944).

it, Otis had, by undertaking the defense, "accepted the terms and conditions imposed."⁷⁸ But this holding, right or wrong, does not tell us what might happen if Otis had rejected the tender of defense. Could the findings of the first case be binding in the second? To us, it seems not. A seller faced with this additional demand in a vouching letter would be offered an unconscionable and probably unconstitutional choice; if he undertakes the defense he is precluded on certain issues that he has not had a chance to litigate against his buyer, while if he remains out he will be precluded on issues that the buyer has litigated but he has not. Would not a buyer in that setting resist most strongly those allegations which fasten responsibility on him and put up a weak or even sham defense against those which he can pass on to his seller?⁷⁹

It might be suggested that a "good faith" test be applied. But this strikes us as impossible and unworkable. One may be precluded because he litigated in fact or because he had the opportunity and should have taken it. But he should rarely, if ever, be precluded because someone else made even a good faith effort on his behalf.⁸⁰

What obviously would be the most efficient solution would be bringing in the seller as an additional party to the action. We have been reminded, however, that there are considerations other than efficiency and convenience operating in this field.⁸¹ The question again becomes one of jurisdiction, and this answer may not be adopted until it becomes clear that court process as well as vouching letters may cross state lines to summon a manufacturer or distributor to litigation where his product has allegedly caused harm.

⁷⁸ 203 Iowa 1152, 1162, 211 N.W. 423, 428. Another example is *U.S. Wire & Cable Co. v. Ascher Corp.*, 34 N.J. 121, 167 A.2d 633 (1961), where U.S. Cable indicated that it would cooperate in the defense "without prejudice" while Ascher demanded assumption not only of the defense but "of any liability which may be adjudged."

⁷⁹ *Siebrand v. Eyerly Aircraft Co.*, 196 F. Supp. 936 (D. Ore. 1961), seems to be an example. The New Jersey court suggested in *U.S. Wire & Cable Co. v. Ascher Corp.*, *supra* note 78, at 127, 167 A.2d at 637, that the tender might be limited to "that portion of the claim for which the indemnitee seeks ultimately to hold the indemnitor liable." However well this might function when the claim is divisible, it seems inapt when the dispute between buyer and seller is over which of them is responsible for the claimants loss. The seller may try to prove that there was no defect; to the extent he attempts to prove that he is not responsible for the defect he is litigating adversely to the party he has been called upon to protect, for there can be no issue in the case about whether he is responsible to the plaintiff.

⁸⁰ The principal exceptions are those relating to those in privity with the litigant and class actions, both of which depend for their validity on the very thing lacking here, unity of interest.

An interesting examination of the effect of conflicting interests is *Karas v. Snell*, 11 Ill. 2d 233, 142 N.E.2d 46 (1957), an attempt to rely upon vouching a city under its statutory duty to indemnify police officers against liability imposed for acts in the course of their official duty.

⁸¹ *Hanson v. Denckla*, 357 U.S. 235 (1958).

CONCLUSION

Until recently vouching has been a technique employed in quality warranty cases only by a few casualty insurers, notably Liberty Mutual Insurance Company. Adoption of the Commercial Code seems certain to give it greater impetus, however, and the problems dealt with above will be explored more critically by the courts. The first flush of judicial enthusiasm has made vouching appear more promising than careful examination will support. In title and infringement cases it will be as useful as it was before the Code, although no more so. In quality cases of a mercantile nature some effective and valuable use may be made of it. But vouching is a litigation tool, and mercantile problems about quality are seldom litigated. Personal injury and property damage make up the great bulk of lawsuits involving claims for defective goods. Here shotgun pleading will tend to preclude use of vouching. It is true that the varied and overlapping allegations narrow down as the case progresses, and the verdict or findings may isolate the basis of liability as breach of the seller's warranty or "other obligation." But it is then too late to vouch; the notice cannot be given on the eve of verdict or even the eve of trial, for its very function is to allow the seller to control the course of proceedings which led to that narrowing. It is the plaintiff, then, who decides whether vouching can be effective. To the already existing incentives plaintiffs have to state their claims as variously as imagination allows, vouching adds one more: alleging fault of the buyer-defendant will make vouching unavailable to that buyer and thus tend to keep out of the other side of the case a powerful adversary against whom plaintiff may lose but against whom he cannot win.