1986

Is Revision Due for Article 2?

David Frisch
University of Richmond, dfrisch@richmond.edu

VILLANOVA LAW REVIEW

VOLUME 31 APRIL 1986 NUMBER 2

IS REVISION DUE FOR ARTICLE 2?

FAIRFAX LEARY, JR.†
DAVID FRISCH‡

TABLE OF CONTENTS

† Distinguished Senior Professor of Law, Delaware Law School of Widener University; J.D. Harvard 1935.

‡ Associate Professor, Delaware Law School of Widener University; J.D. University of Miami 1975, L.L.M. Yale 1980.

The authors acknowledge the research assistance of Richard Hunt, J.D. 1985, and Stephen J. Kelly, Robert Lanes, and Amy Sassler, J.D. 1986, all of The Delaware Law School of Widener University.

I. INTRODUCTION

Recently, a number of Articles of the Uniform Commercial Code have been re-examined and officially revised. Articles 8 and 9 have been the subject of official revisions, receiving rather rigorous overhauls,[1] and a revision of Article 6 is in process.[2] Not to be ignored, Articles 3 and 4 remain under study by a committee pursuant to the procedures of the National Conference of Commissioners on Uniform State Laws, following criticism of prior attempts at revision.[3]

The forces causing the perceived need to revise these various articles were not necessarily the same. The re-examination of Articles 6 and 9 was, in large part, triggered by actual difficulties arising in practice and anticipated difficulties discovered as a result of analysis by scholars and practitioners. On the other hand, a redrafting of Articles 3, 4, and 8 was thought necessary because of the drastic changes in the way many of the transactions covered

1. *See* AMERICAN LAW INSTITUTE (ALI) & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE (1972) (Official Text and Conforming Amendments to Related Sections); PERMANENT EDITORIAL BD. FOR THE U.C.C., PROPOSED REVISION OF ARTICLE 8 (1977). The 1972 amendments have been adopted by 40 or more jurisdictions. The 1978 version has been adopted by California, Colorado, Connecticut, Delaware, Massachusetts, Minnesota, Montana, New York, Ohio, Oklahoma, Texas, Virginia, West Virginia and Wyoming. Maine has added a special section to its code covering the non-certified security. Article 2 was not changed by either the 1972 or 1978 revisions.

2. The Hawkland subcommittee of the American Bar Association's U.C.C. Committee produced one draft. The Illustrative Draft of Article 6 prepared by the American Bar Association's Committee to Review Article 6, *reprinted in* appendix to Article 6, 6 UNIFORM COMMERCIAL CODE SERIES 143-51 (CALLAGHAN 1984). A committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL) is presently producing another. Its drafts are still tentative.

3. The "3-4-8" Committee working under the Permanent Editorial Board, a joint ALI-NCCUSL board, had produced several drafts drawn by Reporters Hal Scott of Harvard and Peter L. Murray of Yale Law School. *See, e.g.*, PERMANENT EDITORIAL BD. FOR THE U.C.C., UNIFORM NEW PAYMENTS CODE, DRAFT NO. 3 (June 2, 1983). At an exposure conference in Williamsburg, Va., in 1983, this draft was extensively criticized. An effort to develop a consensus among the affected interests was undertaken. A Permanent Editorial Board meeting was held on June 6-7, 1985. As a consequence of this meeting, the NCCUSL has appointed Professors Warren and Jordan of U.C.L.A. as reporters to attempt to draft wire-transfer statutes and amendments to Articles 3 and 4 on a conservative basis. The new group held its first meeting in January 1986. *See* Miller, *Report on New Payments Code*, in *Consumer Financial Services Report*, 41 BUS. LAW. 1007 (1986).

by those articles are now conducted, particularly, the increased importance of the noncertificated security and the use of electronic messages to effect the transfer of deposit institution credit.

It is possible that both types of forces now require that another Code Article be addressed. Specifically, is the time ripe for re-examination of all or several parts of Article 2? This article, the oldest in the Code, has not been subjected to significant changes for almost four decades.[4] Since that time, there have been considerable changes in our ways of life and of doing business, changes which may justify a rethinking not only of the substantive provisions of Article 2 but of its scope of coverage as well. For example, the steady decline of our workforce engaged in manufacturing has been offset by the rapid growth of service industries.[5] This decline and offsetting growth raises the question of whether the Code should now cover contracts for commercial services, including franchising. In any event, should not the line, if any, between sales of goods and sales of services be clarified?[6]

4. The senior author joined the U.C.C. drafting team in 1947. From that time until the 1952-1955 proceedings of the New York Law Revision Commission, there were few revisions to Article 2. There is some doubt in the authors' minds as to whether the 1956 revisions actually improved Article 2. The revisions proposed by Supplement No. 1 and approved at the 1954 meetings of the sponsoring organizations also are of questionable benefit, although the placing in U.C.C. § 2-207 of a reference to "different" terms did appear in the November 1951 draft. *See infra* note 94.

5. In 1947, "Final Sales" of all goods were $140.3 billion, and "Final Sales" of services were $71.3 billion. Services were 50.8% of the goods figure. U.S. DEPT. OF COMMERCE, BUSINESS STATISTICS 250 (22d biennial ed. 1979). By 1985, the figure for all goods had increased to $1,644.2 billion, but services had increased to $1,928.8 billion, and thus were 114.2% of goods. While goods increased in the 37 years by 1,099.7%, services increased by 2,470.7% or more than twice as fast as goods. Telephone call to Department of Commerce (1985).

6. Several annual surveys of Article 2 in *Business Lawyer* have referred to the unsatisfactory "sale or service" distinctions made by the courts. *See, e.g.*, Leary & Frisch, *Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title*, 39 BUS. LAW. 1851, 1854 (1983). Recent cases referring to unsatisfactory "sale or service" distinctions, include R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818 (8th Cir. 1983) (contract to supply aluminum framing held sale of goods, not service); Redwine v. Baptist General Convention, 681 P.2d 1121 (Okla. Ct. App. 1982) (charging of patient for use of heart-lung oxygenator during open heart surgery held service, not sale).

Perfetti v. McGhan Medical, 662 P.2d 646 (N.M. Ct. App. 1983), is an interesting case as it held that doctors perform services even when goods are supplied. The mammary prosthesis in *Perfetti* was supplied by the hospital to the doctor who implanted it. *Id.* at 666. Because she could not sue the doctor under the Code, the patient had to sue the manufacturer as a third party beneficiary for breach of an implied warranty of merchantability. *Id.* at 655. Unfortunately for the patient, the court, after concluding she had standing, decided that the warranty was not breached. *Id.* at 656.

In addition, a member of the Subcommittee on General Provisions, Sales,

Most recently, the Permanent Editorial Board has approved the personal property leasing act for inclusion in Article 2 of the Code.[7] But since it is already under intensive study, both as to its place in the law of the United States[8] and the rules for international transactions,[9] we avoid discussion of leasing at this time. Quite apart from personal property leasing, the whole matter of bailments for processing,[10] tolling arrangements,[11] and commercial consignments[12] may need to be reconsidered in light of the

---

Bulk Transfers and Documents of Title of the ABA Committee on the U.C.C. has several times raised the issue that precedent for commercial cases involving many types of service issues is inadequately segregated and therefore inaccessible.

7. Conversation with Ronald DeKoven, Reporter for the National Conference of Commissioners on Uniform State Laws, on the Personal Property Leasing Act.

8. The NCCUSL appointed a drafting committee under the chairmanship of Edward I. Cutler, Esq., of Florida, and a subcommittee of commissioners working with Reporters Ronald DeKoven, Esq., of New York and Professor James A. Martin of Michigan, and has produced several drafts of a "Personal Property Leasing Act." The Act now is a finally approved uniform law, and has been approved for integration into Article 2 of the Code. Much information on this matter is contained in the materials distributed at an ALI-ABA Invitational Symposium on Personal Property Leasing, held in New York on February 17-18, 1983.

9. The International Institute for the Unification of Private Law (UNIDROIT) is preparing a proposed International Convention on Personal Property Leasing. (UNIDROIT, 1981, Study LIX-Doc. 13 (original: English. Rome, March 1981)). There has been one exposure conference in the United States on personal property leasing under ALI-ABA auspices. It was held on May 7-8, 1981. The ALI-ABA materials distributed for the seminar contain much valuable background materials. Exposure conferences have been held, also, in other parts of the world.

10. *See, e.g.*, Medomak Canning Co. v. William Underwood Co., 25 U.C.C. Rep. Serv. (Callaghan) 437 (Bankr. D. Me. 1977) (where company gave cannery ingredients, and packaging and shipping materials for canned goods, finished product constituted bailment for processing). Do these constitute sales, a consignment, or a security interest? Neither U.C.C. § 2-326 nor U.C.C. § 9-114 are entirely clear as to what are consignments for processing. But should not a bailment for repair be differently treated? Should a return of the thing bailed be the test to distinguish consignment and bailment?

11. *See, e.g.*, General Motors Corp. v. Bristol Indus. Corp., 38 U.C.C. Rep. Serv. (Callaghan) 989 (Bankr. D. Conn. 1981) (tolling agreement whereby GMC would supply metals to debtor which were comingled with other metals to produce bronze alloy strip did not create bailment), *rev'd on other grounds*, 690 F.2d 26 (2d Cir. 1982). *See also* Harrington, *A Caveat for Commodity Processing Industries: Insolvent Processors' Creditors vs. Putative Owners of Raw Materials*, 16 U.C.C. L.J. 322 (1984); *supra* note 9.

12. *See, e.g.*, Quaker City Iron Works v. Ganz, 39 U.C.C. Rep. Serv. (Callaghan) 458 (E.D. Pa. 1984) (since Wicaco maintained place of business at which it dealt in goods of the kind consigned, these goods were deemed "sale or return" and subject to claims of creditors); Martin v. First Nat'l Bank, 127 Ill. App. 3d 485, 468 N.E.2d 1002 (1984) (consignor must comply with filing requirments of Article 9 in order to claim perfected security interests in proceeds of sale, with

changing practices and needs of the parties involved.

In addition to a change in scope, perhaps it is also time to change the structure of Article 2. Should not consideration be given to whether certain things may require separate treatment for Article 2 purposes, just as security interests in various types of collateral (i.e., inventory, equipment, fixtures, motor vehicles, mobile equipment, and various intangibles) require special treatment for some Article 9 purposes? Some years ago Professor Grant Gilmore gave a series of lectures, later published in pamphlet form, under the title, "The Death of Contract."[13] But perhaps it was not death that we were witnessing but a proliferation with a perceived need for special and perhaps conflicting rules in particular instances. Rules of interpretation in insurance contracts may or may not be suitable for sales of goods or sales of commercial services. Rules of warranty in sales of turbines may not be suitable for consumer purposes,[14] or for sales of hogs[15] or of blood,[16] or for the transplant of embryos of cattle.[17]

---

priority over bank which had provided financing to consignee); Duesenberg, *Consignments Under the U.C.C.: A Comment on Emerging Principles*, 26 BUS. LAW. 565 (1970); Duesenberg, *Consignment Distribution Under the Uniform Commercial Code: Code, Bankruptcy and Antitrust Considerations*, 2 VAL. U.L. REV. 227 (1968); Hawkland, *The Proposed Amendments to Article 9 of the U.C.C.—Part 5: Consignments and Equipment Leases*, 77 COM. L.J. 108 (1972). Should not U.C.C. § 2-326 contain a reference to U.C.C. § 9-114?

13. G. GILMORE, THE DEATH OF CONTRACT (1974) (series of lectures given in Law Forum Series of College of Law, Ohio State University, in April 1970).

14. For a discussion of the "lemon laws" of 35 states, see *infra* notes 154-57 and accompanying text.

15. *See* Uchtmann, Sarhan & Charalambous, *Do Statutory Exclusions of Implied Warranties in Livestock Sales Immunize Sellers from Liability?* 8 OKLA. CITY U.L. REV. 21 (1982). For a further discussion of implied warranties, see note 28 and accompanying text.

16. Fourteen states have non-uniform amendments to the U.C.C. that declare blood transfusions and organ transplants to be "the rendition of a service." *See infra* note 25. Thirty-four states have independent statutes to the same effect. *See* ARIZ. REV. STAT. ANN. § 32-1481 (1976); ARK. STAT. ANN. § 82-1608 (1976); COLO. REV. STAT. § 4-2-102(b) (1973 & Supp. 1984); CONN. GEN. STAT. § 19-139-(L) (West 1977); GA. CODE ANN. § 51-1-28(a) (1982); HAWAII REV. STAT. § 327.51 (1976); IDAHO CODE § 39-3702 (1977); ILL. ANN. STAT. ch. 111½, § 5102 (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 142 A.8 (West 1972); KAN. STAT. ANN. § 65-3701 (1980); KY. REV. STAT. § 139.125 (1982); LA. REV. STAT. ANN. § 1764(B) (West 1972), MD. GEN. PROV. CODE ANN. § 18-402 (1982); MINN. STAT. § 525.928 (1975); MISS. CODE ANN. § 41-41-1 (1972); MO. REV. STAT. § 431.069 (Supp. 1985); MONT. CODE ANN. § 50-33-102 (1983); NEB. REV. STAT. § 71-4001 (1981); NEV. REV. STAT. § 460.010 (1983); N.H. REV. STAT. ANN. § 507:8-b (1983); N.M. STAT. ANN. § 24-10-5 (1978); N.Y. PUB. HEALTH LAW § 580.4 (McKinney 1971 & Supp. 1971); N.C. GEN. STAT. § 90-220.10 (1981); N.D. CENT. CODE, § 41-02-33(3)(d) (1983); OKLA. STAT. ANN. tit. 63, § 2151 (West 1984); OR. REV. STAT. § 97.300 (1983); PA. STAT. ANN. tit. 35, § 10021 (Purdon 1977); S.C. CODE ANN. § 44-43.10 (Law. Co-op. 1985); UTAH

Although we ask whether Article 2 should be re-examined, it is not our only question. A second question posed is: What are the sources to which one should look in order to discover whether there is a strong enough need to justify a revision?[18] In addition to mentioning sources, we offer a few examples illustrative of the fruits which these sources can produce. By doing so, we hope to spur additional interest because, if discussion of a new Article 2 is to begin, the sooner it begins the better. Revisions take time. Six years can pass from the time a decision is made to revise to the submission of a revision for state-by-state adoption,[19] after which a decade may elapse before widespread adoption occurs and the revision becomes effective. Thus, in 1986, we should plan for the needs of A.D. 2000, even if we only see the future through a glass darkly.

II. SOURCES FOR DISCOVERING A NEED FOR REVISION

There seem to be many sources from which information as to the need for revision of Article 2 may be derived. One source, suggested by the Chairman of the Uniform Commercial Code Committee of the American Bar Association, is a review of the non-uniform amendments to Article 2 already adopted by several states.[20] Another source is the many *ad hoc* statutes, both state

CODE ANN. § 26-31-1 (1984); VA. CODE § 32.1-297 (1985); WASH. REV. CODE ANN. § 70.54.120 (1975); W. VA. CODE § 16-23-1 (1979); WIS. STAT. ANN. § 146.31 (West 1974).

17. There are no statutes on this yet, but the authors have been told that the practice exists.

18. Absent some consensus on what is needed, any project, as has apparently happened to the drafts of the proposed New Payments Code, will founder upon the reef of the "If it ain't broke don't fix it" syndrome. But, as the original enactment of the U.C.C. shows, a consensus can be developed.

19. For example, work on the 1972 amendments to Article 9 started sometime in 1965 with the 1965 report of some 300 non-uniform amendments to Article 9. PERMANENT EDITORIAL BD. FOR THE U.C.C., REPORT NO. 2 (1965). The first draft report was submitted in 1968, a second in 1970, and the final draft was submitted in 1971, with an Official Text and Comments approved edition issued in 1972. *See* PERMANENT EDITORIAL BD. FOR THE U.C.C., PRELIMINARY DRAFT NO. 1 (1968); PERMANENT EDITORIAL BD. FOR THE U.C.C., PRELIMINARY DRAFT NO. 2 (1970); PERMANENT EDITORIAL BD. FOR THE U.C.C., FINAL REPORT (1971).

The 1978 amendments to Article 8 proceeded at a bit faster pace. Revisions to Articles 3 and 4 have been underway since 1978, and no consensus has yet developed despite two extensive conferences at Williamsburg and numerous Exposure Drafts. *See supra* note 3.

20. *See* C. Mooney, *Introduction to the Uniform Commercial Code Annual Survey*, 40 BUS. LAW. 1143, 1144 (1985). Mr. Mooney noted that the Committee on Uniform Commercial Code is organizing a review of the non-uniform state amendments to Article 2 as an initial step of a thorough review. *Id.* He stated

and federal, that, while not a part of the Code, effectively change its rules in selected commercial areas. Reliance on this source would also entail consideration of the impact of consumer protection statutes on the provisions of the Code, and raises the issue of incorporating these statutes into the Code or of placing an exception in Code rules where a consumer law differs. A third source is the volume of litigation generated by particular Code sections. Fourth, suggestions for change might be the product of examination of judicial splits of authority (without regard to the volume of cases) as such a division of interpretation may be a harbinger of future trouble. A fifth source might involve cases in which judicial interpretations appear inconsistent with present reasonable commercial practices. Sixth, an analysis should be made of the areas where the *Second Restatement of Contracts* differs from the Code. Seventh, the differences between Article 2 and the rules of other countries should be considered.[21] And finally, the eighth source should be the combined experience of those operating in the field—not only the attorneys, but also the practical people who daily make deals.

All of this is a rather large order. Therefore, we propose to do no more than offer examples illustrative of what can be garnered from a few of the indicated sources. It is anticipated that the examples will show the desirability of a more thorough review and possibly demonstrate a need for revision of Article 2.

III. SOME EXAMPLES

A. *Warranty Law*

We pick as our first example the law of warranties because several sources indicate trouble in this area. For one thing, the volume of warranty litigation is larger than litigation on any other

that a growing number of state statutes vary the effect of the U.C.C. without actually amending the U.C.C. provisions, thereby making it difficult for counsel involved in multi-state transactions to identify the non-uniform state statutes. *Id.* As a result of this and other current issues, Mr. Mooney indicated that there is a need for a comprehensive long-range plan for the study and modification of the U.C.C. *Id.* at 1145.

21. *See, e.g*, ONTARIO LAW REFORM COMM'N, REPORT ON SALE OF GOODS, (1979); Lando, *Standard Contracts: A Proposal and a Perspective*, in 10 SCANDINAVIAN STUDIES IN LAW 130-31 (F. Schmidt ed. 1966); Jorensen, *Contract as Form*, in 10 SCANDINAVIAN STUDIES IN LAW 122 (F. Schmidt ed. 1966); UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Doc. A/CONF. 97/18, Apr. 10, 1980, *reprinted in* J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 165-70 (1982).

topic.[22] For another, "uniform" Code rules have been rendered non-uniform by numerous *ad hoc* statutes and local Code amendments dealing with warranty law.

1. *Negating Implied Warranties: Blood Transfusions and Livestock*

If a merchant seller wishes to negate the existence of implied warranties, the Code provides a method for doing so in U.C.C. § 2-316.[23] But the Code way is not necessarily the only way. One alternative method of avoiding the imposition of implied warranties is to characterize the transaction statutorily as a sale of a service. For example, the furnishing of blood for transfusions could be characterized as a medical service.[24] Some fourteen states have added to the Code amendments sponsored by the medical associations which effectively remove such sale from its scope.[25] Other states have specifically legislated against having the implied warranties of the Code apply to such transactions.[26]

Another legislative approach can be called the "separate stat-

22. A rough estimate of the litigation involving warranties reported in the *U.C.C. Reporter Service (Callaghan)* is apparent from the fact that the *U.C.C. Case Digest (Callaghan)* devotes over 1,000 pages to U.C.C. §§ 2-313 to 2-318 inclusive.

23. *See* U.C.C. § 2-316 (1978) (Exclusion or Modification of Warranties). Also relevant is U.C.C. § 2-312, which provides for implied warranties of title and against infringement, and instructs on a method for exclusion of such warranties.

24. Theoretically, in such a case the Code warranty provisions would be inapplicable to blood transfusions regardless of any statute declaring it to be a service. They are statutorily applicable only if the underlying transaction is a "sale of goods." *See* U.C.C. § 2-314 (1978) (implied warranty of merchantability); *id.* § 2-315 (1978) (implied warranty of fitness for a particular purpose). A number of cases at common law have held that furnishing blood is a service, hence no implied warranties apply. *See, e.g.*, Shepard v. Alexian Bros. Hosp., Inc., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973); Fisher v. Sibley Memorial Hosp., 403 A.2d 1130 (D.C. 1979); Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967); Jennings v. Roosevelt Hosp., 83 Misc. 2d 1, 372 N.Y.S.2d 277 (Sup. Ct. 1975). *But see* Semler v. Knowling, 325 N.W.2d 395, 399 (Iowa 1982) ("Exclusion from Article 2, however, does not foreclose the application of its policies and reasons.").

25. *See* ALA. CODE § 7-2-314(4) (1984); ALASKA STAT. § 45.02.316(e) (1980); ARK. STAT. ANN. § 85-2-316(3)(d)(i) (1961 & Supp. 1985); COLO. REV. STAT. § 4-2-102(b) (1973 & Supp. 1984); DEL. CODE ANN. tit. 6, § 2-316(5) (1975); FLA. STAT. ANN. § 672.2-316(5) (West 1966 & Supp. 1985); GA. CODE ANN. § 11-2-316(5) (1982); ME. REV. STAT. ANN. tit. 11, § 2-108 (Supp. 1985); MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (West 1958 & Supp. 1985); N.D. CENT. CODE § 41-02-33(3)(d) (1983); S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1980); TENN. CODE ANN. § 47-2-316(5) (1979); TEX. BUS. & COM. CODE. ANN. § 2.316(e) (Vernon 1968); WYO. STAT. § 34-21-233(c)(iv) (1977).

26. Most states have appended the warranty exclusion for blood transfusions to one of the existing warranty sections, making it somewhat doubtful if more than the warranty provisions are excluded, although the intent was proba-

ute approach." In this situation, the modifying statute is not an integral part of the Code, but rather is found, if one had been alerted to look for it, elsewhere in the statute books. The statutes of thirty-four states dealing with blood transfusions and human organ transplants are of this latter type.[27]

In the area of livestock marketing, some twenty-six states have statutes, adopted as amendments to the Code, that withdraw sales of various categories of livestock from full coverage by the Code's implied warranty provisions.[28] Strangely, few states specify "poultry" as livestock to be covered by their amendments.[29] Some use the names given various species, such as "equine, bovine, and porcine,"[30] while others refer to "cattle, hogs and

---

bly to exclude the entire subject matter from the Code. *See, e.g.*, ARK. STAT. ANN. § 85-2-316(3)(d)(i) (1961 & Supp. 1985).

27. For a listing of states that have statutorily mandated that blood injections or transfusions are services and not sales, see *supra* note 16.

28. Nebraska was the first to adopt this type of legislation. The provisions are in ALA. CODE § 2-15-4 (1975 & Supp. 1985); ARK. STAT. ANN. § 85-2-316(d)(ii) (1961 & Supp. 1985); CAL. AGRIC. CODE § 18501 (West 1968); FLA. STAT. ANN. § 672.316(3)(d) (West 1966 & Supp. 1985); GA. CODE ANN. § 11-2-316(3)(d) (1982); ILL. ANN. STAT. ch. 26, § 2-316(3)(d) (Smith-Hurd 1963 & Supp. 1983); IND. CODE ANN. § 1-2-316(3)(d) (West 1980); IOWA CODE ANN. § 554A.1 (West Supp. 1985); KAN. STAT. ANN. § 84-2-316(3)(d) (1983); KY. REV. STAT. § 355.2-316(3)(d) (1972 & Supp. 1984); MICH. COMP. LAWS ANN. § 440.2316(3)(d) (West 1976 & Supp. 1985); MISS. CODE ANN. § 75-2-315 (1981); MO. ANN. STAT. § 277.141 (Vernon Supp. 1985); MONT. CODE ANN. § 30-2-316(3)(d) (1983); NEB. REV. STAT. § 2-316(3)(d) (1980); N.D. CENT. CODE § 41-02-33(3)(e) (1983); OHIO REV. CODE ANN. § 1302.29(c)(4) (Page 1979 & Supp. 1984); OKLA. STAT. ANN. tit. 12A, § 2-316(3)(d) (West 1963 & Supp. 1985); OR. REV. STAT. § 72.3160(3)(d) (1981); S.D. CODIFIED LAWS ANN. § 57A-2-316.1 (1980); TENN. CODE ANN. § 47-2-315 (Supp. 1984); TEX. BUS. & COM. CODE ANN. § 2.316(f) (Vernon 1968 & Supp. 1985); UTAH CODE ANN. § 701A-2-316(5) (1980 & Supp. 1983); WASH. REV. CODE ANN. § 62A.2-316(3)(d) (1966 & Supp. 1985); WIS. STAT. ANN. § 402.316(3)(c) (West 1964 & Supp. 1985); WYO. STAT. § 34-21-233(c)(v) (1977 & Supp. 1985). For the significant text of these statutes, see Uchtmann, *supra* note 15, at 23-25.

Those states which had adopted the variation when the Uchtmann article was written covered only 26.5% of the 1980 poultry sales for the country, whereas the 21 cattle states covered 71.1% of 1980 sales, the hog states covered 76.6% of 1980 sales, and the sheep states covered 48.1% of 1980 sales. *Id.* at 32-33.

29. This is only done by Illinois, ILL. ANN. STAT. ch. 26, § 2-316(3)(d) (Smith-Hurd 1963 & Supp. 1985); Kentucky, KY. REV. STAT. § 355.2-316(3)(d) (1972 & Supp. 1984); and Washington, WASH. REV. CODE ANN. § 62A.2-316(3)(d) (1966 & Supp. 1985).

30. *See, e.g.*, ARK. STAT. ANN. § 85-2-316(d)(i) (1961 & Supp. 1985); KY. REV. STAT. § 355.2-316(3)(d) (1972 & Supp. 1984). The descriptions are quite diverse. Nebraska started with "cattle, hogs and sheep." NEB. REV. STAT. § 2-316(3)(d) (1980). Alabama uses "cattle, swine, sheep, goats, horses, mules and asses." ALA. CODE § 2-15-4 (1975 & Supp. 1985). Florida mentions only "cattle, swine, sheep, horse, poultry and turkeys, or the unborn young of any of the foregoing." FLA. STAT. ANN. § 672.3(d) (West 1966 & Supp. 1985). The Illinois

sheep."[31] A few do not define livestock.[32]

2. *Auction Sales*

Another area where there appears to be an implied warranty problem, as well as perhaps other problems, is auction sales. Where a sale is by auction, does the auctioneer make any warranties?[33] Some case law, pre-Code as well as post-Code, would make the existence of a warranty of title by an auctioneer turn on whether the auctioneer discloses the name of the person delivering the goods for sale.[34] But there is no direct legislative gui-

statute covers "cattle, swine, horses, poultry & turkeys, or the unborn young of any of the foregoing." ILL. ANN. STAT. ch. 26, § 2-316(3)(d) (Smith-Hurd 1963 & Supp. 1985). The Georgia statute is quite limited, applying only to sales "by a licensed auction company or agent," but apparently including within warranty protection "brucellosis reactor cattle detected at an official state laboratory within 30 days following the date of sale." GA. CODE ANN. § 11-2-316(3)(d) (1982). This exclusion relates to disease not detectable by inspection.

31. *See, e.g.*, FLA. STAT. ANN. § 672.316(3)(d) (West 1966 & Supp. 1985) (cattle, hogs); GA. CODE ANN. § 11-2-316(3)(d) (1982) (cattle, hogs, sheep); MICH. COMP. LAWS ANN. § 440.2316(3)(d) (West 1967 & Supp. 1985) (cattle, hogs, sheep); MISS. CODE ANN. § 75-2-315 (1981) (cattle, hogs, sheep); S.D. CODIFIED LAWS ANN. § 57A-2-316.1 (1980) (cattle, hogs, sheep).

Oklahoma specifically provides that implied warranties apply to sales of horses. OKLA. STAT. ANN. tit. 12A, § 2-316(3)(d) (West 1963 & Supp. 1985).

32. The following states do not define "livestock": Kansas, KAN. STAT. ANN. § 84-2-316(3)(d) (1983); MISSOURI, MO. ANN. STAT. § 277.141 (Vernon Supp. 1985); Oklahoma, OKLA. STAT. ANN. tit. 12A, § 2-316(3)(d) (West 1963 & Supp. 1985); Oregon, OR. REV. STAT. § 72.3160(3)(d) (1981) (exclusion does not apply to sale of livestock "for immediate slaughter"); Texas, TEX. BUS. & COM. CODE ANN. § 2.316(f) (Vernon 1968 & Supp. 1985).

For a further discussion of these statutes, see Purcell, *What Warranties do Farmers Give When They Sell Their Livestock*, 2 AGRIC. L.J. 117 (1980); Note, *The Iowa Livestock Warranty Exemption: Illusory Protection for the Buyer*, 67 IOWA L. REV. 133 (1981). The absence of warranty litigation over horses sold for breeding purposes is explained by the general presence of adequate insurance. *See* Fabiani, *Livestock Insurance: A Horse of a Different Color*, 1979 INS. L.J. 431.

33. The question may go deeper. Should most disclosed or statutory agents acting in good faith for another seller make any warranties under the "innocent agent" rule except as to their own good faith and the observance of the regularly observed commercial standards of their respective spheres of action? *See, e.g.*, U.C.C. §§ 3-417(4), 3-419(3), 8-318 (1978).

34. It has always been the common law rule that an auctioneer generally is not liable for a defect in title where the name of its principal is disclosed at the time of sale. *See, e.g.*, Oliver v. Eureka Springs Sales Co., 22 Ark. 94, 257 S.W.2d 367 (1953) (plaintiff had cause of action against sales company that auctioned stolen heifers for undisclosed principal); Mercer v. Leihy, 139 Mich. 447, 102 N.W. 972 (1905) (where auctioneer's principal was present at auction and identified himself, auction company was not liable for selling principal's stolen horse); Corn Land Farms Co. v. Barcus, 105 Neb. 869, 182 N.W. 487 (1921) (auction company's clerk not liable to purchaser for breach of warranty of title at auction sale); Gessler v. Winton, 24 Tenn. App. 411, 145 S.W.2d 789 (1940) (auctioneer who sold mules as principal, not agent, held liable for breach of implied warranty).

dance in the Code as to either this point or the proper time and means for disclosure. By interpreting the wording of U.C.C. § 2-312, the disclosure must be ruled to be a circumstance indicating no claim of title.[35] Perhaps, when Karl N. Llewellyn was drafting Article 2, much of this analysis of warranties in the auction sale area was to be included in a proposed article on commercial agency, which never appeared.[36]

Aside from an auctioneer's warranty of title, what of other warranties in the auction area? Perhaps the drafters felt that the use of the word "seller" in U.C.C. §§ 2-314[37] and 2-315,[38] to-

---

The Uniform Sales Act sought to alter this rule. Section 13(4) stated: "This section (imposing the warranty of title) shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell, by virtue of authority in fact or law, goods in which a third person has a legal or equitable interest." UNIF. SALES ACT § 13(4), 1 U.L.A. 203 (1950). The common law rule has regained its vigor in cases under the Code. *See, e.g.*, Universal C.I.T. Credit Corp. v. State Farm Mut. Auto. Ins. Co., 493 S.W.2d 385 (Mo. Ct. App. 1973) (auction company held liable for breach of implied warranty by selling stolen car and not disclosing name of principal).

35. Section 2-312(2) states that a warranty of title "will be excluded or modified only by specific language or *by circumstances* which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have." U.C.C. § 2-312(2) (1978) (emphasis added).

36. *See* Llewellyn, Commercial Code: Sketch of Prospective Subject Matter (Prepared for W.E. Stanley, October 12, 1943) (Llewellyn Papers, Univ. of Chi. Law School Library, indexed p. 47 as V. 1943, U.C.C. ("Other material not certainly needed for publication, which it may prove desirable to include: a commercial agency. . . .")). In a December 1944 Memo, Plans for Uniform Commercial Code (Index p. 48, 1944 VI. 1.e.), Professor Llewellyn says that "the commercial agency is generally agreed on."

37. Section 2-314 specifically provides:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the *seller* is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as
  (a) pass without objection in the trade under the contract description; and
  (b) In the case of fungible goods, are of fair average quality within the description; and
  (c) are fit for the ordinary purposes for which such goods are used; and
  (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  (e) are adequately contained, packaged, and labeled as the agreement may require; and
  (f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

gether with the reference to the "seller" as someone other than the auctioneer in U.C.C. § 2-328,[39] would be sufficient. But the situation would be more certain if the problem were specifically addressed.[40]

3. *Warranties and the Magnuson-Moss Act*

Furthermore, the Code formulations on warranty need to be

U.C.C. § 2-314 (1978) (emphasis added).

38. Section 2-315 specifically provides:

> Where the *seller* at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315 (1978) (emphasis added).

39. Section 2-328 specifically provides:

> (1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.
>
> (2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.
>
> (3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.
>
> (4) *If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid,* and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

U.C.C. § 2-328 (1978) (emphasis added).

40. The use of the word "seller" in U.C.C. § 2-312 has not provided a safe harbor for the auctioneer. *See* Universal C.I.T. Credit Corp. v. State Farm Mut. Auto. Ins. Co., 493 S.W.2d 385 (Mo. Ct. App. 1973) (auctioneer held liable for breach of implied warranty of title when he auctioned stolen car and did not disclose name of principal); United States v. Chappel Livestock Auctions, 17 U.C.C. Rep. Serv. 299 (8th Cir. 1975) (Callaghan) (state law exempting auctioneer from liability for selling personal property which was subject to security interest, if he acts in good faith and without notice of the security interest, for principal whose identity has been disclosed). *See also* GA. CODE ANN. § 11-2-316(3)(d) (1982); NEB. REV. STAT. § 69-109.01 (1981) (making auctioneer not liable to holder of security interest for sales made in good faith for debtor). Note that the Georgia statute excludes the implied warranty with respect to cattle, hogs, and sheep only when they are sold by an auction company or an agent. But why is this necessary if the auctioneer makes no warranties? It is, therefore, uncertain whether the word "seller" in other state Codes always will exclude warranties.

reconsidered in the light of title I of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.[41] While Code formulations can not change a federal statute, they can, as under the Bankruptcy Code, provide a source of law where the federal statute uses state law terms.[42] Also, changes in Code formulations could potentially harmonize state law warranty concepts with those of the federal statute.

a. Duration of Implied Warranties

An example of nonconformity can be found in sections 104(a)(2)[43] and 108(b)[44] of the Magnuson-Moss Act, which refer to the "duration of any implied warranty." Yet the general rule of state law is that an implied warranty is "broken when made" unless it explicitly extends to future performance. This is addressed in U.C.C. § 2-725(2), which provides:

> A breach of warranty occurs when tender of delivery is made, except that where a warranty *explicitly extends* to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should be discovered.[45]

---

41. 15 U.S.C. §§ 2301-12 (1982).

42. For example, the Bankruptcy Code requires that "adequate assurance" of future performance be given to a party to an executory contract or unexpired lease whenever either is to be assigned by a trustee, 11 U.S.C. § 365(f)(2)(B) (1982), or assumed following a default. *Id.* § 365(b)(1)(C). The term "adequate assurance" also appears in U.C.C. § 2-609 where it serves very much the same function—to preserve a party's expectation of future performance. Therefore, there is no reason why its construction under state law should not be consulted when the adequacy of proposed assurances must be determined under 11 U.S.C. § 365.

43. 15 U.S.C. § 2304(a)(2) (1982). This section specifically provides:
(a) In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—

. . .

(2) notwithstanding section [108(b)], such warrantor may not impose any limitation on the duration of any implied warranty on the product;

Id.

44. 15 U.S.C. § 2308(b) (1982). This section specifically provides:
(b) For purposes of this [Act] (other than section [104(a)(2)]), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

Id.

45. U.C.C. § 2-725(2) (1978).

This excerpt follows a statement providing that "[a] cause of action accrues when a breach occurs,"[46] thereby explicitly barring general application of the "discovery rule." Yet in products liability cases and other situations involving delayed reactions to the use of drugs, or injuries resulting from use of a product long after it was purchased, the "discovery rule" may be essential to prevent a serious failure of justice.

The issue, then, under the Code, is whether there is any "duration" to an implied warranty, i.e., any explicit extension to future performance. In neither U.C.C. § 2-314,[47] on the implied warranty of merchantability, nor U.C.C. § 2-315,[48] on fitness for a particular purpose, is there explicit use of the words "future performance." Yet, is not some duration of performance implicit in the language of "fitness for purpose," where the purpose, ordinary or particular, contemplates future performances?

The implied warranty of merchantability found in U.C.C. § 2-314 does include a warranty of fitness "for the ordinary purposes for which such goods are used."[49] Thus, future performance would seem to be indicated by the Code language. But does that language "explicitly extend" to future performance?[50] Neither the comments to U.C.C. § 2-314 nor the comments to U.C.C. § 2-725 offer any guidance. The Magnuson-Moss Act's definition of an implied warranty, however, seems to indicate a recognition that the reference to "duration" may modify state law.[51]

---

46. *Id.*

47. For the text of § 2-314, see *supra* note 37.

48. For the text of § 2-315, see *supra* note 38.

49. *See* U.C.C. § 2-314 (1978). For the text of § 2-314, see *supra* note 37.

50. By its present nature, an *implied* warranty does not "explicitly extend" to future performance. Stumler v. Ferry-Morse Seed Co., 644 F.2d 667 (7th Cir. 1981) (implied warranties by definition cannot extend to future performances). *See* Clark v. Delaval Separator Corp., 639 F.2d 1320 (5th Cir. 1981) (no breach of implied warranty where plaintiff's cattle developed mastitis after defendant installed milking equipment); Little Rock School Dist. v. Celotex Corp., 264 Ark. 757, 574 S.W.2d 669 (1978) (implied warranty of fitness does not extend to future performance); Wilson v. Massey-Ferguson, Inc., 21 Ill. App. 3d 867, 315 N.E.2d 580 (1974) (no breach of warranty with respect to tractor sold where there was no explicit warranty or representation as to its future performance). But the question is, why shouldn't some aspects of the implied warranty guarantee a reasonable period of future use absent severe user abuse?

51. Under the Magnuson-Moss Warranty Act, the term "implied warranty" is defined to mean "an *implied* warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product." 15 U.S.C. § 2301(7) (1982) (emphasis added). *Compare* 15 U.S.C. § 2308(b) (1982) (permitting limitation of duration of implied warranties "to the duration of a written warranty of reasonable duration") *with* U.C.C. § 2-725(2) (1978) ("A breach of warranty occurs when tender of delivery is

b. Consumer Protections

In the current work being done under the auspices of the 3-4-8 Committee of the Permanent Editorial Board of the Uniform Commercial Code, a tentative decision has been made to eliminate consumer protections from those three Code articles.[52] A similar decision was made in the drafting of Article 9, and U.C.C. § 9-206 contains an express reference to contrary consumer law.[53] In the twenty-nine years since Article 9 was originally approved, many state statutes have been promulgated which use the same definition of "consumer" as does Article 9 in its definition of "consumer goods."[54] The National Conference of Commissioners on Uniform State Laws has drafted for state adoption a Uniform Consumer Sales Practices Act. Its definition also fits within the concept of "consumer" found in the Code.[55] The definitions in the Magnuson-Moss Act, unfortunately, do not. Hence, the Magnuson-Moss Act's provisions cannot be ignored on the ground that the Act is a federal "consumer" statute by a suggestion that Article 2 is subject to consumer statutes.

The term "consumer" is defined in the Magnuson-Moss Act as the buyer of a consumer product other than for purposes of resale.[56] "Consumer product" is defined as a product "normally used for personal, family or household purposes."[57] There is no guidance in the Act as to what "normal" means. The regulations issued thereunder by the Federal Trade Commission state:

This means that a product is a "consumer product" if

---

made, except that where a warranty explicitly extends to future performance . . . .").

52. The Permanent Editorial Board so decided in early 1984 and sent to several interested parties a memorandum of their decision. *See* Miller, *Report on the New Payments Code*, 40 BUS. LAW. 1139 (1985).

53. Section 9-206(1) begins with the following: "Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods . . . ." U.C.C. § 9-206(1) (1978). A "good" is a "consumer good" if "used or bought for use primarily for personal, family or household purposes." U.C.C. § 9-109(1) (1978).

54. *See, e.g.*, UNIF. CONSUMER CREDIT CODE § 2-104(1)(c), 7 U.L.A. 634 (1985) (consumer credit sale is sale of goods, services or interest in land in which "the goods, services or interest in land are purchased primarily for a personal, family, household or agricultural purposes").

55. The new act's scope is defined by reference to "consumer transactions" which include "a sale, lease, assignment, award by chance, or other disposition of an item of goods, a service, or an intangible [except securities] to an individual for purposes that are primarily personal, family, or household." UNIF. CONSUMER SALES PRACTICE ACT § 2(1), 7A U.L.A. § 234 (1985).

56. 15 U.S.C. § 2301(3) (1982).

57. *Id.* § 2301(1).

> the use [i.e., for personal household or family purposes] of that type of product is not uncommon. The percentage of sales or the use to which a product is put by any individual buyer is not determinative. For example, products such as automobiles and typewriters which are used for both personal and commercial purposes come within the definition of consumer product. Where it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage.[58]

In its discussion of agricultural machinery, structures, and implements, the Commission again indicates that a use is "normal" unless it is "uncommon."[59] There may be dictionary justification for this construction, but to the authors it seems a somewhat abnormal use of the word "normal." The justification lies in the need to avoid, to the extent possible, any need for a producer to furnish double packaging and description of the same product for warranty purposes, since the producer quite often must package before knowing the end use. But it does show that Article 2 should be re-examined to avoid the appearance of a warranty conflict as to those products not uncommonly used for personal, household or family use, and amendment is needed to give some understandable content to the concept of "duration" of implied warranties.

c. Disclaimer of Implied Warranties

Disclaimers of implied warranties under U.C.C. § 2-316(2)[60] have also been a source of problems. A disclaimer of a warranty of merchantability or of fitness must be conspicuous,[61] but a disclaimer of all warranties with the use of words such as "as is" is

58. 16 C.F.R. § 700.1(a) (1985).

59. *See id.* § 700.1(b) ("Agricultural products . . . are not covered by the Act where their personal, family, or household use is uncommon.").

60. Section 2-316(2) specifically provides:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicious, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicious. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

U.C.C. § 2-316(2) (1978).

61. *Id.* For the full text of § 2-316(2), see *supra* note 60.

not explicitly required to be conspicuous.[62] The reason for this distinction has escaped some courts,[63] and escapes the present authors as well. Even commercial buyers could overlook "as is" on the back of a printed form. In addition, under the Magnuson-Moss Act, where there is a written warranty, implied warranties may not be disclaimed[64]—even if the buyer is, for example, a buyer the size of DuPont & Company who agrees to the disclaimer.

Many purely consumer-oriented, non-uniform amendments,[65] and statutes not a part of the Code,[66] contain provisions designed to prevent a disclaimer of implied warranties. If the de-

62. *See* U.C.C. § 2-316(3)(a) (1978). This subsection states:

> (3) Notwithstanding subsection (2)
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty;

Id.

63. In a typical expression of confusion, the court in *Osborne v. Genevie* made the following observations:

> However, we fail to see why the draftsmen of the Uniform Commercial Code would have felt that language such as "there are no warranties which extend beyond the description on the face hereof" had to be conspicuous in order to be effective, and yet were willing to accept words such as "as is" or "with all faults" as valid disclaimers when these expressions were not conspicuous.

289 So. 2d 21, 22 (Fla. Dist. Ct. App. 1974). To remedy the apparent drafting "slip," many courts have implied in U.C.C. § 2-316(3)(a) a "conspicuous" requirement. *See, e.g., Osborne*, 289 So. 2d at 23 ("as is" requirement must be set forth in conspicuous manner); Fairchild Indus. v. Maritime Air Serv., Ltd., 274 Md. 181, 333 A.2d 313 (1975) (disclaimer such as "as is" or "with all faults" must be conspicuous); Gindy Mfg. Corp. v. Cardinale Trucking Corp., 111 N.J. Super. 383, 268 A.2d 345 (1970) ("as is" disclaimer that was not clear with respect to its applicability did not disclaim implied warranty in sale of new semi-trailers).

64. 15 U.S.C. § 2308 (1982).

65. Alabama's Code adds a provision to U.C.C. § 2-316 which makes the section inapplicable to consumer goods. ALA. CODE § 7-2-316(5) (1975). This section provides: "Nothing in subsection (2) or subsection (3)(a) or in section 7-2-317 shall be construed so as to limit or exclude the seller's liability for damages for injury to the person in the case of consumer goods." *Id.* The District of Columbia Code makes exclusion of implied warranties as to consumer goods unenforceable. D.C. CODE ANN. § 28-2-316.1 (1981 & Supp. 1985). Maine's § 2-313(1)(b) adds a sentence reading: "In the case of consumer goods sold by a merchant with respect to such goods, the description affirms that the goods are fit for the ordinary purposes for which such goods are used." ME. REV. STAT. ANN. tit. 11, § 2-313(1)(b) (1964 & Supp. 1985). Maryland's § 2-316 provides that the section does not apply to consumer goods. MD. COM. LAW CODE ANN. § 2-316(1) (1975 & Supp. 1985). New Hampshire requires a separately signed conspicuous writing for disclaimers of implied warranties. N.H. REV. STAT. ANN. § 382-A-2:316(4) (1961 & Supp. 1983). Vermont also has this requirement. VT. STAT. ANN. tit. 9A, § 2-316(4) (1966 & Supp. 1985). Washington requires what

cision is made to exclude consumer protections, then these non-Code statutes can be ignored, to the extent that the word "consumer" is defined to include only persons purchasing for personal, family or household purposes. The special consumer amendments to Article 2 adopted by some states could then be changed to statutes external to the Code, or consumer provisions might be integrated into the Code in a harmonious fashion.

4. *Third Party Beneficiaries of a Seller's Warranties*

Next, there is the question of the Code's coverage of what are called third party beneficiaries of a seller's warranties. Here, the developments in the law since the drafting stage of the Code have rendered obsolete the three-tiered approach to the privity problem embodied in the 1956 adoption of three alternatives in U.C.C. § 2-318.[67] But special treatment of the privity problem,

---

is not being warranted to be set forth with particularity. WASH. REV. CODE ANN. § 62A-2-316(4) (1966 & Supp. 1985).

66. *See, e.g.*, CAL. CIV. CODE §§ 1790-1795.7 (West 1985) (Song-Beverly Consumer Warranty Act) (in particular § 1792.4). *See also* WIS. STAT. ANN. §§ 421.101-428.104 (West 1974) (Wisconsin Consumer Act) (in particular § 421.106, which controls agreements to forego rights).

67. The three alternatives in U.C.C. § 2-318 provide:

Alternative A

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

> A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

U.C.C. § 2-318 (1978).

Even a cursory survey of existing case law reveals that the alternative adopted by a particular jurisdiction in no way establishes the parameters of privity law in that jurisdiction. Courts have been freely developing a common law of privity which is best described as unpredictable and inconsistent. This is easily explained by the fact that each alternative fails to address many frequently litigated privity issues.

Consider, for example, Alternative A, which is the law in most states. It is silent on the need for vertical privity. The drafters have acknowledged its neutrality on this issue, making it clear that Alternative A was never "intended to

i.e., giving non-purchasers a warranty claim against either a seller to the ultimate user or a remote seller, may not be appropriate in view of products liability statutes[68] and section 402A of the *Second Restatement of Torts* where a personal injury claim is involved. Conceivably, cases involving personal injury claims could be left to other areas of the law while any loss of a purely "commercial" or "economic" nature could be treated separately in the Code.[69] Surely, the Code should not be interpreted as preempting all

enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." U.C.C. § 9-318 comment 3 (1978).

Alternative B does eliminate the need for vertical privity, but does so only if the plaintiff is "injured in person." It too is silent on the need for such privity if the loss is economic.

Although absent from Alternative C is the "injury in person" language of Alternative B, also absent is an express statement that economic loss is recoverable by a plaintiff lacking vertical privity. Given the failure of either Alternative B or C to resolve this and other privity issues, and the existence of diverse case law and commentary, thought should be given to a statutory cleansing of the doctrine, or perhaps, anticipating the year 2000, to ending its role in the area of warranty law. *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 11-8, at 411 (2d ed. 1980) ("It is possible that lack of privity as a defense to a cause of action will be only a historic relic in the year 2000. It is a doctrine in hasty retreat . . . .").

68. *See* ALA. CODE §§ 6-5-501 to -525 (Supp. 1985); ARIZ. REV. STAT. ANN. §§ 12-681 to -686 (1982); ARK. STAT. ANN. § 34-2801 to -2807 (Supp. 1985); COLO. REV. STAT. §§ 13-21-401 to -406 (Supp. 1984); CONN. GEN. STAT. § 52-572m to -572r (Supp. 1985); GA. CODE ANN. § 51-1-11 (1982); IDAHO CODE, §§ 6-1401 to -1409 (Supp. 1985); ILL. ANN. STAT. ch. 110, § 13-213 (Smith-Hurd 1984); IND. CODE ANN. § 33-1-1.5-1 (West Supp. 1985); KAN. STAT. ANN. §§ 60-3301 to -3306 (1983); KY. REV. STAT. §§ 411.300-.340 (1978); ME. REV. STAT. ANN. tit. 14, § 14-221 (1980); MICH. COMP. LAWS § 600.2945 (Supp. 1975); MINN. STAT. ANN. §§ 544.41, 604.02-.04 (Supp. 1985); NEB. REV. STAT. §§ 25-21, -180 (1979); N.H. REV. STAT. ANN. § 507-D:1 to -D:5 (1983) (held unconstitutional in Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983)); N.C. GEN. STAT. §§ 99B-1 to B-10 (1979 & Supp. 1983); N.D. CENT. CODE § 28-01.1-01 to .1-07 (Supp. 1983); OR. REV. STAT. §§ 30.900-.925 (1983); S.C. CODE ANN. § 15-73-10 to -30 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 20-9-10 (1979); TENN. CODE ANN. § 29-28-101 to -108 (1980 & Supp. 1985); UTAH CODE ANN. § 78-15-1 to -6 (1977); WASH. REV. CODE ANN. § 7.72.010 to .040 (Supp. 1985). *See also* Karl v. Bryant Air Conditioning Co., 705 F.2d 164 (6th Cir. 1983) (Sixth Circuit applied response of Michigan Supreme Court that Michigan's products liability act preempted all other liability for defective products).

69. The issue of whether strict liability in tort should extend to economic loss has prompted no small volume of judicial debate. The vast majority of courts that have considered the question have not permitted recovery for economic loss under strict liability. *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976) (strict liability did not extend to buyers of mobile homes who suffered economic loss); Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (strict liability in tort applicable to physical injuries and not to economic loss). For perhaps the leading case favoring such an extension to economic loss, see Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (strict liability in tort action maintained although plaintiff's damage was limited to loss of defective carpeting).

products liability suits in tort against sellers of goods.[70]

The elimination of personal injury claims from warranty liability is desirable as it will annul the sympathy factor in the interpretation of warranty disclaimers and limitations of damages clauses. We suggest that the Delaware Supreme Court,[71] and perhaps other courts, were incorrect in holding that the Code prevents a court from adopting the strict liability rule of section 402A of the *Second Restatement of Torts*, at least for personal injury cases.

What is needed is a clear legislative delineation of the boundaries for warranty law and tort law, or, in the alternative, a consolidation of the two. Several alternatives should be considered. In the first place, it will be necessary to determine what is meant by "commercial" or "economic" loss. Should commercial loss include loss of salary, commissions, business, or other compensation resulting from personal injuries? Or, should these be remitted to personal injury law? If the latter approach is selected, then the Code warranty law could cover consequential economic damages,[72] such as a loss of sales caused by the dysfunction of a product that was not as warranted, but without the overtones of a personal injury suit. The issue in such a case would be how far up the chain of distribution, and how wide horizontally, to extend liability. Seemingly, an abolition of privity should allow recovery all the way, including loss of profits, by a person who may reasonably be expected to use, consume, or be affected by the goods, and who is injured as a result of the breach of the warranty.

Further complications could be caused by the passage of United States Senate Bill 100, which provides for liability for

70. *But see* Cline v. Prowler Indus., Inc., 418 A.2d 968, 980 (Del. 1980) ("In view of . . . the lack of adequate justification for the separate existence of a tort remedy apart from the Code in sales transactions, we conclude that the General Assembly did not intend to permit the adoption of a competing theory of liability in cases involving the sales of goods and, thus, preempted the field."). For a further discussion of the *Cline* case, see *infra* note 71 and accompanying text.

71. *See* Cline v. Prowler Indus., Inc., 418 A.2d 968, 980 (Del. 1980). In *Cline*, the plaintiff purchased a travel-trailer that was heated by a propane heater. When the plaintiff turned on the propane heater, the unit exploded, causing personal injuries to the plaintiff. *Id.* The plaintiff sued the manufacturer of the heating unit under theories of breach of warranty and strict liability in tort. However, the trial judge refused to instruct the jury on the strict liability theory. *Id.* at 970. On appeal, the Delaware Supreme Court upheld the trial judge's decision, holding that the Uniform Commercial Code had preempted the sales field and, therefore, was the plaintiff's sole recourse for recovery. *Id.* at 980.

72. The classic example of consequential damages is loss of profits. The coverage would be in addition to recovery of the diminution in value of the product.

breach of an express warranty[73] and has its own rules for liability in the absence of such a warranty.[74] The bill purports, under the federal commerce clause, to preempt state laws, and to replace the "strict liability" rules of state law.[75] Since warranty liability is construed to be strict liability, an issue arises as to whether the federal statute, if enacted, or the similar state statutes, also preempt the implied warranties of the Code or merely supplement them.

5. *Notice to Sellers*

Again, on the topic of warranties, mention should be made of U.C.C. § 2-607(3),[76] which bars any remedy if a buyer does not

73. S. 100, 99th Cong., 1st Sess. §§ 7, 8(a)(2) (1985). Section 7 of S. 100 specifically provides:

> (a) A product is unreasonably dangerous because it did not conform to an express warranty made by the manufacturer if—
> (1) the product failed to conform to such warranty; and
> (2) the failure of the product to conform to such warranty caused the claimant's harm.
> (b) A product may be unreasonably dangerous for failure to conform to an express warranty although the manufacturer did not engage in negligent or fraudulent conduct in making the express warranty.

Id. § 7.

Section 8(a)(2) of S. 100 specifically provides:

> (a) In any product liability action, a product seller other than a manufacturer is liable to a claimant, if the claimant establishes by a preponderance of the evidence that—
> (2) (A) the product seller made an express warranty, independent of any express warranty made by a manufacturer as to the same product;
> (B) the product failed to conform to such warranty; and
> (C) the failure of the product to conform to such warranty caused the claimant's harm.

Id. § 8(a)(2).

74. *Id.* §§ 4-6, 8.

75. *Id.* § 3(b)(1). Section 3(b)(1) specifically provides:

> (b)(1) This Act supersedes any State law regarding recovery for any loss or damage caused by a product to the extent that this Act establishes a rule of law applicable to any civil action brought against a manufacturer or product seller for loss or damage caused by a product, including any action which before the effective date of this Act would have been based on: (A) strict or absolute liability in tort; (B) negligence or gross negligence; (C) breach of express or implied warranty; (D) failure to discharge a duty to warn or instruct; or (E) any other theory that is the basis for an award for damages for loss or damage caused by a product. Any issue arising in such action that is not governed by any such rule of law shall be governed by applicable State law. This Act shall not be construed to waive or affect any defense of sovereign immunity asserted in any State under any provision of law.

Id.

76. Section 2-607(3) provides:

> (3) Where a tender has been accepted

notify the seller of any breach where a tender has been accepted. Maine and South Carolina have amended the section to preclude its application to suits for personal injuries.[77] Caselaw is divided on the issue of notice of breach in two areas: first, whether notice must be given by the aggrieved party to a remote seller;[78] and second, whether notice must be given when the suit is by one claiming third party beneficiary status under U.C.C. § 2-318 or otherwise.[79]

The problem of notice to a remote manufacturer is illustrated by the recent case of *Firestone Tire & Rubber Co. v. Cannon*,[80]

(a) the buyer 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; and
(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

U.C.C. § 2-607(3) (1978).

77. *See* ME. REV. STAT. ANN. tit. 11, § 2-607(7) (1964 & Supp. 1985) (notice requirement not applicable to personal injury); S.C. CODE ANN. § 36-2-607(3)(a) (Law. Co-op. 1976) (requiring no notice of personal injury to seller of consumer goods).

78. For cases holding that notice to a remote seller is not required, see Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984); Goldstein v. G.D. Searle & Co., 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1978); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); Vintage Homes, Inc. v. Coldiron, 585 S.W.2d 886 (Tex. Civ. App. 1979). For cases holding that notice is required, see Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); Western Equip. Co. v. Sheridan Iron Works, Inc., 605 P.2d 806 (Wyo. 1980). Those courts willing to excuse notice to a remote seller have done so on the questionable ground that the term "seller" in U.C.C. § 2-607(3)(a) should be read as "the immediate seller." For the full text of § 2-607, see *supra* note 76.

79. The overwhelming majority of courts hold that warranty beneficiaries need not give notice. *See, e.g.*, Simmons v. Clemco Indus., 368 So. 2d 509 (Ala. 1979) (claimant who contracted silicosis due to defective sandblasting hoods supplied by employer not required to give notice to manufacturer); Chaffin v. Atlanta Coca-Cola Bottling Co., 127 Ga. App. 619, 194 S.E.2d 513 (1972) (notice provisions did not apply to soft drink buyer's mother who was injured after consuming soap-like substance in soft drink which daughter gave her); Mattos v. Hash, 279 Md. 371, 368 A.2d 993 (1977) (repairman injured by faulty clamp not required to give same notice within reasonable time after accident that his employer would have been required to give had any of his property been damaged). *But see* Parrillo v. Giroux Co., 426 A.2d 1313 (R.I. 1981) (bartender injured by exploding bottle of grenadine required to give notice to defendant manufacturer within reasonable time). The cases holding that notice is not required have taken § 2-607(3)(a)'s use of the word "buyer" literally, disregarding the comment's suggestion that "the reason of the section does extend to requiring the beneficiary to notify the seller that an injury has occurred." U.C.C. § 2-607 comment 5 (1978). For the full text of § 2-607(3), see *supra* note 76.

80. 53 Md. App. 106, 452 A.2d 192 (1982), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983).

where a remote manufacturer was not given notice of a breach of warranty within a reasonable time.[81] A majority of the Maryland Court of Special Appeals followed what they conceived to be the majority view that direct notice is not necessary.[82] What is required is that each buyer in the chain of distribution notify its seller in order to preserve the right to indemnity.[83] We believe this concept would work if the final user and each prior seller was limited to suit against the next prior seller in the chain of distribution. This theory has difficulties, however, when the end user sues only a remote manufacturer.

The concurrence in *Firestone* focused on two changes that make a "no direct notice" rule no longer viable. First, the rather widespread use of the direct suit permits a buyer to drop his immediate seller from the suit or not even sue that seller at all.[84] Second, without prompt notice, a remote manufacturer may be unable to obtain access to the remains of the product causing the damage so as to build a defense of, for example, faulty installation by the immediate seller.[85] Thus, the situation in *Firestone* suggests that the local seller may have a conflict of interest with the manufacturer, and, consequently, as a litigation decision, may fail to give notice before suit.[86] Both points, however, were rejected by the majority.

One proposed justification for a rule excusing notice to parties with whom the buyer has not dealt is that the identity of the remote manufacturer may be unknown. We suggest that whenever this is true, the courts can and should rule that the reason-

81. In *Firestone*, a truck driver purchased a tire for one of his tractors from Elliott Equipment Company. Elliott received this tire through a chain of distributors. However, the tire was manufactured by Firestone. 53 Md. App. at 107, 452 A.2d at 193. While the tractor was hauling a trailer in Arizona, the tire "blew out," causing the tractor to cross a median strip and collide with two trees. *Id.* at 108, 452 A.2d at 193. The accident caused extensive damage to the trailer and lost profits to the owner because of his inability to use the tractor. *Id.*

82. *Id.* at 118, 452 A.2d at 198.

83. *See id.*

84. *Id.* at 121-22, 452 A.2d at 200 (Lowe, J., concurring). One impediment to such a suit was effectively removed by dictum in the Supreme Court's decision in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). In *World-Wide Volkswagen*, the Supreme Court stated that a "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *Id.* at 297-98. In light of this statement, it would be a rare case where a jurisdictional defense is available to an out-of-state manufacturer.

85. 53 Md. App. at 121-22, 452 A.2d at 200 (Lowe, J., concurring).

86. *Id.*

able time for notice does not start to run until the manufacturer's identity is discovered. But in the case of many products, as was true in *Firestone*, the name of the manufacturer is on the product or on the package. In fact, quite often the purchase is the result of direct advertising by the manufacturer. In that case, the reasonable time should run from the discovery of the defect. Suits against a remote manufacturer of a component part, however, present a different picture and could be handled, if necessary, by a rule requiring notice within a reasonable time after learning of the manufacturer's identity.

Additionally, any revision of Article 2 should consider a change in the penalty for a failure to give notice from an absolute bar of "any remedy" to a bar conditioned on a showing of some prejudice from the failure to receive notice, as is done in Article 4.[87] We advocate a further qualification. Where, in fact, the ultimate user's immediate seller gives an upstream notice, such notice should act to protect the user who did not give notice. But some guidelines to this result should appear in the statute.

We believe that the non-uniform amendments to U.C.C. § 2-607(3) by Maine and South Carolina[88] are based on the harshness of the complete bar rule presently found in the uniform text. If our suggestion regarding the effect of a failure to give notice is adopted, the need for the Maine and South Carolina amendments largely disappears.

B. *The Battle of the Forms*

Turning from warranties, where state variations and *ad hoc* statutes are numerous, we find an area which, despite the absence of any statutory variations (except in Montana),[89] and, so far as

87. *See* U.C.C. § 4-207(4), 4-406(2)(a) (1978). Section 4-207(4) specifically provides: "Unless a claim for breach of warranty under this section is made within a reasonable time after the person claiming learns of the breach, the person liable is discharged to the extent of any loss caused by the delay in making claim." U.C.C. § 4-207(4) (1978).

Section 4-406(2)(a) specifically provides:

> (2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank
> (a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure;

Id. § 4-406(2)(a).

88. For a discussion of these statutes, see *supra* note 77 and accompanying text.

89. MONT. CODE ANN. § 30-2-207 (1985).

we are aware, of any special statutes, has spawned much litigation and discussion in legal periodicals.[90] U.C.C. § 2-207[91] was once introduced to a continuing legal education audience as follows:

> [O]ne of the problems in this field, which has always been the delight of law professors—for all I know the delight of law students—is the so-called battle of the forms where seller and buyer, each dedicated to his own brand of insanity, exchange forms which have nothing to do with each other and then ask counsel, "Well, where are we?" That was a problem that Professor Llewellyn dearly loved, and he put a long section in Article 2 which has been generally hailed by the academic community as nothing less than Magna Carta and, as far as I can tell, generally hailed by members of the bar as probably the end of civilization as we know it.[92]

---

90. Some of the more recent commentary on § 2-207 can be found in Baird & Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982); Duesenberg, *Contract Creation: The Continuing Struggle with Additional and Different Terms under Uniform Commercial Code Section 2-207*, 34 BUS. LAW. 1477 (1979); Gedid, *A Background to Variance Problems Under the Uniform Commercial Code: Toward a Contextual Approach*, 22 DUQ. L. REV. 595 (1984); Murray, *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597 (1978); Shanker, *Contract by Disagreement!? (Reflections on U.C.C. 2-207)*, 81 COM. L.J. 453 (1976); Taylor, *U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality*, 46 CIN. L. REV. 419 (1977); Thatcher, *Battle of the Forms: Solution by Revision of Section 2-207*, 16 U.C.C. L.J. 237 (1984); Travalio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207*, 33 CASE W. RES. L. REV. 327 (1983).

91. The current version of § 2-207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

U.C.C. § 2-207 (1978).

92. P.F. COOGAN, G.T. DUNNE, E.A. FARNSWORTH, G. GILMORE, W.E. HOGAN, H. KRIPKE, F. LEARY, JR. & H. SACHSE, ADVANCED ALI-ABA COURSE OF

Professor Gilmore's statement about the academic community has not continued to be true. Many articles criticizing the section have been written since those words were uttered. One of the more recent articles states:

> To say that Section 2-207 is no model of simplicity or clarity would be to understate the matter considerably. The judicial opinions and scholarly commentary document an ongoing struggle to comprehend an unnecessarily complex and opaque statute. To the extent that Section 2-207 improves only marginally upon the common-law rules governing contract formation and content it was intended to displace or qualify, enactment of the statute has actually impeded modernization of the law governing commercial transactions. By ignoring evidence of the parties' agreement other than their formal expressions, the statute has discouraged the expansion of commercial practices through custom, usage, and agreement of the parties.[93]

One reason for the difficulty with section 2-207 may well be the failure of courts and commentators to consider Article 2's contract provisions as a whole. U.C.C. § 2-207 was designed to set express terms where both parties use differing express terms. It was not meant to supplant the use of custom, course of dealing, etc., where there are no conflicting express terms. Another reason may be a failure to realize how very limited a function the section was originally intended to perform prior to Supplement No. 1 and the 1956 amendments to Article 2.[94]

STUDY ON BANKING AND SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 108 (Feb. 1-4, 1968) [hereinafter cited as P.F. COOGAN].

93. Thatcher, *supra* note 90, at 239-40 (footnotes omitted).

94. The text of § 2-207 of the May 1949 Draft read:

Section 2-207. *Additional Terms in Acceptance or Confirmation.*

Where either a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time states terms additional to those offered or agreed upon

(a) the additional terms are to be construed as proposal [sic] for modification or addition; and

(b) between merchants the additional terms become part of the contract unless they materially alter it or notice of objection to them is given within a reasonable time after they are received.

U.C.C. § 2-207 (May 1949 Draft).

In the Spring 1950 Draft, there was little change except that the former preamble became subsection 1, which then read: "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time *operates as an acceptance even though* it states terms additional to those

One issue under pre-Code law was the unnoticed counter-offer that would constitute a rejection of the offer.[95] Even at com-

---

offers or agreed upon." U.C.C. § 2-207 (Proposed Final Draft, Spring 1950) (emphasis added). The previous (a) and (b) became one sentence joined by "and" in subsection (2). Also, the necessary "s" was added to "proposal" and "modification or" was eliminated. *See id.*

The interesting question is how a "written confirmation" of an already completed deal can operate as an acceptance, although it could also operate as a proposal "for modification" which, if agreed to, requires no consideration by virtue of § 2-209(1). Actually every proposal for modification is, in one sense, a proposal for addition even if it merely adds a "not" to a prior term. The modification wording, however, remained eliminated.

The Spring 1951 Draft made no change, but in the November 1951 Draft the words "or different from" reared their ugly heads in subsection (1) but not in (2), and the "objection" in subsection (2) was changed so it could be either "already given" or "given within a reasonable time." *See* U.C.C. § 2-207 (Final Text Edition, Nov. 1951). For the full text of the current version of U.C.C. § 2-207, see *supra* note 91. Fuel for subsequent misunderstanding is furnished because in comment 3 the phrase "whether or not additional terms will become part of the contract. . ." becomes "whether or not additional *or different* terms. . . ." *See* U.C.C. § 2-207 comment 3 (1978) (emphasis added).

Supplement No. 1, dated January 1955, produced a very lengthy revision, expanding the text from nine lines of type with two subsections to 44 lines of type with six subsections. Many of the ideas now in § 2-207 surface here. Supplement No. 1 stated as its reason or the changes:

> In order to make the battle of the forms rule work in a business sense, there first has to be a distinction drawn between offers which contain form clauses and those which do not, and, secondly, the conflict of forms must be arranged in a business-like way when the parties are clearly engaged in a deal even though the form situation has not yet been clearly ironed out.

U.C.C. § 2-207, at 7 (Supplement No. 1 to 1952 Draft).

Finally, the present wording appears in the 1956 recommendations as a change to the 1952 wording with the following laconic comment: "The section was entirely rewritten in Supp. No. 1, and was later redrawn in a special supplement to express more clearly what was intended." U.C.C. § 2-207 (1956 Recommendations to the Editorial Board). Since the distinction between offers which contain form clauses and those which do not, made in Supplement No. 1, was omitted, the thinking must have changed so that both were to receive the same treatment.

95. *See, e.g., In re* Marcalus Mfg. Co., 120 F. Supp. 784 (D. N.J. 1954) (where offeree's response did not conform to offer, it was not unequivocal acceptance of offer but counter-offer); Riverside Coal Co. v. Elman Coal Co., 114 Conn. 492, 159 A. 280 (1932) (where wholesaler's confirmation of oral order for coal taken by salesman contained provisions not embodied in order, wholesaler's confirmation was "counter proposal"); Aluminum Prod. Co. v. Regal Apparel Co., 296 Mass. 84, 4 N.E.2d 1003 (1936) (where defendant ordered goods from principal/plaintiff through agent and plaintiff tendered goods to defendant with bill in its own name, there was notice that plaintiff was not acting as principal in contract with the agent but rather was making counter-offer); Johnson v. M. J. O'Neill, Inc., 182 Minn. 232, 234 N.W. 16 (1931) (where offeree includes new condition or additional requirement not included in offer, no contract results); Poel v. Brunswicke-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915) (proposal to accept offer, if modified, is equivalent to rejection); Howells v. Strooct, 50 A.D. 344, 63 N.Y.S. 1074 (App. Div. 1900) (where defendants wrote and offered certain cloth and asked for notice of acceptance or rejection by re-

mon law, it was possible to accept an offer and at the same time request modifications. As stated in *A Study of the Effect of the Uniform Commercial Code on Minnesota Law*, the counter-offer construction at common law does not apply "if the acceptance is definite and clearly indicates that the additional terms are merely 'suggestions' for modifications and not conditions."[96] In other words, at common law you were making a counter-offer unless you made it very clear that you were not.

Subsection (1) of U.C.C. § 2-207 was intended to reverse that approach. When properly analyzed, its effect is that you are making a proposal for modifications when your timely reply to an offer states your acceptance but also states terms and conditions which vary from those of the offer. The "unless" clause, added in amendments prior to 1956[97] and emphasized in the 1956 Report, preserves freedom of contract for offerees by providing that a counter-offer can be made if the offeree clearly so provides. Where a form uses a definite expression of acceptance, the result of the Code can be restated as providing, "If you do not mean what you say, you should say so." The method of saying so is to "expressly" make the statement of acceptance conditional on the offeror's acceptance of the additional or different terms.

The *Second Restatement of Contracts*, in sections 59[98] and 61,[99]

---

turn mail, no contract of sale when plaintiff replied that they had submitted offer to mill since defendant's letter required unqualified acceptance; thus plaintiff's letter was counter-offer); Stanley v. Gannon, 109 Misc. 611, 180 N.Y.S. 602 (Sup. Ct. 1919) (requiring exact match on every detail for contract to be formed); Crown v. Goldsboro, 182 N.C. 217, 108 S.E. 735 (1921) (requiring meeting of the minds on every detail). *But see* Gedid, *supra* note 90, at 612 (suggesting that the "last shot" doctrine may not have been as pervasive as is generally considered). On the other hand, see Slawson, *The New Meaning of Contracts: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 58-60 (1984) (drafting instructions to corporate clients). Leland L. Bull, Jr., prefers the longer Supplement No. 1 version. Bull, *Uniform Commercial Code Section 2-207: More to the "Battle of the Forms,"* MICH. B.J. 536 (1983).

96. *See* HINYON AND MCCLURE, A STUDY OF THE EFFECT OF THE UNIFORM COMMERCIAL CODE ON MINNESOTA LAW (1964). The authors state:

> The effect of this subsection is that additional terms in a purported acceptance are presumed to be mere requests for modification unless expressly made conditions, whereas present caselaw presumes that they are conditions and a rejection of the offer unless expressly made as requests or suggestions. The U.C.C. thus changes the presumption of intent as to the effect of additional terms in an acceptance when not expressly indicated.

Id. at 68-69.

97. For a reference to Supplement No. 1 to the 1952 Draft, where the "unless" clause first appeared, see *supra* note 94.

98. Section 59 reads: "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those

comes close to conforming to U.C.C. § 2-207(1), which is cited in the comments to those sections. However, the black letter language does not give, in the present authors' opinion, as clear an indication of the line of departure from the common law approach of *Poel v. Brunswick-Balke-Collendar*[100] type cases as does the Code, if, indeed, the *Restatement* intends any departure.

Arguably, under the *Restatement* formulations, with the emphasis on unequivocal acceptance for a contract to be formed, there can be no additional or different terms. Section 59 refers to a response "which purports to accept . . . but is conditional on the offeror's assent to terms additional to or different from those offered,"[101] not as an acceptance but as a counter-offer. Section 61 refers to an acceptance "which requests a change or addition to the terms of the offer."[102] But there is no guide to separate "conditional" from "request."

It seems as if the *Restatement* assumes that every party negotiates a contract of sale. It does not meet head-on the somewhat exaggerated but essentially accurate account of business form contracting as stated in 1967 by Grant Gilmore and quoted above.[103] A proper commercial code should address the case where each form states terms and conditions with neither an express requirement of consent thereto nor any precatory language

---

offered is not an acceptance but is a counter-offer." RESTATEMENT (SECOND) OF CONTRACTS § 59 (1981).

99. Section 61 provides: "An acceptance which *requests* a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms." *Id.* § 61 (1981) (emphasis added).

The comment states that "[a]n acceptance must be unequivocal." *Id.* § 61 comment a. The illustrations given use precatory language which makes the distinction between "request" and "condition" quite easy. The final clause in the comment calls for treatment as an acceptance "unless, if fairly interpreted, the offeree's assent depends on the offeror's further acquiescence in the modification." *Id.* The difficulty is that, given the common law background, courts will, as does the woman of fable, "give the same opinion still," as to when a counter-offer is made. Also the *Restatement* is not very helpful in determining when there is a "condition" to acceptance.

100. 216 N.Y. 310, 110 N.E. 619 (1915) (proposal to accept offer if modified is equivalent to rejection). *Cf.* Kurio v. United States, 429 F. Supp. 42, 66-67 (S.D. Tex. 1970) (acceptance which attempts to restate terms of offer must be accurate in every material respect); Maddox v. Northern Natural Gas Co., 259 F. Supp. 781 (W.D. Okla. 1966) (for binding contract, acceptance must be absolute, unconditional, and identical with terms of offer).

101. RESTATEMENT (SECOND) OF CONTRACTS § 59 (1981). For the full text of § 59, see *supra* note 98.

102. RESTATEMENT (SECOND) OF CONTRACTS § 61 (1981). For the full text of § 61, see *supra* note 99.

103. *See supra* text accompanying note 92.

seeking modifications. Under the *Restatement*, the common law result will be that in the event of a price change before shipment, either party can examine the papers and walk away from the deal.[104] In the event of a shipment after an exchange of forms, under the *Restatement*, the piece of paper last sent would seem to govern.

What, in substance, U.C.C. § 2-207 attempts to do is to preserve each party's freedom to contract on two levels. One is to allow an offeror to say, "My terms, or I won't play," and assumes the offeree will accept or reject as offered. On the same level, the Code allows the acceptor to say, "You must accept my counteroffer or I won't play," where the offeror has said nothing. But two other situations can occur on the second level. Suppose neither party makes the appropriate manifestation in its paper of "My terms or I won't play" (the "neither" case), or suppose each so manifests, as would happen if each followed the usually suggested forms (the "each" case). What then?

In the "neither" case, U.C.C. § 2-207(2) treats the "additional terms" in the second form as proposals for addition to the contract which, unless both parties are merchants, will not become part of the contract unless the party firing the first shot consents. Whoever sends a paper in response to an offer stating in it "We accept" has a contract on the offeror's terms and must press for modification whether its terms be "different" or "additional."[105]

Where the contract is between merchants, however, the party firing the first shot in our "neither" case, (if its purchasing personnel read the purported acceptor's terms or are otherwise aware of them) has three options. The party can accept the proposals for addition or modification; it can object to them; or it can decide that they are material changes, hence not a part of the contract, and do nothing, hoping it is right. If the merchant chooses this third option and is right, the terms are not part of the contract. If he is wrong, the terms are part of the contract unless they

104. At least this seems to be the result if "no contract" results. There are a number of grounds on which courts could avoid the extreme rigors of the "mirror image" rule. *See* Baird & Weisberg, *supra* note 90, at 1231-37; Annot. 3 A.L.R.2d 257 (1949). But, perhaps this only leads us to a three-tier classification of additional or different terms, i.e. trivial, minor and material. The trouble arises with the need to distinguish between minor and material clauses.

105. *See* U.C.C. § 2-207(1), (2) (1978). A proposal for modification still requires mutual assent under the U.C.C. where the proposal is not "between merchants." U.C.C. § 2-209(1) only eliminates the "independent consideration" requirement. *See id.* § 2-209(1).

are "different" as opposed to "additional." Where both of the parties' papers have provisions on the same subject, then the terms of the first to fire should be considered objections to the "different" terms of the other, under U.C.C. § 2-207(2)(c). In some courts they have been.[106]

On this point there is a clear need for revision either to eliminate the additional-different dichotomy or to give guidance in determining which is which. This is particularly needed where the Code supplies terms when there is no statement of them by the parties, as in the case of implied warranties. Where the offer is silent as to warranties, are the Code's "silent" terms part of the offer?[107] Is a response on the warranty issue, where the offer is silent, to be considered "additional" or "different"? Is there to be a difference depending on the answer to the last question?

Now suppose we have both an offer with a term limiting all acceptances to its terms, and an expression of acceptance with additional or different terms. Even between merchants, the different and also the additional terms are mere proposals for modification. If the purported acceptance is also conditioned on assent to its terms, we have the "each" case. The acceptance is a counter-offer and one that limits subsequent acceptance to its terms. In either case, the Code has not abolished the mirror image rule and the parties can thus insist on its application by the use of appropriate language. In these cases where each party is dedicated to its own brand of insanity, we should perhaps allow them to stew in their own respective common law juices without a contract, permitting each to walk away.[108]

But there is another situation—the oral contract followed by a memorandum in confirmation which is sent usually by a seller, but need not be. The oral contract will ordinarily be a bare bones contract, with only a brand name, or other description, quantity, price, and possibly a delivery term. If both parties have sent confirmation forms, do we treat the forms as agreed modifications where they agree with each other and then apply U.C.C. § 2-207(1) and (2)[109] as if they were an offer and an expression of

106. *See, e.g.*, Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569 (10th Cir. 1984) (analyzing three approaches).

107. The warranties would be in the contract if neither party referred to warranties. Presumably, then, the implied warranties are terms of the offer, and are accepted by an unqualified acceptance.

108. That is, of course, in the absence of further conduct which might trigger U.C.C. § 2-207(3), which we discuss later.

109. For the full text of U.C.C. § 2-207(1) and (2), see *supra* note 91.

acceptance of a modification? Should not a more clearly defined solution be expressed in the text?

What if the parties have exchanged papers which do not form a contract, but nevertheless act as if there were one? We suspect that the terms of U.C.C. § 2-207(3)[110] are a bit broad. The section should not read "conduct by both parties which recognizes the existence of a contract," but rather "conduct by both parties in performing the sale with respect to which they have exchanged writings." If no writings are exchanged, or if there is only one party's unaccepted writing, then U.C.C. § 2-204(1)[111] governs and U.C.C. § 2-207(3)[112] is not needed, although the search for "terms" under U.C.C. § 2-204(1) may reach the same result.

The requisite conduct, under U.C.C. § 2-207(3), should indicate that the parties are performing as if the specific writings exchanged had in fact made a contract, leaving only the identification of the express terms. Then it is appropriate to provide that the contract consists of the terms on which the writings agree. It then becomes necessary to fill in all gaps where express terms are needed to provide the court with "a reasonably certain basis for giving an appropriate remedy."[113] It is here that the Code formulation may be considered to be too rigid in some cases but quite appropriate in others. Whether the appropriateness relates primarily to off-the-shelf sales is itself an issue. Specifically manufactured goods with periodic payments do not fit within Code formulations for finding terms at all.[114]

---

110. For the full text of U.C.C. § 2-207(3), see *supra* note 91.

111. Section 2-204(1) specifically states: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." U.C.C. § 2-204(1) (1978).

112. For the full text of U.C.C. § 2-207(3), see *supra* note 91.

113. U.C.C. § 2-204(3) (1978).

114. *See, e.g.*, Bethlehem Steel Corp. v. Litton Indus., 321 Pa. Super. 357, 468 A.2d 748 (1983), *aff'd by necessity* (2-2), 507 Pa. 88, 488 A.2d 581 (1985). In *Litton*, a seven-judge panel of the Superior Court reversed (4-3) the prior decision of a three-judge panel. *See* 31 U.C.C. Rep. Serv. (Callaghan) 1091 (1982) (original superior court decision will now not be officially reported). The three-judge panel in a split decision (2-1) had reversed the trial judge who had found "no contract." In all, eight judges voted in the Superior Court (4-4), as one judge on the original panel had retired before the "en banc" review, but the other two sat. Because only four judges sat in the Supreme Court, the total of all appellate court judges split evenly (6-6). In 1985, it was, therefore, the trial judge's June 6, 1979 decision of "no contract" that broke the ties.

The case involved an alleged binding option to build up to five additional 1,000 foot self-unloading ore vessels. 321 Pa. Super. at 360, 468 A.2d at 749. The problem was, according to the trial judge, a failure to agree on an escalation clause to be applied on a quarterly basis to the quarterly progress payments. *Id.*

In going for the "fill-ins," we perhaps must distinguish between two sets of cases. One set of cases concerns the gap created where one party uses a term for which there is a Code gap filler, either consistent with or different from the formulation in the gap filler, and the other party has no term on the issue or a contradictory term. The second set involves cases in which the term crucial to the dispute was used by one party, while the other party's writings are either silent on the point or contradict the first party's terms, and the Code does *not* supply a gap filler on point.

In our first set of cases, in which one party uses the Code formulation and the other is silent, we can either construe the other party's silence as impliedly including the Code formulation so that the writings agree, or we can reach the same result by canceling both terms and inserting the Code provision. But where one party uses a formulation that differs from the "gap filler" formulation and the other either uses the Code formulation, or is silent, what happens? Where the Code formulation is used by either party and the other uses a different formulation, we have an express disagreement and, strictly following the language of U.C.C. § 2-207(3),[115] the Code formulation applies. If any reference to a term in the one party's document is absent from the other party's form, should we not again include the Code term by implication in the silent document, therefore creating an inconsistency which mandates use of the gap filler?

Let us now add to the complexity by asking whether, in these cases, we are following the intent of the parties? Isn't the intent that is receiving recognition really only that of the party using the Code formulation? Suppose one party uses a formulation that gives a lesser warranty than that provided by the Code, but is consistent with an applicable trade usage. If the second party expressly uses the full Code formulation, under the literal language of U.C.C. § 2-207(3),[116] that formulation appears to govern. Contradictory terms are excised and then the Code moves in. Although, under U.C.C. § 1-205(4),[117] express terms govern a us-

at 371, 468 A.2d at 755. "A reasonable price at the time of delivery" under U.C.C. § 2-304(1), was obviously not desired by either party. Nor was it easy, as one can see, to determine the intent of either party, hence, no contract.

115. For the full text of U.C.C. § 2-207(3), see *supra* note 91.

116. For the full text of U.C.C. § 2-207(3), see *supra* note 91.

117. Section 1-205(4) specifically provides:

> (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable

age of trade, we do not have express terms of agreement here. We are looking for terms to use in dispute resolution when there is no mutually agreed stipulation. It is here that U.C.C. § 2-207 breaks down. We feel that any applicable usage of trade should govern in subsection (3) cases rather than the Code formulation in at least two situations. One is where both parties are silent. The other situation is where one party's term uses the usage of trade and the other party uses the full Code provision or is silent.

As further variation, suppose the buyer's offer specifies less than the full scope of the Code warranty protection and the seller's conditional expression of acceptance specifies even less. For example, a buyer uses a limited remedy warranty of parts and labor for replacement, and the seller's form, the second shot, states the limited warranty recovery as "parts only." Both are merchants. A literal application of U.C.C. § 2-207(3) would treat these as different terms canceling each other, giving to the buyer the full panoply of Code remedies. This is absurd, and should not be the result. The doctrine of estoppel,[118] or something akin, would support a ruling that the offeror could not be given more protection than its form specified. But should there not be some Code guidance for the courts? Also, it is possible to argue that both parties' writings agreed on the concept of a limited replacement warranty and the only unagreed portion was who pays for the labor. The common law's "last shot" solution, in our hypothetical, would favor the "parts only" seller. But if by chance the "parts and labor" paper was last fired, then it would govern. Is this situation a case where courts should be allowed to "split the difference"?[119]

Finally, if both parties are silent, or one specifies the usage of

---

express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

U.C.C. § 1-205(4) (1978).

118. Section 1-103 authorizes the application of doctrines of estoppel, etc., to supplement Code provisions. U.C.C. § 1-103 (1978).

119. *See* National Presto Indus. v. United States, 338 F.2d 99 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965). In *National Presto*, Judge Davis said:

> But it is unsatisfactory to tell a party who did not, either in terms or by fair implication, assume a certain heavy risk that he *alone* must bear it simply because of the happenstance that it fell to his lot. Particularly is this so where, as here, the unexpected occurrence led to a period of extra work which was not useless to the other party. It is at least equally logical and decidedly more just to divide the cost between the two parties, neither of whom can be properly charged with the whole.

338 F.2d at 111 (emphasis in original) (footnote omitted).

When the parties exchanging conflicting forms (without realizing the conflict) go ahead and perform as if there were a contract, why not have a "split the

trade and the other is silent, shouldn't the court find that the writings agree on the usage of trade? The usage must be considered as "having such regularity of observance [in the business here involved] as to justify an expectation that it will be observed with respect to the transaction in question."[120] That being the expectation that both parties had, or should have had, the silent party should be given no more. The silence, in the writings, should be construed as an expression of the expectation, not of the Code term. The same approach should be taken if there is evidence of a course of dealing. While we are of the opinion that such results might be reached under the Code, out of an abundance of caution, we suggest that an amendment would be helpful.

One final point should be made. One should not expect too much of the "between merchants" rule of U.C.C. § 2-207(2) as to what becomes a part of the agreement. The rule is best stated in the negative. Additional, and perhaps different terms, do not become part of the agreement if one of four scenarios is present. The first is where the offer expressly requires a "no changes" acceptance. The second is where the offer has a term on the same subject that is so different as to constitute an objection which "has already been given" to the proposed change. The third is where specific objection is given within a reasonable time after notice of the term has been received. This scenario is not often played because the usual situation is that each side looks only at the material typed in the blanks on the face of the other side's form and then files it. The fourth and final scenario involves the additional term which would materially "alter the contract." But what determines when "the contract" would be materially altered?[121] Here three approaches are possible.

One approach could be called the surgical approach, namely, "When in doubt, cut it out." Doubts as to "materiality" would be resolved against inclusion of the term in the contract.

A second approach is the "significance" approach. Is the term significantly different from what is usual and customary in

difference" rule? Why does the rule have to be all or nothing for one party? Could not the conflict be considered analogous to an unexpected event?

120. U.C.C. § 1-205(2) (1978).

121. The concept of "materially altering the contract" is a bit difficult to grasp when the issue is whether there is a contract. If the alteration is "material" to the first form sender, isn't it equally material to the second form sender? If there has been no change of position, a "no contract" result may not be so bad. But where further conduct screams "contract," a mere cancellation of the material term and a ruling that the other party's terms constitute the contract does not seem proper.

the particular business? Clearly, it makes no difference if the dispute is not over compliance with the particular term. There is a contract, and whether the disputed term is or is not a part of the contract is irrelevant. Thus the use of the variation to reach a "no contract" conclusion is prohibited. If we limit materiality to significant changes, that is, an "equity does not stop to pick up pins" approach, we could avoid much litigation.[122] Perhaps we should omit the "materiality" test altogether and substitute a rule that between merchants the term becomes a part of the contract if it states a trade custom or usage in whole or in part. This would aid courts that might have difficulty in finding that the trade custom is a silent term in every offer or acceptance. Such a rule would also, we suspect, limit issues to the less vague question of the existence of a trade custom rather than notions of materiality.

Lastly, the official comment uses a "surprise and hardship" approach. For example, the comment treats a term for interest on late payments as an immaterial change. In today's world of

122. Article 19 of the 1980 *United Nations Convention on Contracts for the International Sale of Goods* provides:

> (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
>
> (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
>
> (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, *supra* note 21, art. 19. The section is reprinted and discussed in J. HONNOLD, *supra* note 21, at 188-96. Under this approach, the scope of the rule is reduced to conflicts in relatively minor terms. Conceivably, the approach is an attempt to chart a line between "dickered" and "boiler-plate" terms after the fashion of Karl Llewellyn. The trouble is, as Honnold says, "The only fact that emerges is that both parties were paying no attention to the printed provision on the other's forms." J. HONNOLD, *supra* note 21, at 195.

One might be tempted to say that the parties only consider as material that which is to be filled out on the face of the forms. But we often find warranty scope and arbitration or dispute settlement left to the "boiler-plate". Does the volume of litigation of these items indicate materiality, or does the litigation result because invited by the lack of precision in the law? Would not the better search be for "trade practice" rather than Code "gap-fillers," as this would result, even in the case of "off-the-shelf" goods, in a much needed greater degree of diversity from trade to trade. This may also be the lesson to be drawn from the various non-uniform amendments to the warranty provisions of the U.C.C.

inflation and high and rapidly fluctuating rates,[123] with lagging rules on prejudgment interest,[124] there can be an extremely large difference between the interest due under a prevailing statute and that recoverable under a contract term.

In *Rangen, Inc. v. Valley Trout Farms*,[125] the rate which a majority of the Idaho Supreme Court, relying on the Code comment, found to be a non-material alteration increased the recovery of interest by 1,929% (from $1,400 to $27,000) over that recoverable had the interest statute been treated as a conflicting silent term and thus applicable in the absence of an agreed term.[126] An issue of interpretation could arise even under a silent term approach. Is the silent term the state's prejudgment interest law, or is it the trade practice as to interest on overdue invoices? An interest rate, applicable from the due date, could be considered as limiting bargained-for credit if the bargain was for an interest-free thirty, sixty, or ninety-day payment time, or if in the trade thirty, sixty, or ninety-day credit was usually interest free, as in the old "two percent ten days net thirty days" term. Here, in particular, the suggested change from "materially alter" to "states a trade

123. For many years, the business loan rate was below six percent, the usual statutory rate for prejudgment interest. For example, in 1950 the average rate on business loans charged by banks in 19 large cities was rising from 2.6% to 2.84%. *See* 37 FED. RES. BULL. 304 (March 1951). In 1956, this same rate rose from 3.93% to 4.38%. *See* 43 FED. RES. BULL. 53 (Jan. 1957). Recently, the rate has been as high as 20.14% in 1982. *See* Tables published by Board of Governors of Federal Reserve System in Federal Reserve Bulletin. While the trend now is toward lower rates with the fourth quarter 1985 "prime" at 9.5%, *see* N.Y. Times, Jan. 5, 1986, § 3 (Business), at 22, the economic value of customary interest (which usually exceeds "prime") over the statutory rate is far greater than it was when the comment was written or last considered in 1957, when customary interest rates were lower than statutory rates.

124. For two different suggestions on prejudgment interest, see, e.g., MANITOBA LAW REFORM COMMISSION, REPORT ON PREJUDGMENT COMPENSATION ON MONEY AWARDS: ALTERNATIVES TO INTEREST (Report No. 47) (1982); Keir & Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUS. LAW. 129 (1983).

125. 104 Idaho 284, 658 P.2d 955 (1983). The court in *Rangen* also queried as to whether oral notice of objection would be sufficient under U.C.C. § 2-207(2)(c). *Id.* at 296, 658 P.2d at 964.

126. The comment to U.C.C. § 2-207 is not clear, in giving examples of "clauses which involve no element of surprise" which are incorporated into the contract absent objection. It includes: "a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where *they* are within the range of trade practice and do not limit any credit bargained for." U.C.C. § 2-207 comment 5 (1978) (emphasis added). The antecedent of "they" appears to be only "credit terms" in view of the "and" clause. Hence the comment does not require increase on overdue invoices to be within the range of trade practice. Shouldn't it do so? Should not the statute itself have an "including but not limited to" list of examples? For a comparison, see UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, *supra* note 21.

usage or custom in whole or in part" would also avoid the obsolescence of the present prejudgment interest statutes.

Subsection (3) of U.C.C. § 2-207 could also stand a clearer reference to custom and usage of trade as a prime source for gap fillers. Such a source, in general, is far less apt to suffer from obsolescence over time than "any supplementary terms" incorporated from express Code provisions. In addition, proof of trade custom should be made easier by including not only written trade codes similar to the "Worth Street Rules" for the cotton trade,[127] but also the provisions of form contracts negotiated between representatives of the selling trade and the buying trade.[128]

We suggest that in any redrafting of U.C.C. § 2-207 it must be assumed that the parties will not change their forms. Hence, we do not concur with some suggested revisions which appear to require changes.[129]

C. *Remedies*

1. *Reclamation*

Part 7 of Article 2 has its share of non-uniform amendments.[130] One is a sort of an "amendment by omission" in

127. WORTH STREET RULES, STANDARD COTTON TEXTILE SALES NOTE (published by the Assoc. of Cotton Textile Merchants of New York, 40 Worth Street, New York City).

128. *See, e.g.*, International Milling Co. v. Hachmeister, Inc., 380 Pa. 407, 110 A.2d 186 (1955) (standard forms covering sales between flour merchants and bakers had sufficient blank space to insert quality description, hence seller was spoofing buyer as to no changes permitted). The National Association of Purchasing Agents has worked up forms for basic commodities. The National Retail Dry Goods Association has published Basic Sales Provisions. In the United States, cases like Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930), have been thought to create antitrust problems. But if drafted jointly by representatives of both sides with no penalty for non-adoption, perhaps a distinction exists.

At any rate, in European trade, jointly negotiated form contracts are not unknown. Consider UNIFIN, 1959, adopted by the Timber Trade Federation of the United Kingdom and the Finnish Sawmill Owner's Association, or DUTCHFAS, 1952, adopted by the Timber Trade Association of Holland and the Swedish Wood Exporters Association, discussed in 10 SCANDINAVIAN STUDIES IN LAW, *supra* note 21.

In the computer-to-computer contracting of the future, we can envision a complete purchase order stating a stock number (description including quality term), quantity, shipping date, and "Terms NRDGA Standard A," incorporating the provisions of a National Retail Dry Goods standard set of terms for a particular commodity.

129. *See, e.g.*, Barron & Dunfee, *Two Decades of 2-207: Review, Reflections and Revision*, 24 CLEV. ST. L. REV. 171, 206-07 (1975); Thatcher, *supra* note 90, at 246-54.

130. Twenty-six states have non-uniform texts to U.C.C. § 2-702. *See* ALA.

U.C.C. § 2-702(3) on reclamation of goods by an unpaid seller.[131] The proposed 1966 official amendments eliminated the words "or lien creditor" as one whose intervening rights would take precedence over an unpaid seller's right of reclamation.[132] To date only twenty-one states and the District of Columbia appear to have adopted this amendment.[133]

Non-uniformity has also resulted from the now famous case

CODE § 7-2-702 (1984); ALASKA STAT. § 45.02.702 (1980); ARIZ. REV. STAT. ANN. § 44-2381 (1967); COLO. REV. STAT. § 4-702 (1973); DEL. CODE ANN. tit. 6, § 2-702 (1974); GA. CODE ANN. § 11-2-702 (1982); HAWAII REV. STAT. § 490-2-702 (1976); IDAHO CODE § 28-2-702 (1980); KY. REV. STAT. § 355.2-702 (1972); MASS. GEN. LAWS ANN. ch. 106, § 2-702 (West 1958); MICH. COMP. LAWS ANN. § 440.2702 (West 1967); MO. ANN. STAT. § 400.2-702 (Vernon 1965); NEB. REV. STAT. § 2-702 (1980); NEV. REV. STAT. § 104.2702 (1979); N.H. REV. STAT. ANN. § 382-A:2-702 (1961); OHIO REV. CODE ANN. § 1302.76 (Page 1979); OR. REV. STAT. § 72.7020 (1984); R.I. GEN. LAWS § 6A-2-702 (1970); S.C. CODE ANN. § 36-2-702 (Law Co-op. 1977); S.D. CODIFIED LAWS ANN. § 57A-2-702 (1980); TENN. CODE ANN. § 47-2-702 (1979); TEX. BUS. & COM. CODE ANN. § 2.702 (Vernon 1968); UTAH CODE ANN. § 704-2-702 (1985-86); VT. STAT. ANN. tit. 9A, § 2-702 (1966); VA. CODE § 8.2-702 (1965); W. VA. CODE § 46-2-702 (1966).

Five have non-uniform texts to U.C.C. § 2-719. *See* ALA. CODE § 7-2-719 (1984); CAL. COM. CODE § 2719 (West 1964); MISS. CODE ANN. § 75-2-719 (1981); VT. STAT. ANN. tit. 9A, § 2-719 (1966); WASH. REV. CODE ANN. § 62A.2-719 (Supp. 1986).

Fourteen have amended U.C.C. § 2-725. *See* ALA. CODE § 7-2-725 (1984); CAL. COM. CODE §§ 2725, 2800-01 (West Supp. 1985); COLO. REV. STAT. § 4-2-725 (1973); IOWA CODE ANN. § 554.2725 (West 1967); ME. REV. STAT. ANN. tit. 11, § 2-725 (Supp. 1984-85); MISS. CODE ANN. § 75-2-725 (1972); OHIO REV. CODE ANN. § 1302.98 (Page Supp. 1985); OKLA. STAT. ANN. tit. 12A, § 2-725 (West 1963); OR. REV. STAT. §§ 72.7250, 72.8010-.8200 (1983); R.I. GEN. LAWS § 6A-2-725 (Supp. 1984); S.C. CODE ANN. § 36-2-725 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. § 57A-2-725 (Supp. 1984); TENN. CODE ANN. § 47-2-725 (1979); WIS. STAT. § 402.725 (Supp. 1985). For further discussion of § 2-725, see *infra* note 162 and accompanying text. Although the bulk of Article 2's remedial provisions are located in Part 7, other provisions capable of being characterized as remedial can be found elsewhere. *See, e.g.*, U.C.C. § 2-601 (1978) (buyer's right to reject); *id.* § 2-608 (buyer's right to revoke acceptance).

131. Section 2-702(2) permits a seller to reclaim goods sold on credit to an insolvent buyer if the conditions of the subsection are met. U.C.C. § 2-702(2) (1978). Section 2-702(3) places a limitation on that right. It provides: "The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them." *Id.*

132. The reason for the deletion of this language by the Permanent Editorial Board was to prevent the reclamation right from being subordinate to a buyer's trustee in bankruptcy by virtue of his avoidance power as a lien creditor. *See, e.g., In re* Kravitz, 278 F.2d 820 (3d Cir. 1960) (seller's reclamation right cannot prevail over trustee in bankruptcy).

133. The states reported as eliminating "or lien creditor" from their versions of U.C.C. § 2-702(3) are Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Washington, Wisconsin, and Wyoming.

of *In re Samuels & Co.*,[134] which involved the respective rights of unpaid sellers of cattle and a secured creditor (as a good faith purchaser) who financed the inventory of the meat packer.[135] The United States Court of Appeals for the Fifth Circuit, sitting en banc, reversed the decision of its panel, and held that due to the after-acquired property clause in the security agreement, the secured party attained the status of a good faith purchaser under U.C.C. § 2-403(1),[136] and, hence, defeated the reclamation rights of the sellers.[137]

---

134. 510 F.2d 139 (5th Cir. 1975), *rev'd on rehearing en banc*, 526 F.2d 1238 (5th Cir.), *cert. denied*, 429 U.S. 834 (1976). A prior decision in the case, at 483 F.2d 557 (5th Cir. 1973), was reversed as Stowers v. Mahon, 416 U.S. 100 (1975).

135. The livestock was delivered to the buyer on a "grade and yield" basis, that is, the contract price was left open for a period of 24 hours until the Department of Agriculture graded the meat and determined the yield. Further, payment was made by check. The court concluded that the sales were "cash sales." *Samuels & Co.*, 510 F.2d at 146. The sellers' right of reclamation was, therefore, grounded in U.C.C. § 2-507(2) ("Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.") and § 2-511(3) ("payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment") rather than U.C.C. § 2-702.

136. *Samuels & Co.*, 526 F.2d at 1243. Section 2-403(1) states in part:

> A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> . . .
>
> (b) the delivery was in exchange for a check which is later dishonored, or
>
> (c) it was agreed that the transaction was to be a "cash sale" . . . .

U.C.C. § 2-403(1) (1978). The Code definition of "purchaser" includes persons "taking by . . . mortgage, pledge, lien . . . or any other voluntary transaction creating an interest in property." U.C.C. § 1-201(32), (33) (1978), and is, as a consequence, broad enough to encompass an Article 9 secured party. *See, e.g.*, U.C.C. § 9-101 comment (1978) (distinctions among security devices will be made on functional rather than formal grounds); *id.* § 9-102(2) (Article applies to liens created by contract).

137. The court believed that this result was compelled by "[t]he Code's overall plan, which typically favors good faith purchasers, and which encourages notice filing of nonpossessory security interests in personalty through the imposition of stringent penalties for nonfiling. . . ." *Samuels & Co.*, 526 F.2d at 1241-42) (appendix) (footnote omitted).

Because U.C.C. § 2-702(3) explicitly makes the right of reclamation under that section subject to the interests of a good faith purchaser, the reasoning of the Fifth Circuit would be equally applicable to the claim of a credit seller. *See* 526 F.2d at 1244-45.

In addition to the *Samuels* debacle, the American Beef Packers Company filed in bankruptcy in January 1975, leaving livestock producers in 13 states unpaid for over $20 million worth of cattle. Prior to this the total due cattlemen from 167 packer failures from 1958 to 1975 was $43 million, an average loss of only $257,000 per failure. S. REP. No. 932, 94th Cong., 2d Sess. 4-5 (1976).

Once the unpaid cattle sellers were shown the tenuous nature of their rights under U.C.C. § 2-507(2) and 2-702(2), they secured a flurry of protective state statutes.[138] They also secured a federal act specially amending the Packers and Stockyards Act. The amendment, by use of a trust fund approach, provided what was considered a better assurance of recovery.[139]

Absent a written misrepresentation of solvency, section 2-702 has a statutory time limit of ten days after receipt of the goods by the buyer for notice of reclamation.[140] The comment to U.C.C. § 2-507(2) attempts to apply the same ten-day period to reclamations under that section.[141] A California court recently refused to go along with what it called "attempted legislation by comment."[142] Amendment may be needed to provide a workable

138. The cattle raisers pushed for new legislation in light of the size of the American Beef Packers Company failure. Some state legislation was passed. *See, e.g.*, 1976 Cal. Legis. Serv. 772 (West); KAN. STAT. ANN. §§ 47-1801 to -1802 (1981); NEB. REV. STAT. §§ 54-1801 to -1808 (1984); OKLA. STAT. ANN. tit. 2, § 9-138 to -139 (West Supp. 1984-85); TEX. AGRIC. CODE ANN. §§ 148.021-.028 (Vernon 1982). But state-by-state progress was too slow, so a federal preemptive statute was obtained. Packers and Stockyards Act, Pub. L. No. 94-40, § 8, 90 Stat. 124a, 1251-52 (1976) (codified at 7 U.S.C. § 196 (1982)). For a further discussion of the preemptive statute, see *infra* note 139.

139. The Packers and Stockyards Act of 1921, as amended, received a new § 196, which provides in part:

> (b) All livestock purchased by a packer in cash sales, and *all* inventories of, or receivables or proceeds from meat, meatfood products, or livestock products derived therefrom, shall be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers . . .

7 U.S.C. § 196 (1982) (emphasis added). Thus, the new section makes the packer a trustee in a cash sale for the vendor, not only of the livestock, but of proceeds. Also, the Act covers all livestock as defined in the Packers & Stockyards Act of 1921, § 182, namely "cattle, sheep, swine, horses, mules, or goats—whether live or dead." 7 U.S.C. § 182(4) (1982). For additional background, see S. REP. No. 932, 94th Cong., 2d Sess. 4 (1976) and H.R. REP. No. 1391, 94th Cong., 2d Sess. 1 (1976). Livestock sellers lose the benefit of the trust if payment is not received within thirty days of its due date, or, if within fifteen days after receipt of notice of dishonor of a payment instrument promptly presented, written notice is not filed with the Secretary of Agriculture.

These provisions preempt the Code, 7 U.S.C. § 228(c) (1982), but interact with the ten-day limit of § 546(c) of the Bankruptcy Code. 11 U.S.C. § 546(c)(1) (1985). For the text of section 546(c), see *infra* note 143.

140. U.C.C. § 2-702(2) (1978). The ten-day limit will not apply if the buyer made a "misrepresentation of solvency . . . to the particular seller in writing within three months before delivery." *Id.*

141. Comment 3 to § 2-507 states: "The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here." U.C.C. § 2-507 comment 3 (1978). Note that this obvious reference to U.C.C. § 2-702(2) is less than accurate. The demand to reclaim, not the reclamation itself, must occur within the 10-day limit established by that subsection. *See* U.C.C. § 2-702(2) comment 2 (1978).

142. *See* Citizens Bank of Roseville v. Taggart, 143 Cal. App. 3d 318, 191

time limit. Note, however, the Bankruptcy Code has only the ten-day limit and does not provide for an "out" where there is a written misrepresentation of solvency;[143] nor is it clear whether the cash sale rule of U.C.C. § 2-507(2)[144] fits the new Bankruptcy Code provision.[145]

Statutory revisers are faced with two issues.[146] The first is whether only unpaid cattle sellers should be relieved from the priority of the after-acquired property clauses of those financing a buyer's inventory or whether other sellers should have the same rights.[147] The second is whether the ten-day limits of U.C.C. § 2-

---

Cal. Rptr. 729 (1983). Other courts have also refused to impose a 10-day limit. *See, e.g.*, Burk v. Emmick, 637 F.2d 1172 (8th Cir. 1980); Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc., 387 S.W.2d 17 (Ky. 1965); *In re* Lindenbaum's, Inc., 2 U.C.C. Rep. Serv. (Callaghan) 495 (E.D. Pa. 1964). However, the vast majority have imposed a 10-day limit to claiming reclamations. *See, e.g.*, Holiday Rambler Corp. v. First Nat'l Bank & Trust Co., 723 F.2d 1449 (10th Cir. 1983); Szabo v. Vinton Motors, Inc., 630 F.2d 1 (1st Cir. 1980); Sorrels v. Texas Bank & Trust Co., 597 F.2d 997 (5th Cir. 1979); *In re* Helms Veneer Corp., 287 F. Supp. 840 (W.D. Va. 1968); Chapman Parts Warehouse, Inc. v. Guderian, 609 S.W.2d 317 (Tex. Civ. App. 1980).

143. *See* 11 U.S.C. § 546(c) (1985), which reads in part:

> Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but—
>
> (1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor . . . .

Id.

144. Section 2-507(2) specifically provides: "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due." U.C.C. § 2-507 (1978).

145. If it does fit, the fit is an uneasy one. Observe that the right granted by U.C.C. § 2-507(2) is not dependent upon the buyer's insolvency, unlike the Bankruptcy Code provision. *See supra* notes 143-44. Also, the U.C.C. definition of insolvency differs from the Bankruptcy Code definition, as the U.C.C. adds "has ceased to pay his debts in the ordinary course of business." *Compare* U.C.C. § 1-201(23) (1978) *with* 11 U.S.C. § 101(29) (1985).

146. Although we limit our discussion to two issues, there are others. For example, does the reclamation right granted by either U.C.C. § 2-702(2) or U.C.C. § 2-507(2) extend to proceeds from the resale of the goods by the buyer? On this point, not all courts agree. *Compare In re* Coast Trading Co., 31 Bankr. 667 (Bankr. D. Or. 1982) (sellers have no claim to proceeds) *with* Ranchers & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 73-74, 552 P.2d 313, 317 (1976) (seller has claim to proceeds) *and In re* Central Islip Supermarkets, Inc., 4 U.C.C. Rep. Serv. (Callaghan) 29 (N.Y. Sup. Ct. 1976) (seller has claim to proceeds).

147. For a discussion of cattle sellers' rights, see *supra* notes 134-39 and accompanying text.

207(2) and comment 3 to U.C.C. § 2-507(2) should commence to run from the receipt of the goods or from the discovery of trouble.[148] If the normal situation is that there is about a three- or four-day delay in sending a check after delivery and another two-day delay before the check is received and deposited, then five or six of the ten days allowed have elapsed. Given a five-business-day lapse after the seller deposits the check before the seller can learn that the check has "bounced," but during which the buyer's obligation is suspended,[149] there is little or no time in which a seller may act, especially where weekends intervene.

Since the United States Supreme Court has held that a check is not a representation of sufficient money in the bank for it to clear,[150] the check cannot serve as the written representation of solvency to extend the Code's useless ten-day period.[151] Where bankruptcy has intervened, there can be no extension. The ten-day limit is now in the relevant section of the Bankruptcy Code.[152] It is entirely academic to say that sellers should get, every three months, a written representation of solvency from those with whom they deal. Perhaps the trust concept of section 206 of the Packers and Stockyards Act could be adopted in the Code.[153] Protection should, however, be accorded to buyers in the ordinary course of business, no matter what solution is adopted.

---

148. For a discussion of the 10-day limitation on unpaid sellers' reclamation rights, see *supra* notes 140-45 and accompanying text.

149. *See* U.C.C. § 3-802 (1978) ("where an instrument is taken for an underlying obligation . . . the obligation is suspended pro tanto . . . until its presentment").

150. Williams v. United States, 458 U.S. 279 (1982).

151. A few courts have indicated a willingness to equate the giving of a check with a representation of solvency provided the seller can show it relied on the check. *See In re* Creative Bldgs., Inc., 498 F.2d 1, 4 (7th Cir. 1974) (dictum) (check could serve as "tacit representation" of solvency); *In re* Kee Lox Mfg. Co., 22 U.C.C. Rep. Serv. (Callaghan) 938 (Bankr. E.D. Pa. 1977) (dictum) (check can comply with literal requirements of writing only if relied upon by seller as representation of solvency); Hamm Brewing Co. v. First Trust & Sav. Bank, 103 Ill. App. 2d 190, 195, 242 N.E.2d 911, 915 (1968) (check can comply with literal requirement of a writing, i.e., in writing, addressed to particular seller and dated within three months of delivery). All of these are prior to *Williams*, *supra* note 150.

152. For the text of the relevant section of the Bankruptcy Code, see *supra* note 143.

153. For a discussion of the Packers and Stockyards Act trust concept, see *supra* note 139 and accompanying text. The trust concept has been adopted in several consignment of works of art statutes. For a discussion of the trust concept in consignment of works of art statutes, see *infra* note 215 and accompanying text.

2. *Automotive Lemons*

A second remedial area which has, in part, been rendered non-uniform involves that progenitor of nightmares—the automotive lemon. In 1982, Connecticut became the first state to pass what is descriptively called a "lemon law" relating to the purchase of new automobiles.[154] At last count, thirty-four states had adopted some form of this legislation.[155] Most of these acts do not expressly supersede other relevant legislation, primarily U.C.C. § 2-608 and the Magnuson-Moss Act.[156] Do they simply

154. *See* CONN. GEN. STAT. ANN. § 42-179 (West Supp. 1985).

155. *See* ALASKA STAT. § 45.45.300 (1984); ARIZ. REV. STAT. ANN. §§ 44-1261 to -1265 (Supp. 1984-1985); CAL. CIV. CODE § 1793.2 (West 1985); COLO. REV. STAT. § 42-12-101 (1984); CONN. GEN. STAT. ANN. § 42-179 (West Supp. 1985); DEL. CODE ANN. tit. 6, §§ 5001-5009 (Supp. 1983); FLA. STAT. ANN. §§ 681.10-.108 (West Supp. 1985); HAWAII REV. STAT. § 4337-3.5 (Supp. 1984); ILL. ANN. STAT. ch. 121½, §§ 1201-1208 (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 322E.1 (West Supp. 1985); KY. REV. STAT. ANN. §§ 367.860-.870 (Bobbs-Merrill Supp. 1984); 1984 LA. ACTS. 228; ME. REV. STAT. ANN. tit. 10, §§ 1161-1165 (Supp. 1984-1985); MD. COM. LAW CODE ANN. § 14-1501 (Supp. 1985); MASS. GEN. LAWS ANN. ch. 90, § 7N½ (West Supp. 1985); MINN. STAT. ANN. § 325F.665 (West Supp. 1985); MO. ANN. STAT. §§ 407.560 to .579 (Vernon Supp. 1985); MONT. CODE ANN. §§ 61-4-501 to -507 (1983); NEB. REV. STAT. §§ 60-2701 to -2709 (1984); NEV. REV. STAT. §§ 598.151-.786 (1983); N.H. REV. STAT. ANN. § 357-D (Supp. 1983); N.J. STAT. ANN. § 56:12-19 (West Supp. 1985); N.Y. GEN. BUS. LAW § 198-a (McKinney Supp. 1984-1985); N.C. GEN. STAT. § 25-2-103(1)(d) (Supp. 1983); OR. REV. STAT. §§ 646.316-.375 (1983); PA. STAT. ANN. tit. 73, §§ 1951-1963 (Purdon Supp. 1985); R.I. GEN. LAWS §§ 31-5.2-1 to -13 (Supp. 1984); TENN. CODE ANN. §§ 55-23-101 to -105 (Supp. 1984); TEX. CIV. CODE ANN. § 4413(36) (Vernon Supp. 1985); VT. STAT. ANN. tit. 9, §§ 4174-4181 (Supp. 1984); VA. CODE §§ 59.1-207 to .14 (Supp. 1985); WASH. REV. CODE ANN. §§ 19.118.010-.070 (Supp. 1985); W. VA. CODE §§ 46A-6A-1 to -9 (Supp. 1985); WIS. STAT. ANN. § 218.015 (West Supp. 1985); WYO. STAT. § 640-17-101 (Supp. 1983). For a survey and comparison of the legislation adopted by the various states, see Honigman, *The New "Lemon Laws": Expanding UCC Remedies*, 17 U.C.C. L.J. 116 (1984).

Three states—Connecticut, Texas, and Vermont—have appointed arbitration boards whose decisions are effective against manufacturers without a stay pending appeal, even though the boards' members include car dealers but not manufacturers. *See* CONN. GEN. STAT. ANN. §§ 42-181 to -182 (West Supp. 1985); TEX. CIV. CODE ANN. § 4413(36)(12.03) (Vernon Supp. 1985); VT. STAT. ANN. tit. 9, §§ 4174, 4176 (1984).

In Chrysler Corp. v. Texas Motor Vehicle Comm'n, No. A-83-CA 641 (W.D. Tex. 1984), the United States District Court for the Western District of Texas held the Texas statute to be unconstitutional. The Fifth Circuit reversed the decision as to those parts of Texas' lemon law held unconstitutional and affirmed where the district court ruled in favor of the statute. Chrysler Corp. v. Texas Motor Vehicle Comm'n, 755 F.2d 1192 (5th Cir. 1985).

156. One commentator suggests:

> A consumer, for example, could sue the manufacturer for rescission under a state's lemon law, the dealer for revocation of acceptance and consequential damages under § 2-608 of the UCC, and both the dealer and manufacturer for reasonable attorney fees under 15 U.S.C. § 2310(d) of the Magnuson-Moss Act.

add another arrow to the automobile purchaser's quiver? Will they be interpreted as stating additional conditions precedent to the exercise of the remedy of "revocation of acceptance"? Under the lemon laws, if the breach of warranty is substantial and is not timely remedied after a specified number of attempts, the manufacturer must either refund the purchase price or provide a new vehicle.[157] But there is a common significant provision requiring that the purchaser first exhaust any proper out-of-court settlement procedure established by the manufacturer before taking the case to court.[158]

For our purposes, the "lemon laws" raise a fundamental question relevant to the structure of a redrafted Article 2. Should the rules of the game as to grounds for rescission be different for different sorts of contracts or should they be the same without regard to the underlying subject matter or identity of the players? Should resort to alternative dispute resolution procedures, if available, be a condition precedent to the use of the judicial system or would this be another expensive delay, causing consumer claims to be abandoned?

3. *The "Lost Volume" Seller and Other Remedial Issues*

In another area, there has been sufficient legal writing about the "lost volume" seller[159] to justify a reconsideration of that is-

---

Honigman, *supra* note 155, at 119 n.21. The lemon laws of Illinois and Oregon do, however, limit resort to other remedies. *See* ILL. ANN. STAT. ch. 121½, § 1205 (Smith-Hurd Supp. 1985); OR. REV. STAT. § 646.375 (1983). Arizona has amended U.C.C. § 2-608 to exclude from its scope new automobiles subject to its lemon law. ARIZ. REV. STAT. ANN. § 47-2608(D) (Supp. 1984). It may be that lemon laws will hinder consumers more than they aid them.

157. *See* Honigman, *supra* note 155, at 119. *But see* FLA. STAT. ANN. §§ 681.10-.108 (West Supp. 1984) (consumer, not manufacturer, may choose remedy of either new vehicle or refund of purchase price).

158. *See* Honigman, *supra* note 155, at 119, 120.

159. *See, e.g.*, Childres & Burgess, *Seller's Remedies: The Primacy of UCC 2-708(2)*, 48 N.Y.U. L. REV. 833 (1973); Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66 (1965); Schlosser, *Construing UCC Section 2-708(2) to Apply to the Lost-Volume Seller*, 24 CASE W. RES. L. REV. 686 (1973); Goetz & Scott, *Measuring Sellers' Damages: The Lost-Profits Puzzle*, 31 STAN. L. REV. 323 (1979); Sebert, *Remedies Under Article Two of the Uniform Commercial Code: An Agenda For Review*, 130 U. PA. L. REV. 360 (1981); Shanker, *The Case for a Literal Reading of UCC Section 2-708(2) (One Profit for the Reseller)*, 24 CASE W. RES. L. REV. 697 (1973); Speidel & Clay, *Seller's Recovery of Overhead Under UCC Section 2-708(2): Economic Cost Theory and Contract Remedial Policy*, 57 CORNELL L. REV. 681 (1972); Comment, *A Theoretical Postscript: Microeconomics and The Lost Volume Seller*, 24 CASE W. RES. L. REV. 712 (1973) (economic analysis of the problem).

sue as well as other issues under U.C.C. § 2-708(2),[160] including the scope of application of the section and the formula for determining the amounts recoverable under it. Moreover, in the area of incidental and consequential damages, further study is required as to when and how such damages may be limited or totally excluded by contract provisions.[161] As for Article 2's statute

160. Section 2-708(2) states:

> If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

U.C.C. § 2-708(2) (1978).

161. Authorization or such a limitation or exclusion is found in § 2-719(3):

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

U.C.C. § 2-719(3) (1978). Most courts do not strike limitation or exclusion clauses as unconscionable in a commercial setting. *See, e.g.*, Chatlos Sys., Inc. v. National Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980) (contractual exclusion of consequential damages is not unconscionable where claim is for commercial loss, parties were substantial business concerns, there was no unfair surprise, and type of damages was expected), *cert. denied*, 457 U.S. 1112 (1982); AMF, Inc. v. Computer Automation, Inc., 573 F. Supp. 924 (S.D. Ohio 1983) (contractual exclusion of consequential damages not unconscionable where both parties are large, sophisticated merchants); KKO, Inc. v. Honeywell, Inc., 517 F. Supp. 892 (N.D. Ill. 1981) (contractual exclusion of consequential damages is not unconscionable where facts demonstrate equality of bargaining power between merchants and absence of overreaching or pressure tactics, and resulting contract is a facially fair one).

Although rare, some courts have found unconscionability in this setting. *See, e.g.*, Select Pork, Inc. v. Babcock Swine, Inc., 640 F.2d 147 (8th Cir. 1981) (contractual exclusion of consequential damages is unconscionable where seller knew at time of contracting that there was chance that he would not be able to produce enough livestock to meet contract requirements); Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co., 86 Ill. App. 3d 980, 408 N.E.2d 403 (1980) (contractual exclusion of consequential damages between merchants was unconscionable where limiting clause was neither conspicuous nor known to buyer at time of contracting, clause directing buyer's attention to limitations on reverse side was stamped over, and product defects were latent); Trinkle v. Schumacher Co., 100 Wis. 2d 13, 301 N.W.2d 255 (Ct. App. 1980) (limitations of consequential damages unconscionable where, under the circumstances, contract provides neither minimum nor adequate remedy to buyer).

On the other hand, courts have been less reluctant to delete clauses excluding consequential damages on the basis of unconscionability where the claimant is a consumer, even in the absence of personal injury. *See, e.g.*, McCarty v. E.J. Korvette, Inc., 28 Md. App. 421, 347 A.2d 253 (1975) (limitation of consequential damages for personal injury unconscionable as matter of law, and similar limitation with regard to property damage is so tainted by unconscionability as to warrant complete deletion of limitations); Fischer v. General Elec. Hotpoint, 108 Misc. 2d 683, 438 N.Y.S.2d 690 (1981) (exclusion of consequential damages un-

of limitations, a few non-uniform amendments to U.C.C. § 2-725, adopt a discovery rule, thus preserving the right to sue for personal injury damages.[162] Is that where the line should be drawn? What of personal injuries caused by goods such as high tension wire towers that fail? Of course, the issue should be handled while the whole area of the relation of tort and contract is being studied as suggested above.[163]

In the case of non-consumer goods, consideration might be given to further defining when a limited remedy fails of its essential purpose and the extent to which that failure makes the other provisions of Article 2 available to the economically injured buyer.[164] For example, where the limited remedy is accompanied by a provision for liquidated damages, is that provision also vitiated?[165] If the limited remedy is a part and parcel of a very re-

---

conscionable where consumer is in substantially poorer bargaining position and seller should have been aware that consumer did not understand significance of exclusion).

162. Amendments to § 2-725 take two forms. The first specifically mentions personal injury in the statutory language. *See, e.g.*, ALA. CODE § 7-2-725(2) (1984) ("a cause of action for damages for injury to the person in the case of consumer goods shall accrue when the injury occurs"); ME. REV. STAT. ANN. tit. 11, § 2-725(2) (Supp. 1984-1985) ("A cause of action for personal injuries arising under this Article for breach of warranty occurs [sic] when the injury takes place and is governed by the limitation of action period under Title 14, section 752."). The second form adopts as the general date for breach of warranty actions the date "when the breach is or should have been discovered." *See, e.g.*, S.C. CODE ANN. § 36-2-725(2) (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. § 57A-2-725(2) (1980).

163. For a discussion of the relation between tort and contract, see *supra* note 69 and accompanying text.

164. Code comment provides that parties should be "free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies [should] be given effect." U.C.C. § 2-719 comment 1 (1978). However, the Code further 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 Act." U.C.C. § 2-719(2) (1978).

Unfortunately, no guidance is offered as to when such a failure occurs, and as a result, the case law on this point is voluminous. For a small sampling of recent cases, see Matco Machine & Tool Co. v. Cincinnati Milacron Co., 727 F.2d 777 (8th Cir. 1984) (remedy fails where defect persists despite numerous repair efforts by both parties); Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co., 709 F.2d 427 (6th Cir. 1983) (repair remedy fails when seller is unable to promptly repair the product); Consolidated Data Terminals v. Applied Digital Data Sys., Inc., 708 F.2d 385 (9th Cir. 1983) (clause limiting remedy to repairs failed of its essential purpose where warranted goods failed to perform according to specifications despite seller's continued efforts to repair).

165. For cases in which courts have held that the clause for liquidated damages is also vitiated by a failure of a limited remedy clause, see, e.g., Matco Machine & Tool Co. v. Cincinnati Milacron Co., 727 F.2d 777 (8th Cir. 1984); Riley v. Ford Motor Co., 442 F.2d 670 (5th Cir. 1971); Morris v. Chevrolet Motor Div. of General Motors Corp., 39 Cal. App. 3d 917, 114 Cal. Rptr. 747

stricted warranty, does the warranty restriction also remain?

Case law addressing another remedy issue leaves doubt as to the extent to which use of a product precludes the buyer's right to revoke an acceptance,[166] and what the measure of recovery should be when there is considerable use but revocation is nevertheless permitted.[167] Where consumers are involved, the courts,

---

(1974). For cases in which courts have held that the liquidated damages remedy is not vitiated, *see, e.g.*, Chatlos Sys., Inc. v. National Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980); Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 95 A.D.2d 5, 465 N.Y.S.2d 606 (1983); Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980).

166. A brief review of the many cases in this area leads inexorably to the realization that whether a buyer's revocation is timely under U.C.C. § 2-608(2) is a "most persistently litigated yet perpetually confused question." J. WHITE & R. SUMMERS, A HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 8-3, at 309 (2d ed. 1980). *See also* Myron v. Yonkers Raceway, Inc., 400 F.2d 112 (2d Cir. 1968) (revocation of acceptance of racehorse after 24 hours is unreasonable); Max Bauer Meat Packer, Inc. v. United States, 458 F.2d 88 (Ct. Cl. 1972) (buyer's delay in revocation was unreasonable where it prevented seller from reinspecting the goods, as the parties had agreed, to confirm non-conformity); Irrigation Motor & Pump Co. v. Belcher, 29 Colo. App. 343, 483 P.2d 980 (1971) (revocation after four months of use is reasonable where buyer informed seller of defect shortly after machine was installed); Birkner v. Purdon, 27 Mich. App. 476, 183 N.W.2d 598 (1970) (revocation of acceptance of Christmas trees on Dec. 21 is reasonable because of difficulty of discovering defect and seller's assurances); White Devon Farm v. Stahl, 88 Misc. 2d 961, 389 N.Y.S.2d 724 (1976) (inspection and discovery of defect six months after passage of title is reasonable where parties had previously agreed upon an inspection date and passage of title was fortuitous); Berlin & Co. v. Whiting Mfg., Inc., 5 U.C.C. Rep. Serv. (Callaghan) 357 (N.Y. Sup. Ct. 1968) (revocation within four months of delivery is unreasonable where inspection of goods and discovery of defect presented no difficulty); Sarnecki v. Al Johns Pontiac, 3 U.C.C. Rep. Serv. (Callaghan) 1121 (Pa. C.P. 1966) (revocation after five months and 3,000 miles is reasonable in purchase of automobile where buyer reported defect four days after delivery); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 554 P.2d 349 (1976) (formal revocation within week of informing seller of intent to revoke is reasonable in light of difficulty in discovering defect).

If a reconciliation of the case law is possible, we leave that attempt for another day. Suffice to say that four circumstances seem to have attained relevance: "(1) the difficulty of discovering the defect, (2) the terms of the contract, (3) the relative perishability of the goods and (4) the course of performance after the sale and before the formal rejection." J. WHITE & R. SUMMERS, *supra*, § 8-3, at 309. For one interesting attempt at reconciliation, see Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960 (1978).

167. In particular, is the seller entitled to compensation for the value of the buyer's use of the goods before or following an effective revocation of acceptance or for both periods? Most courts and commentators would support such an award. *See, e.g.*, Keen v. Modern Trailer Sales, Inc., 40 Colo. App. 527, 578 P.2d 668 (1978) (seller entitled to set-off for rental value of repossessed goods); Lawrence v. Modern Mobile Homes, Inc., 562 S.W.2d 729 (Mo. Ct. App. 1978) (seller entitled to set-off for reasonable value of buyer's continued use after revocation); Erling v. Homera, Inc., 298 N.W.2d 478 (N.D. 1980) (seller entitled to set-off for ascertainable use value from time of purchase to date of hearing on

at least in some automobile cases, seem to balance the consumer's need for the product against the reduced opportunity costs to the seller.[168] The pervasive "lemon laws" bear on this point with varying solutions.[169] Should such a balancing approach be limited to consumer transactions or should it also be applied to strictly commercial transactions, recognizing delays in the law and the cash stringencies of many businesses?

4. *Four-Tier Damages Classification*

The whole four-tier classification of damages in Article 2 might well be a subject of re-examination. The Code seems to categorize damages as actual, incidental, consequential, and punitive. The policy stated in U.C.C. § 1-106 is that remedial provi-

---

remand less interest on purchase price); Jorgensen v. Pressnall, 274 Or. 285, 545 P.2d 1382 (1976) (seller rightfully awarded offset for rental of mobile home during buyer's occupancy); J. WHITE & R. SUMMERS, *supra* note 166, § 8-3, at 317, 318; Phillips, *Revocation of Acceptance and the Consumer Buyer*, 75 COM. L.J. 354 (1970); Note, *Uniform Commercial Code—Sales—Buyer's Continued Use of Goods After Attempted Revocation of Acceptance Does Not Bar Such Revocation as a Matter of Law*, 27 RUTGERS L. REV. 763 (1974). The more difficult question, however, is how to measure that compensation. Fair rental value, although an adequate starting point, should not be dispositive, especially where the good was in some way defective. *See* J. WHITE & R. SUMMERS, *supra* note 166, § 8-3, at 318.

168. For a recent example of a balancing of interests analysis, see McCullough v. Bill Swad Chrysler-Plymouth, Inc., 5 Ohio St. 3d 181, 449 N.E.2d 1289 (1983). In *McCullough*, after giving notice of revocation of acceptance, the buyer drove the automobile for an additional 23,000 miles. 5 Ohio St. 3d at 182, 449 N.E.2d at 1291. The court said:

> [T]he trier of fact should pose and divine the answers to the following queries: (1) Upon being apprised of the buyer's revocation of his acceptance, what instructions, if any, did the seller tender the buyer concerning return of the now rejected goods? (2) Did the buyer's business needs or personal circumstances compel the continued use? (3) During the period of such use, did the seller persist in assuring the buyer that all nonconformities would be cured or that provisions would otherwise be made to recompense the latter for the dissatisfaction and inconvenience which the defects caused him? (4) Did the seller act in good faith? (5) Was the seller unduly prejudiced by the buyer's continued use?

Id. at 184, 449 N.E.2d at 1293. Interestingly, although the revocation was found to be effective, the seller did not receive a value-of-use offset as it had neglected to introduce any evidence proving the value of such use. *Id.* at 185 n.4, 449 N.E.2d at 1294 n.4.

169. *See, e.g.*, Honigman, *supra* note 153, at 122. The author states:

> Also of interest is whether the new lemon laws will be construed to permit consumers to use their vehicles while awaiting resolution of their case. The majority of lemon laws appear to be neutral with respect to consumer use after rescission, allowing a manufacturer, who takes a vehicle back, a setoff for consumer use of the vehicle prior to reporting the defect and "for any subsequent period when the vehicle is not out of service by reason of repair."

Id. (footnote omitted). For a discussion of relevant state lemon laws, see *supra* note 155.

sions should be construed to place the aggrieved party in the position it would have been in had the breaching party fully performed.[170] Then there is a "but" clause providing that "neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law."[171] The comment states the purpose is to make clear that "compensatory damages are limited to compensation. They do not include consequential or special damages. . . ."[172] Try to tell a buyer of goods for resale that the "market-less contract" measure[173] puts it in as good a position as if the seller had performed when resold goods are being returned as defective by angry sub-buyers who are taking their business elsewhere. Section 2-708(2) gives a seller an "out" from the market contract rule[174] but only allows loss of profits and incidental damages, not other consequentials. Why? The buyer's market-contract rule permits a recovery of both incidental and consequential damages and where a buyer has procured cover, incidental and consequential damages are also recoverable.[175] Why no consequentials for a seller who resells? Then, when the buyer has accepted the goods, the recovery rule for compensatory damages is "loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."[176] Subsection (3) of U.C.C. § 2-714 allows recovery of incidental and consequential damages "in a proper case."[177] Why the limit and what is its scope? When is such recovery proper? Why should incidentals ever be limited? Why limit consequentials if the proof is sufficiently definite, unless the limitation is consensual? Should it be taken that all these limitations are subject to "agreement otherwise"?[178]

---

170. Section 1-106(1) states:

> The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

U.C.C. § 1-106(1) (1978).

171. *Id.*

172. *Id.* § 1-106(1) comment 1.

173. *See* U.C.C. § 2-713(1) (1978).

174. The market-contract rule for sellers appears in U.C.C. § 2-708(1).

175. *See* U.C.C. § 2-712(1), (2) (1978).

176. *Id.* § 2-714(1).

177. *Id.* § 2-714(3).

178. *See id.* § 1-102(4) ("The presence in certain provisions . . . of the words 'unless otherwise agreed' or words of similar import does not imply that the effect of other provisions may not be varied by agreement. . . .").

For breach of warranty, the buyer's damages are based on a "value" differential "at the time and place of acceptance."[179] The section provides an "out" where "special circumstances show proximate damages of a different amount."[180] Do such special circumstances make the situation a "proper case" for incidental and consequential damages, as included in the term "proximate damages"?

Do Article 2's damages rules suffer from too great a degree of specificity? Should not the Code state a general principle, as is found in U.C.C. § 1-106,[181] or a revision thereof, which would merely distinguish between general damages and those unusual damages, as to the potentiality of which the seller should be made aware before entering into the contract? Should there not be a statement of general principle that damages rules should be applied to prevent over-compensation?[182] Also, should there not be a clear statutory statement on the extent, if any, of the duty to mitigate damages?[183]

The damages rules do not seem clearly drawn to meet the

---

179. *Id.* § 2-714(2). If, because of the non-conformity, the buyer would be entitled to revoke the acceptance, then "the time and place of acceptance . . . is determined as of the . . . decision not to revoke." *Id.* § 2-714(2) comment 3.

180. *Id.* § 2-714(2).

181. For the text of U.C.C. § 1-106(1), see *supra* note 170.

182. The problem of over-compensation is frequently the focus of discussion involving the availability of an election of remedies under Article 2. Should, for example, a buyer who covers be permitted to seek market damages if that measure would yield a higher recovery? This and other over-compensation issues are explored in J. WHITE & R. SUMMERS, *supra* note 166, §§ 6-4, 7-7, at 233-34, 271-73; Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 256 (1963); Sebert, *supra* note 159, at 30-33; Vernon, *Expecting Damages for Breach of Contract: A Primer and Critique*, 1976 WASH. U.L.Q. 179, 190-93.

183. A principle of mitigation does currently surface in U.C.C. § 2-715(2)(a) (1978). It precludes recovery of consequential damages by a buyer if the loss could have been "prevented by cover or otherwise." *Id.* Even in the absence of any express Code mandate to mitigate, some courts have held that that duty has survived the Code's enactment under U.C.C. § 1-103, which provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." *See, e.g.*, Schiavi Mobile Homes, Inc. v. Gironda, 463 A.2d 722 (Me. 1983). In *Gironda*, the original buyer, after experiencing medical, financial, and marital difficulties, breached the contract of purchase for a mobile home. *Id.* at 723. The seller contacted the original buyer's father inquiring as to whether his son was still planning to purchase the mobile home. *Id.* The father expressed doubt, but offered to purchase the mobile home himself. *Id.* The seller ignored the father's offer, thereafter reselling at a lower price. *Id.* The seller brought an action to recover lost profits. *Id.* at 723-24. The Supreme Court of Maine ruled that the seller had not properly mitigated his damages and refused to award him lost profits. *Id.* at 725-26.

realities of the marketplace with respect to lead times needed for replacement purchases. For many things required by manufacturers there is not much of a "spot" market, and to secure sufficient quantities, the order must be given at some time ahead of anticipated delivery. Should there not be some statutory recognition of this fact and of the loss caused by the delay, if proved?

The present interest rate market has made acute the problem of costs incurred by reason of delays in payment. The area can be called "prejudgment interest," but perhaps "delay damages" would be a better term. It is significant that the New York Law Revision Commission's objection to the inclusion of the phrase "damages from delay or otherwise resulting from the breach"[184] in the term "incidental damages" in U.C.C. § 2-715(1)[185] was to prevent such damages from always being classed as "incidental."

So far as Code language is concerned, the significance of the characterization of damages as incidental rather than consequential seems to lie in the fact that consequential damages are clearly subject to the "notice" or "foreseeability" requirement of *Hadley v. Baxendale*,[186] reworded in the Code as "reason to know."[187] General and incidental damages are not expressly subject to such a requirement. Perhaps these labels should be discarded in favor of the Magnuson-Moss Act's distinction between "uncommon" and "not uncommon" damages, which is made in the Federal Trade Commission regulations.[188] Recovery of the former would require "reason to know" at the time of contracting while recovery of the latter would not.

D. *Inflation and Foreign Money Problems*

1. *Inflation and Damages for Delay*

This tension between regular damages and consequential damages will always arise where there is delay in payment due to litigation or otherwise. In these cases, the dollar paid later can be

184. ALI-ABA, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 81 ("Reason for Change").

185. Section 2-715(1) labels as incidental damages those "expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach." U.C.C. § 2-715(1) (1978).

186. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

187. *See* U.C.C. § 2-715(2)(a) (1978) (Consequential damages include "any loss resulting from general or particular requirements and needs of which the *seller at the time of contracting had reason to know*.") (emphasis added).

188. 16 C.F.R. § 700.1(a) (1986).

shown not to have the same purchasing power as the dollar when payment was supposed to have been made. The point was well made by Lord Justice Omrod, of the Court of Appeal, in *William Cory & Son Ltd. v. Wingate Investments Ltd.*:[189]

> It is clear that the defendants have had the use of this money ever since the date when they became liable to compensate the plaintiffs for breach of contract.
>
> It does not stop there. If the damages in this case are to be assessed at 1972 or 1973 pounds, the defendants will save an enormous amount because they will be able to pay a debt due in 1972 in 1980 pounds, which is not reasonable, equitable or just.[190]

Our law of damages needs revision to compensate for payments not timely made. For example, payment after final judgment in 1986, in present dollars, of the difference between the contract and the market price for pigs in 1973, awarded in a suit started in 1977, is not just compensation.[191] If the buyer "covers," the buyer's damages (cost of cover minus contract price) should be adjusted to a dollar amount having the same purchasing power as the dollars used to effect cover had on the date of use. If money was borrowed to effect cover, reimbursement for interest actually paid should be included. If repayment was made before judgment in the same number of dollars, the additional "delay in payment" adjustment should start from the dates of repayment of the interest and loan principal. If the loan is not repaid, no delay in payment adjustment need be made as to the principal, but interest paid after the breach date should be adjusted.

If the buyer does not cover, should the delay damages be based on the difference between the breach date cost of pigs and the present cost of pigs? Or should the delay damages be based on the difference in the purchasing power of money between the determination date for the default (perhaps later than or earlier than the actual breach date) and the judgment date?[192] Also,

189. Reported in [1980] 17 Build. L.R. (Eng.).

190. [1980] 17 Build. L.R. 109 (Eng.).

191. Assume the buyer still wanted three pigs. The 1973 market price of pigs would not buy three pigs in 1986. Assume the buyer covered at a price, for immediate delivery, above the contract price. The buyer has been deprived of all opportunity value for the use of the excess for 12 years. Should there not be compensation for this loss?

192. The problem has been discussed in connection with damages for defective construction. *See* Feldman & Libling, *Inflation and the Duty to Mitigate*, 95

should delay damages continue until the judgment is actually paid? Since there are delays of many years between a contract breach and a collection on a final judgment, these problems will be with us for some time. The *rate* of inflation may have slowed recently, but the gap between the value of 1979 or 1982 dollars and the present dollar continues to widen nevertheless.

Finally, on this issue, how should delay damages be calculated? Under present statutes and case law, the rules for "prejudgment interest" are far from uniform or suitable in a time of high borrowing costs.[193] Mr. and Mrs. Keir, in their article,[194] suggest that the law has not kept pace with modern economic theory. They would, for corporations and businesses, base delay damage on the lost opportunity cost to the particular business based on either the average cost of capital or the average historical return on investment.[195] For individuals, they would take, depending on the individual, the rate of return on a low risk liquid

---

LAW Q. REV. 270 (1979); Waddams, *The Date for the Assessment of Damages*, 97 LAW Q. REV. 445 (1981); Wallace, *Inflation and Assessment of Construction Cost Damages*, 98 LAW Q. REV. 406 (1982) [hereinafter cited as Wallace, *Inflation and Assessment*]; Wallace, *Cost of Repair and Inflation*, 96 LAW Q. REV. 406 (1982). The problem also arises in determining proper compensation for tort injuries. *See* Royal Commission on Civil Liability and Compensation for Personal Injury Report, Vol. III Overseas System of Compensation, CMD. No. 7054-111 (Mar. 1978). For other discussions, see K. ROSENN, LAW AND INFLATION (1982); Mackaay & Fabien, *Civil Law and the Fight Against Inflation—A Legal and Economic Analysis of the Quebec Case*, 45 LA. L. REV. 719 (1984); Rea, *Inflation and The Law of Contract and Torts*, 14 OTTAWA L. REV. 465 (1982); Comment, *Inflation As an Assessment Factor in Contract Damage Awards*, 45 LA. L. REV. 69 (1984).

193. In the first place, many statutes award prejudgment interest only if the basic claim is for a sum certain. *See, e.g.*, CAL. CIV. CODE § 3287(a) (West 1970); ILL. REV. STAT. ch. 74, §§ 2-3 (1979); WIS. STAT. ANN. § 138.04-.05 (West 1974 & Supp. 1985). *See also* Leslie Salt Co. v. St. Paul Mercury Ins. Co., 637 F.2d 657 (9th Cir. 1981) (applying California law, court upheld award of prejudgment interest for defendant's refusal to pay cash value of damaged machine under insurance policy); Weiland Tool & Mfg. Co. v. Whitney, 100 Ill. App. 2d 116, 241 N.E.2d 533 (1968) (prejudgment interest is allowable only when claim is for liquidated damages or for sum ascertainable by simple and certain calculation); *rev'd on other grounds*, 44 Ill. 2d 105, 251 N.E.2d 242 (1969); Benke v. Mukwonago-Vernon Mut. Ins. Co., 110 Wis. 2d 356, 329 N.W.2d 243 (Ct. App. 1982) (prejudgment interest is recoverable only in cases that involve liquidated damages or damages susceptible of reliable and reasonably accurate methods of calculation). *See generally* Comment, *Prejudgment Interest: Survey and Suggestion*, 77 Nw. U.L. REV. 192 (1982).

It is not clear whether a suit for "cover" fits these rules. Also, the rates are not the current borrowing rates. In present statutes, the percentage rates range from 5% to 15%. For a discussion of the often large disparity between the statutory and market rates, see *supra* note 123 and accompanying text.

194. Keir & Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUS. LAW. 129 (1983).

195. *Id.* at 148. The authors suggest that the "particular facts of a case or the availability of evidence may determine [which measure] is used. If no proof

investment or, if higher, the individual's historical return rate on investments.[196] On the other hand, the Law Reform Commission of the Canadian Province of Manitoba, in its 1982 report,[197] took the position that a market interest rate reflected an estimate of *future* inflation while prejudgment compensation is to compensate for *past* inflation, so that application of a current interest rate was not the answer. As one commentator observed, the current rate is not even a reliable barometer of existing and future rates of inflation:

> Central bank and related rates of interest simply have not been, as Professor Waddams (and indeed other transatlantic writers) seem to suppose, so calculated as to compensate a lender for actual or prospective rates of inflation. Thus in 1974-75 in the United Kingdom with then current rates of inflation well in excess of 20 per cent, bank rates never rose above 12¾ per cent.[198]

The Manitoba Commission made some forty recommendations, but in essence the Commission would find what economists call the "real interest rate" and multiply it by the time elapsed, to which would be added the percentage change in an appropriate price index from the due date to the judgment date to compensate for the lost purchasing power of money.[199] If, however, the creditor had in fact borrowed a sum to cover the non-payment, the report recommends awards of the actual costs of the borrowing in place of its formula.[200] Where money was borrowed to acquire the goods for delivery to be repaid on receipt of the buyer's payment, should not all costs created by extending the life of the loan until damages are received be recoverable, including the lost

---

can be or is supplied of either measure, a business entity would seem to be entitled to . . . the average return on market funds." *Id.* at 148-49.

196. *Id.* at 149. The authors suggest that the "awards should range from a minimum of the yield on money market investments or treasury bills and, if higher, should have a maximum of either the individual's cost of borrowing, his historical return on investment, or the average rate earned on mutual funds." *Id.* at 150.

197. MANITOBA LAW REFORM COMMISSION REPORT ON PREJUDGMENT COMPENSATION ON MONEY AWARDS, REPORT NO. 47 (Jan. 4, 1982) [hereinafter cited as REPORT NO. 47]. For a critical discussion of this report, see Hammond, *Compensation for the Lost Value of Money: A Canadian Proposal*, 99 LAW Q. REV. 68 (1983).

198. Wallace, *Inflation and Assessment*, *supra* note 192, at 409-10 (footnotes omitted).

199. *See* REPORT NO. 47, *supra* note 197, at 74-75.

200. *See id.* at 55-59.

opportunity costs on any disbursements, such as fees and periodic interest payments? If, as in *Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*,[201] interest on the borrowed money is paid out in periodic payments during the life of the loan, delay damages, as the case held, should be payable in respect of each such payment.

An issue for a review committee, then, is whether the Code should provide a guideline rule for delay damages to cover lost opportunity costs and changes in the value of money.

2. *The Money of the Contract*

As trade expands and becomes international, or even without any international features, in today's world of finance, should not the parties be able to select the money in which they wish to deal, at least as far as state law is concerned?

If the parties have selected a particular currency as the "store of value" they wish to govern their transaction, they can only do so up to a point. If a law suit results in the United States, we convert the selected currency to United States dollars under either the "breach day" rule[202] or the "judgment day" rule.[203] If actual payment occurred on the date of the breach, there would be no problem. The party receiving the payment could convert dollars into the desired currency that same day. But if payment does not happen then, years can pass from breach day to judgment day. After judgment, appeals follow so that the actual transfer of funds may occur several years after the judgment date. During the extended period from either the breach date or the judgment date, the "store of value" is not that for which the par-

201. 697 F.2d 481 (2d Cir. 1983).

202. For a discussion of the interrelation of the "breach day rule" and the "judgment day rule," see the opinion of Judge Frank in Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952 (2d Cir. 1951). Both the "breach day" and the "judgment day" rules address the issue of which is the appropriate date for application of an exchange rate to damage awards: the date of the breach or the date of the judgment. The choice of one rule over the other has important consequences due to fluctuations in currency values. For an application of the breach day rule, see Librairie Hachette, S.A. v. Paris Book Center, Inc., 62 Misc. 2d 873, 309 N.Y.S.2d 701 (Sup. Ct. 1970) (rule selected to prevent defendant from profitting by non-payment). The Code, in U.C.C. § 3-107(2), seems to choose the "breach day" rule for instruments calling for a payment in a foreign currency. However, the last sentence of the official text reads: "If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency." It appears, therefore, that § 3-107(2)'s preference for the "breach day" rule is merely a rule of interpretation. U.C.C. § 3-107(2) (1978). New York and a few other states have omitted the last sentence.

203. For an application of the judgment day rule, see, e.g., Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1 (S.D.N.Y. 1973).

ties contracted but is the United States dollar. Should not the parties be able, subject to national currency control laws, to specify the risk of fluctuations in monetary purchasing power that they wish to assume? If the suit had been brought in the country whose currency was named, the judgment would have been in the currency of that country. Should the dollar value of recovery vary with the location of the selected forum?

Again turning to English precedent, we find that this jurisdiction has done just what is hinted at above in several recent cases. The first allowed an appeal of a German corporation seeking judgment in German deutsche marks.[204] In the second, the House of Lords approved conversion from the agreed currency on the date of actual payment or the issuance of execution process if the payment was not made in the currency in which the judgment was entered.[205] If payment was made in pounds sterling by the judgment debtor or by the sheriff as a result of an execution sale, the clerk of courts would be supplied with an affidavit stating the converted value so that credit could be entered on the judgment roll showing a judgment for a specific amount of the foreign currency.[206]

In two maritime cases three years later, *The Despina R* and *The Folias*,[207] the principle adopted was to search for the basic currency actually used by the party whose payments were to be reimbursed.[208] Repairs to a ship were paid first in Chinese currency for temporary repairs, and later in Japanese yen for further repair, but since the money used was withdrawn from a United States dollar account, the ensuing judgment for reimbursement was entered in dollars.[209]

A subsequent case, *B.P. Exploration Co. (Libya) v. Hunt (No. 2)*,[210] involved the frustration of a contract between British Petro-

204. Schorsch Meier Gmbh v. Hennin, [1975] 1 Q.B. 416 (using England's adherence to Treaty of Rome (Common Market) as one ground for affirming award of arbitrators).

205. Miliangos v. George Frank (Textiles) Ltd., [1975] 3 All E.R. 801 (H.L.).

206. The date of payment selected by Lord Wilberforce was the date "when the court authorises enforcement of the judgment in terms of sterling." *Id.* at 813-14.

207. The Despina R and Folias, [1979] 1 All E.R. 421 (H.L.). One case was in contract, the other in tort. The House of Lords determined the currency "in which the loss was effectively felt" and held that judgment be entered in that currency.

208. *Id.* at 422.

209. *Id.*

210. [1981] 1 W.L.R. 232. *See also* President of India v. Taygetos Shipping

leum and Nelson Bunker Hunt to exploit Libyan oil discoveries. The frustration resulted from the expropriation of the subject of the venture by the Libyan government.[211] Payments were due from Hunt, in part, for oil actually diverted from British Petroleum and for his share of the development expense.[212] The judgment for the oil was entered in United States dollars as that was the currency of the international oil trade. But the judgment for the reimbursement of development expense was entered in pounds sterling as that was the currency used by British Petroleum to purchase Libyan currency for payments and to buy materials used.[213]

In today's world there would seem to be no reason why a commercial code should not permit parties to specify the currency that they desire to use as the "store of value" for their transactions. It should make no difference whether it is the currency actually employed or whether it is chosen because of its stability of purchasing power.

E. *Other Problems*

At this point it may not be out of place to suggest that the Code may be a bit out of date in so often referring to the "intent" of the parties. It should be clear that actual internal mental intention does not and should not govern. We suggest that the word "intent" and the phrase "if the parties so intend" be re-examined with a view to substituting either "if the parties so provide" or "if the conduct of the parties so indicates." If, for example, a

Co. SA (The Agenor), [1985] 1 Lloyd's L.R. 155. In *The Agenor*, the parties specified demurrage at $6,000 a day payable in pounds at $2.2878 to one pound. At the time of the award $1.2390 equaled one pound. *Id.* at 156-57. The court ruled that due to the contract terms the judgment was to be in pounds sterling determined at the conversion rate specified in the contract. *Id.* at 158.

211. [1981] 1 W.L.R. at 238-40.

212. *Id.* at 239-40.

213. *Id.* at 245. In another case addressing a similar issue, Lord Wilberforce stated, "In the case of a company in liquidation, the corresponding date for conversion would be the date when the creditor's claim . . . is admitted by the liquidator." Miliangos v. George Frank (Textiles) Ltd., [1975] 3 All E.R. at 814. *See also In re* Lines Bros. Ltd. (in Liquidation) (No. 2) [1984] 2 W.L.R. 905 (discussing the *Miliangos* principle). Some legislative changes might be required in this country. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 144 comment b (1971); Becker, *The Currency of Judgment*, 25 AM. J. COMP. LAW 152 (1977); Bowles & Philips, *Judgments in Foreign Cases: An Economist's View*, 39 MOD. L. REV. 196 (1976). For problems of foreign procurement where appropriations in dollars must be drawn upon for each partial payment, see Ciucci & Hoppe, *Legal Aspects of Contracting When the Currency Rate is Fluctuating: How the Problem was Handled in Japan, What Future Problems Can Be Expected, and Suggestions as to How They May be Alleviated*, 16 A.F.L. REV. 53 (1974).

"money of the contract" rule is to be adopted, consideration should be given to opening the verbal formulation with "if the parties so provide . . . ."

The artists of today have not liked the consignment provisions of the Code in which their goods become subject to the creditors of the dealer.[214] Several statutes have been enacted insulating consignors of art objects from the claims of the consignees' creditors.[215] But should the consignors of art objects be the only ones receiving special protection?[216] Are there other businesses where consignment for sale is so prevalent that a duty of inquiry should be placed on the creditor rather than placing a duty of disclosure on the consignor? One state, California, has felt that consumer consignors need protection from a dealer's

214. *See* U.C.C. § 2-326(2)-(3) (1978). This section renders consigned goods subject to the claims of the consignee's creditors where the goods are delivered for sale to a consignee who "maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the [consignor]." *Id.* § 2-326(3). To shield its interest in the goods, the consignor must comply with the filing provisions of Article 9 or a rarely, if at all existent, state sign law, or show that the consignee is generally known by its creditors to be dealing in consigned goods. *See id.* § 2-326(3)(a)-(c).

The consignment rule can therefore be seen as penalizing a consignor who permits its interest to remain unknown, i.e., who creates but fails to cure the consignee's ostensible ownership of the goods. The traditional rationale is to protect those creditors of the consignees who would otherwise be "misled by the secret reservation." *Id.* § 2-326 comment 2. Whether ostensible ownership concerns continue to justify the Code's approach is open to question. *See, e.g.*, Dolan, *The UCC's Consignment Rule Needs an Exception for Consumers*, 44 OHIO ST. L.J. 21 (1983); *infra* notes 218-19 and accompanying text.

215. *See, e.g.*, COLO. REV. STAT. § 4-2-326(5) (Supp. 1985). This provision makes U.C.C. § 2-326 inapplicable "to the placement of works of fine art [by the artist] on consignment, which shall be governed by the provisions of article 15 of title 6, C.R.S." *Id.* The reference is to the Consignment of Works of Fine Art Act, which applies only to works of art delivered by the creating artist to an art dealer. The statute uses an "in trust" approach.

New Mexico and Texas add a new item in § 2-326(3), referring to similar statutes protecting artists in those jurisdictions. *See* N.M. STAT. ANN. § 55-2-326(3)(d) (1985); TEX. BUS. & COM. CODE ANN. § 2-326(c)(4) (Vernon 1968 & Supp. 1985). Alaska adds to its U.C.C. § 2-326 a new subsection stating that works of art consigned by the creating artist are not subject to the claims of the consignee's creditors. It also includes definitions of terms. *See* ALASKA STAT. § 45.02.326(e)(1)-(3) (1980). *See also* ARK. STAT. ANN. § 85-2-326(5) (1961 & Supp. 1985) ("provisions of this Section shall not apply to the placement of works of fine art on consignment"); MICH. COMP. LAWS ANN. § 440.2326(5) (West Supp. 1985) ("Whenever a person delivers or causes to be delivered a work of fine art to an art dealer . . . the work of fine art is not subject to the claims of the art dealer's creditors . . . .").

216. As the title to his article suggests, Professor Dolan argues that consumer consignment should be excluded from the scope of U.C.C. § 2-326. *See* Dolan, *supra* note 214; *see also* CAL. COM. CODE § 2-326(3)(d) (West 1964 & Supp. 1985) (exclusionary paragraph added by non-uniform amendment).

creditors.[217] Claims of secured creditors as purchasers[218] seem to be covered in some statutes. In others, a purchaser takes free of a consignor's interest, but the "payment" received is a trust fund for the owner. These latter statutes may create, in connection with general inventory financing, a tracing problem, so some clarification seems needed.

Indeed, with the modern use of credit reports, credit investigations, and balance sheet analysis by sellers' credit departments, perhaps the time has come to remove the remaining vestiges of the doctrine of ostensible ownership as it protects unsecured creditors.[219] Conceivably, the provision in U.C.C. § 2-326(3) protecting consignors where it is generally known that the consignee deals in consigned goods could be expanded. It could protect consignors, even against a secured party claiming good faith purchaser status, where dealers in goods of that kind often deal in consigned goods. Secured parties, like other persons extending credit, should perhaps be required to rely on their credit investigations.[220]

---

217. California has added a paragraph (d) to § 2-326(3), creating a list of actions that defeat creditors of the consignee. The section provides in part:

> (3) Where goods are delivered to a person for sale and the person maintains a place of business at which he or she deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return . . . . However, this subdivision is not applicable if the person making delivery does any of the following:
>
> . . .
>
> (d) Delivers goods which the person making delivery used or bought for use for personal, family, or household purposes.

CAL. COM. CODE § 2-326(3)(d) (West 1964 & Supp. 1985).

218. U.C.C. § 1-201(12) includes "a secured creditor" in the definition of "creditor," but U.C.C. § 1-201(33) defines a purchaser as one "who takes by purchase." The term "purchase" is defined in U.C.C. § 1-201(32) as "taking by . . . mortgage, pledge, lien . . . or any other voluntary transaction creating an interest in property." Thus, if a consignment passes title to the consignee, the after-acquired property clause of an inventory-secured party would prevail over the consignor, as also, under U.C.C. § 2-403(2) and (3), would a buyer in the ordinary course of business.

219. The need to regulate the separation of ownership and possession of property depends in large part on the extent to which unsecured creditors rely on their debtor's possession. It has been suggested that as a result of modern credit practices they do not:

> At one time creditors may have relied on their debtor's stock in trade, but modern commercial lenders, beginning with the advent of open-account selling and inventory financing, stopped extending credit based on a debtor's ostensible ownership of merchandise. Today creditors either investigate that appearance or do not rely on it at all.

Dolan, *supra* note 214, at 29.

220. Conspicuously absent from the literature is a consensus on the quan-

The entrusting section[221] may also need to be clarified to make clear just what knowledge should be attributable to a reasonable entruster about the entrustee's operations before the rule applies.[222] If the repair function is exercised at a separate location from the selling function, or two separate businesses are conducted, should the rule be different than the rule for a unified business at one location?[223] Should there be a "trust fund" approach to the proceeds received by the entrustee?[224]

---

tum of reliance that secured parties place on their secured status when extending credit. *Compare* Dolan, *supra* note 214, at 30 n.49 ("It would be a mistake to underestimate the extent to which lenders with security interests take those interests only as a precaution. Because large corporations usually borrow on the strength of their financial statements and profit history, the security interest in inventory is often a small consideration.") *with* Baird & Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 183-84 (1983) ("The secured creditor is able to offer a lower rate of interest precisely because he does not rely solely on the debtor's honesty and general financial health. He is thus necessarily interested in discovering which assets a debtor owns and what claim others might have upon those assets."). Professors Baird and Jackson also question the efficacy of private credit investigations to provide this needed information:

> In a private system, unassisted by a legal rule, a creditor who does not discover interests superior to his own does not know whether such interests do not exist or whether they do exist but are not reflected in private files. This reflects a fundamental problem a debtor has in convincing creditors that he has been telling the truth; in the absence of an ability to check the debtor's story, creditors will be inherently suspicious of a debtor, who can gain advantage by misbehaving . . . . In a public system, however, because of the existence of a legal rule, the absence of a record of a superior interest is unambiguous, because unless the interest is recorded, it cannot be superior. It therefore provides a reliable check on the veracity of the information provided by the debtor.

Id. at 184 n.34. The authors question whether, in fact, lenders taking security offer lower interest rates. The choice may well be "no loan" versus "secured loan." *See also* Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929 (1985). *See also* Jackson & Schwartz, *Vacuum of Fact or Vacuous Theory: A Reply to Professor Kripke*, 133 U. PA. L. REV. 987 (1985).

221. The Code's entrustment provisions are U.C.C. §§ 2-403(2) and (3). *Cf.* U.C.C. § 7-503(a), (b) (1978).

222. Section 2-403(2) requires that the entrusting be to a "merchant" who deals in goods of that kind. U.C.C. § 2-403(2) (1978). Is it also required that the entruster know the entrustee is such a merchant? For an affirmative answer, see Atlas Auto Rental Corp. v. Weisberg, 54 Misc. 2d 168, 281 N.Y.S.2d 400 (1967). *See also* Leary & Sperling, *The Outer Limits of Entrusting*, 35 ARK. L. REV. 50, 84-85 (1981) ("knowledge of the . . . status of the entrustee by the entruster is essential").

223. Once more, the answer must depend on what, if any, relevance attaches to the knowledge of the entruster concerning the scope of the entrustee's business. Not to be ignored is the existence of certificate of title acts. If the entrusted goods are subject to such an act, should that make a difference? On these and other "entrustment" problems, see Leary & Sperling, *supra* note 222.

224. The sale by the entrustee gives the entruster a cause of action for the

The doctrine of "cure" where a defective tender is made and its effect on the perfect tender rule could be clarified,[225] as well as the issue under U.C.C. § 2-508(2), as to whether a "further reasonable time" is available to a seller who had no reason to believe the tender was defective.[226] Perhaps here we need to make a distinction between an original producer and one who sells prepackaged goods produced by another.[227]

In another area, do the courts need more guidance on the merchant exception to the Statute of Frauds rule of U.C.C. § 2-201[228] and the other exceptions?[229] Should the interrelation of

---

value of the goods converted. This, however, is an unsatisfactory remedy where the entrustee's insolvency would require the entruster to share ratably with other creditors. Perhaps this would be an appropriate situation in which to impress a constructive trust or equitable lien upon the proceeds. *See* R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 172, at 520 (1970) ("whenever the elements of a constructive trust or equitable lien are present, section 1-103 will justify the use of these remedies in code cases"). The issue is reminiscent of that involving a claim to proceeds by a reclaiming cash or credit seller. For a discussion of claim to proceeds by a reclaiming cash or credit seller, see *supra* note 131 and accompanying text.

225. The perfect tender rule generally allows a buyer to reject a tender "if the goods or the tender of delivery fail in any respect to conform to the contract." U.C.C. § 2-601 (1978). This right, like most, is not absolute. It is at all times subject to the seller's right to cure under U.C.C. § 2-508. Unfortunately, the inherent conflict between these two sections has never been satisfactorily resolved. The academic literature and case law has caused one commentator to lament, "Cure has become discretionary." Miniter, *Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments*, 13 GA. L. REV. 805, 835 (1979).

226. Once the seller's time for performance has passed, cure is permitted under § 2-508(2) only if "the seller had reasonable grounds to believe [the tender] would be acceptable with or without money allowance." U.C.C. § 2-508(2) (1978). Interpreting the wording of this subsection is no easy task. In particular, the section offers no criteria upon which to ascertain when a seller has reasonable grounds to believe a buyer would accept a nonconforming tender. For an overview of the commentary and case law on this point, see Schmitt & Frisch, *The Perfect Tender Rule—An "Acceptable" Interpretation*, 13 U. TO. L. REV. 1375 (1982).

227. Put another way, should the right to cure extend to a seller who is mistaken as to the quality of the goods or should it be limited to those who know the tender is nonconforming? *Compare* Meads v. Davis, 22 N.C. App. 479, 481, 206 S.E.2d 867, 868 (1974) ("Obviously this section deals with the situation in which the seller knows *prior* to delivery that the goods are not in conformity . . . .") (emphasis in original) *with* Joc Oil USA, Inc. v. Consolidated Edison Co., 107 Misc. 2d 376, 434 N.Y.S.2d 623 (Sup. Ct. 1980) ("compelling equitable considerations exist to extend the § 2-508(2) remedy to those innocent sellers who have no prior predelivery knowledge of nonconformity"). Perhaps here, also, a distinction between "off the shelf" goods purchased for resale and seller-manufactured goods, with knowledge of nonconformity required only for the latter case, could be appropriate.

228. Under U.C.C. § 2-201(2), the Statute of Frauds is satisfied when a merchant fails to object to a timely confirmation of an oral contract within 10 days after receipt, with reason to know the contents. This ostensibly straightfor-

that rule and the parol evidence rule of U.C.C. § 2-202 be clari-

ward provision has generated an astounding number of cases involving diverse issues. One of the most frequently litigated ones is who is or is not a merchant. *See, e.g.*, Pierson v. Arnst, 534 F. Supp. 360 (D. Mont. 1982) (farmer who entered into oral "futures" contract was not merchant as he possessed no special knowledge or skill with respect to commodities market); Cudahy Foods Co. v. Holloway, 55 N.C. App. 626, 286 S.E.2d 606 (1982) (real estate broker who guaranteed payment for shipment of cheese to third party was not merchant as she did not deal in cheese or hold herself out as having knowledge or skill peculiar to goods in question).

Another frequently litigated issue is when a writing qualifies as a "writing in confirmation" of an alleged oral agreement. *See, e.g.*, Great Western Sugar Co. v. Lone Star Donut Co., 721 F.2d 510 (5th Cir. 1983) (writing did not qualify as confirmation since it was an offer, not a confirmation); East Europe Domestic Int'l Sales Corp. v. Island Creek Coal Sales Co., 572 F. Supp. 702 (S.D.N.Y. 1983) (one defendant's writing did not qualify as it did not evidence prior agreement; other defendant's writing did qualify as writing in confirmation). Recently, the Seventh Circuit decided a case with profound implications. *See* Thomson Printing Mach. Co. v. B.F. Goodrich Co., 714 F.2d 744 (7th Cir. 1983). In *Thomson Printing*, the Seventh Circuit was of the opinion that the term "receipt" in U.C.C. § 2-201(2) does not require receipt by a particular agent of an organization. As a result, receipt by the mailroom is receipt by the organization. *Id.* at 746-48. Elsewhere, we have suggested that "[c]orporate counsel may find their client's mail room procedures worth examining in the light of the case." Leary & Frisch, *Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title*, 39 BUS. LAW. 1851, 1857 (1984).

229. *See* U.C.C. §§ 2-201(3)(a)-(c) (1978). Subsections 2-201(3)(a)-(c) specifically provide:

> (3) A contract does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
>
> (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
>
> (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
>
> (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 3-606).

Id. These other statutory exceptions have also produced a stream of litigation that shows no signs of abating. If that were not enough to justify a second look at the statute, the situation is further exacerbated by conflicting judicial authority on the question of whether any nonstatutory exceptions to the statute should be recognized. The principal candidate is promissory estoppel. For cases receptive to an estoppel challenge, see, e.g., Allen M. Campbell Co., General Contractors v. Virginia Metal Indus., 708 F.2d 930 (4th Cir. 1983) (under North Carolina law, promissory estoppel is exception to statute of frauds); R.S. Bennett & Co. v. Economy Mechanical Indus., Inc., 606 F.2d 182 (7th Cir. 1979) (Illinois no longer considers statute of frauds a complete bar to recovery on promissory estoppel theory); Warden & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339 (Iowa 1979) (Iowa statute of frauds does not displace doctrine of promissory estoppel in relation to sale of goods); Del Hayes & Sons, Inc. v. Mitchell, 304 Minn. 275, 230 N.W.2d 588 (1975) (principle of promissory estoppel is not displaced by U.C.C.; however, it was inapplicable here as actual con-

fied? There are decisions holding that the unanswered memorandum cannot be contradicted.[230] In today's electronic age, the whole concept of a signed writing may need rethinking. A rule having the same protective effect would be one that merely requires substantially contemporaneous objective evidence indicating that both of the parties had a deal as to an ascertainable quantity of an ascertainable subject matter. This could be described as a "finger pointing" rule where the objective conduct, as distinct from oral testimiony as to conversations, demonstrates the existence of a contract with a particular subject matter.[231]

In any event, the application of whatever rule is adopted for U.C.C. § 2-201 must be suitable for computer to computer ordering. While a "writing" is defined to include any reduction to tangible form,[232] it should be made clear that the reduction to tangible form can be made at a later date and need not be made at the time of the transaction. The potential to create hard copy

---

tract existed). For cases that have been unreceptive, see, e.g., C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852 (9th Cir. 1977) (Ninth Circuit concluded that California Supreme Court would not permit doctrine of promissory estoppel as exception to statute of frauds as it would render statute of frauds a nullity); McDabco, Inc. v. Chet Adams Co., 548 F. Supp. 456 (D.S.C. 1982) (under South Carolina law, promissory estoppel cannot be used to circumvent U.C.C.'s statute of frauds); Lige Dickson Co. v. Union Oil Co., 96 Wash. 2d 291, 635 P.2d 103 (1981) (increased litigation and confusion would necessarily result if promissory estoppel were allowed to overcome valid statute of frauds defense). *See generally* Duesenberg, *The Statute of Frauds in its 300th Year: The Challenge of Admissions in Court and Estoppel*, 33 BUS. LAW. 1859 (1978). Although promissory estoppel is the most frequently asserted nonstatutory exception, there is authority supportive of others. *See, e.g.*, H.B. Alexander & Son, Inc. v. Miracle Recreation Equip. Co., 314 Pa. Super. 1, 460 A.2d 343 (1983) (statute of frauds waived through course of dealing and conduct).

230. *See* David J. Joseph Co. v. S & M Scrap Metal Co., 163 Ga. App. 685, 295 S.E.2d 860 (1982) (purchase confirmation became, through failure to object, a final integrated agreement). *Accord* Shipilberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 535 S.W.2d 227 (Ky. 1976). These courts were unpersuaded by § 2-201, which correctly recognizes that although the statute has been satisfied, "the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected." U.C.C. § 2-201 comment 3 (1978). These are important cases because if the approach is followed, the confirmer receives a tremendous advantage that, in most instances, cannot be justified.

231. Many of the exceptions to the Statute of Charles, and other pre-Code statutes were justified on the "finger pointing" basis. This is particularly true of the "earnest money" exception, and the "substantial improvement" exception in real estate cases. *See* RESTATEMENT (SECOND) OF CONTRACTS § 129 illustrations 3-5 (1977); *id.* § 129 reporter's note (citing cases). The exceptions specified in U.C.C. §§ 2-201(3)(a)-(c) do not adequately cover the field. For the text of this section, see *supra* note 229.

232. *See* U.C.C. § 1-201(46) (1978). " 'Written' or 'writing' includes printing, typewriting or any other intentional reduction to tangible form." *Id.*

should be sufficient. The "signature" definition, even now, would accommodate such a change in the definition of writing.[233]

Computer to computer contracting may soon become prevalent and can be aided if there are appropriate gap fillers that give choices appropriate to various trades. One can imagine, for example, a Code with warranty choices of various types, so that the messages between merchants would need only say, for example, "G.C. 1A2C3B."[234] This would then incorporate the text of choice A in the first gap filler, choice C in the second, and choice B in the third. The Code could also have a rule that would apply, between merchants, where no choice is made, and a separate rule that would apply between merchants and consumers.[235]

The concept of a retraction of an anticipatory repudiation is another area worthy of re-examination.[236] If the essence of a contract for sale is an assured expectation of the power to control goods or to receive money at the date set for performance,[237] then any action which impairs a reasonable person's assured expectation is a breach, and should have the same consequences as any other breach.[238] As in the case of other breaches, an accord

233. The term " '[s]igned' includes any symbol executed or adopted by a party with present intention to authenticate a writing." *Id.* § 1-201(39). Strong evidence that the definition was intended to be a flexible one is found in the comment, which urges courts to "use common sense and commercial experience in passing upon these matters." *Id.* § 1-201 comment 39.

234. A statutory catalog of alphabetically designated terms for incorporation by numerical or other digital reference is not new. Some years ago, New York adopted a similar statute for provisions in powers of attorney to include all powers listed and not stricken. *See* N.Y. GEN. OBLIG. LAW § 5-1501 (McKinney Supp. 1986). Checks today, as a practical matter, numerically designate the bank on which they are drawn. Such a statute would greatly simplify computer to computer or telex to telex contracting.

235. A merchant to merchant rule could well have periods of time for making claims and limitations on remedies or the quantum of damages that would not be appropriate vis-a-vis consumers.

236. The aggrieved party's rights following an anticipatory repudiation are the subject of U.C.C. § 2-610; retraction of such repudiation is the subject of U.C.C. § 2-611.

237. The Code defines the general obligations of the parties in the following terms: "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." U.C.C. § 2-301 (1978). This is, however, a statement of the parties' ultimate expectation. There is, in addition, an interim expectation: "A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired." *Id.* § 2-609(1).

238. Although repudiation vests the aggrieved party with certain rights, the term is without definition. We are told only that a repudiation occurs if a party fails to provide timely assurance of performance following a *justified* demand under U.C.C. § 2-609. *See* U.C.C. § 2-609(4) (1978). One definitional possibility is to adopt the language of U.C.C. § 2-609(1), so that any impairment of a

and satisfaction or an agreed modification can restore the assured expectation.[239] But after a breach, should unilateral action by the breaching party be permitted to, in effect, restore the contract? In our law there are several instances of unilateral restoration. One is in the retraction of a waiver.[240] Another is the doctrine of cure where a tender is defective.[241] The retraction of an anticipatory repudiation is a third.[242] But the first two have a different impact on the aggrieved party's expectations than the third.[243]

The situations are somewhat different in each case. In the waiver situation, unilateral action first made the burden of per-

---

party's interim expectation is a repudiation. *See supra* note 237. Perhaps what has so far dissuaded courts from its adoption is the statement in comment 1 to § 2-610, reminiscent of the pre-Code formulation, that "anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." U.C.C. § 2-610 comment 1 (1978). In fact, courts seem to treat a U.C.C. § 2-609 demand for assurances as a necessary first step in order to satisfy the comment's standards of "impossibility" and "clearness." *See, e.g.*, UMIC Government Sec., Inc. v. Pioneer Mortgage Co., 707 F.2d 251 (6th Cir. 1983); Bill's Coal Co. v. Board of Pub. Utils., 682 F.2d 883 (10th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1981).

239. The basic Code provision dealing with modifications and waivers is U.C.C. § 2-209. Although consideration is unnecessary for either to be effective, the standard of good faith must be met. U.C.C. § 2-209 comment 2 (1978). *See* U.C.C. § 2-103(1)(b) (" 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."). *See generally* Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979), Roszkowski, *Contract Modification and the Statute of Frauds: Making Sense of Section 2-209 of the Uniform Commercial Code*, 36 ALA. L. REV. 51 (1984).

240. Section 2-209(5) provides:

> A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

U.C.C. § 2-209(5) (1978).

241. For a discussion of the "cure" doctrine, see *supra* notes 224-25 and accompanying text.

242. *See* U.C.C. § 2-611(1) (1978) ("Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.").

243. For a discussion of the effect of a retraction of an anticipatory repudiation on the aggrieved party's expectations, see *supra* notes 234-37 and accompanying text. Note that the retraction of a waiver is by one who previously indicated that a right would not be enforced. It may not be retracted to defeat detrimental reliance. *See* U.C.C. § 2-209(5) (1978). Cure after a defective tender is also limited and requires prompt notice. *See id.* § 2-508(1). Controls on retraction of an anticipatory repudiation also exist, but a repudiation is, we feel, more devastating to the aggrieved party's expectations than the prospective working of a waiver or the "oop" offer of cure.

formance easier. The retraction restores an agreed term and can only be done with respect to future performances not affected by reliance on the waiver.[244]

In the cure situation, the attempt at restoration must promptly follow a rejected profferred performance, and prompt notice that the defect will be corrected is required.[245] Indeed, in many instances of cure, the defect can be seen as the result of an innocent mistake by the party making the tender. There may be an innocent undercount, or inclusion of a wrong size where the seller has numerous sizes. Or, the seller may have been misled by one or several of its suppliers. Here the expectation of assured control over goods is not subjected to the same destruction as in the case of an anticipatory repudiation where there is a signal of total non-performance.[246] Hence, our conclusion is that the concept of unilateral retraction of an anticipatory repudiation could be separately re-examined and possibly changed. This would not necessitate a like change in the doctrines of waiver and cure.

IV. CONCLUSION

What do we show by our examples of warranty,[247] battle of the forms,[248] remedies,[249] money of the contract[250] and a few other miscellaneous quibbles?[251] Even where special interests have obtained trade oriented special statutes, we find that the basic trouble in Article 2 is the same as a pervasive need in the practice of law—a greater degree of specialization in the treatment of subject matter. General principles are there, when a broad view is taken, but greater guidance in specialized application may be needed. This is not surprising when one considers the manner in which Article 2 was originally drafted.

---

244. *See* U.C.C. § 2-209(5) (1978). For the full text of § 2-209(5), see *supra* note 240.

245. For a discussion of the cure requirements, see *supra* notes 224-25 and accompanying text.

246. U.C.C. §§ 2-508(1) and (2) both require that the seller "seasonably notify the buyer" of his intention to cure.

247. For a discussion of warranties, see *supra* notes 22-88 and accompanying text.

248. For a discussion of the battle of the forms, see *supra* notes 89-129 and accompanying text.

249. For a discussion of remedies, see *supra* notes 130-88 and accompanying text.

250. For a discussion of the money of the contract, see *supra* notes 189-213 and accompanying text.

251. For a discussion of miscellaneous issues, see *supra* notes 214-46 and accompanying text.

Some seventeen years ago Professor Grant Gilmore said, of statutory drafting styles, obsolescence, and the Code:

> The current style or fashion is to draft much more tightly, with a desperate attempt at internal logical consistency and the avoidance of all ambiguity by the definition of all possible terms. That style is, surely, going to make it more difficult to deal with the Code between now and the year 2000, than it was to deal with the older acts up to 1960.
>
> Article 2 is, however, less subject to that criticism than the rest of the Code. By comparison with Articles like 9, Article 2, when you study it, seems to have been drafted in a soft and mushy style. It doesn't quite go to pieces on you like the old Sales Act, but it tends in that direction. I take it that the explanation of why the style of Article 2 is so different from the style of the rest of the Code goes back to the drafting history of the Code. Article 2 was drafted first.[252]

Professor Gilmore then attributed some significance to his perception, largely true, that practitioners did not, early on, take the Code project seriously, although they got into the act in later articles, particularly Article 9.[253] He then continued:

> The practitioners never managed to get Professor Llewellyn to reopen the Sales Article, which stayed soft and mushy. Everything in Article 2 turns on whether things are done, or not done, in good faith and in a commercially reasonable fashion, sometimes on whether they are done seasonably. . . . Out of that plastic material you can make pretty much whatever you're going to need to make in 1970 or 1990.[254]

There is something of Gilmorean exaggeration in that last bit. Of all the articles of the Code, Article 2 is the one that most needs to bear in mind the description of the common law given just over a half a century ago by a Harvard Law School professor.[255] After

252. P.F. COOGAN, *supra* note 92, at 102-03.

253. *Id.* at 103. ("To the practical people in the early 40's the so-called Uniform Commercial Code was just a law professor's project like the *Restatement*, and you didn't have to worry about it, and nobody worried about Article 2 until, from the practitioner's point of view, it was too late.").

254. *Id.*

255. Gardner, *An Inquiry Into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1 (1932). Professor Gardner was of the opinion that the intellectual appa-

stating that many legal writers have concluded that the spirit of the Anglo-American legal system can be epitomized in the concept of "reasonableness," Professor Gardner said:

> Certainly that reasonableness has not consisted in the construction of comprehensive series of definitions under which every human relationship could be classified and filed. Still less has it consisted in the formulation of some fixed purpose, conceived of as the end of law, to serve which every private and official action must be made to bend. The strength of English law, as of English government, resides in a traditional willingness to hear the parties out on both the facts and the ethics of their cases, to search patiently for the root of every controversy, and to decide it according to the interests and habits of the parties principally involved.[256]

A bit later in the same article, Professor Gardner identified commercial law as a legal system "whereby economic cooperation is sought to be reconciled with an individualistic philosophy of life."[257] He felt that the skill of the good commercial lawyer consisted in having developed the following arts: "the interpretation of promises, the correct appreciation of values, the adaptation of remedies to secure the benefits of commercial intercourse without risking the impairment of individual rights."[258]

The functions of the judge in commercial cases are the same as those just mentioned for the commercial lawyers. The function of a Code is to make it possible for judicial decisions to be made "according to the interests and habits of the parties principally involved."[259] Possibly a second function is to eliminate, as much as possible, the need for "agreements otherwise" on terms of the deal other than the essential "dickered terms" as to subject matter, quantity, quality where different levels thereof exist, delivery timing and method, as well as guidelines for pricing.[260]

---

ratus employed to resolve contract problems should be as simple and direct as possible.

256. *Id.* at 3.

257. *Id.* at 42.

258. *Id.*

259. *Id.* at 3.

260. For a discussion of this function regarding pricing, see *supra* notes 122-28 and accompanying text. U.C.C. § 2-305 should include some guidelines for pricing for periodic payments or escalation for specially manufactured goods, or at least make clear that where such types of pricing are bargained about, or are usual and customary, a failure to agree results in no contract.

The tight drafting desired by some practitioners makes for ease of predictability in the practice of advising clients, but makes very difficult the resolution of disputes arising out of those fact patterns not envisaged by the draftsmen. Also, the Code should provide for the recent technological changes in method and timing of communication caused by computerization and the interconnected telex system.[261]

The drafting process for revision of Article 2 should be predicated on a study of our eight sources,[262] especially an analysis of the areas where practitioners have found difficulties under the Code. The theme should be to preserve, wherever possible, Article 2's present structure, definitions, and format, while providing for necessary adjustments. One such adjustment could be the greater use of general business practices in lieu of the statutory gap fillers as heretofore suggested.[263] Another suggestion would be to provide some additional interpretive clauses in the text of Article 2 in areas where application of Code principles to newly developing factual situations would be hindered under current state statutory construction laws.[264] This could be helped by

261. *See, e.g.*, Montello Oil Corp. v. Marin Motor Oil, Inc., 740 F.2d 220 (3d Cir. 1984). In *Montello*, the court adopted a time of dispatch rule to avoid attempting to solve the question of whether a telex message had been received when the recipient's machine was not functioning as it had been shut off for the night on the date the ten-day notice period for a U.C.C. § 2-702 reclamation expired. *Id.*

262. To review, the eight sources are:

1. Non-uniform amendments.
2. Ad hoc statutes impinging on Code rules.
3. Volume of litigation engendered.
4. Conflicts of decision under the Code.
5. Judicial interpretation inconsistent with present reasonable commercial conduct.
6. Differences with the *Restatements*.
7. Variances from other legal systems.
8. Combined experience of merchant operators.

The eighth will require careful surveys conducted by questioners who have the confidence of those being questioned. The "If it ain't broke, don't fix it" syndrome must be avoided.

263. For a discussion of the idea of greater use of general business practices in lieu of the statutory gap fillers, see *supra* notes 120-28 and accompanying text.

264. *See* Landis, *Statutes and the Sources of Law* in HARVARD LEGAL ESSAYS IN HONOR OF BEALE AND WILLISTON 213, 218 (1934) ("Courts today have avowedly rejected as part of their technique the doctrine of the equity of the statute. Whatever significance statutes possess to govern results, they achieve by virtue of being interpreted to include the particular situation."). The Pennsylvania Statutory Construction Act, for example, provides: "(b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 PA. CONS. STAT. § 1921(b) (1975). The usual verbiage in statutory construction cases and statutes is that

drafting with broad principles, followed by textual material in subsequent sections or subsections giving illustrations of specific applications on both sides of the coin, namely permissible approaches and impermissible approaches.[265]

Several hard policy decisions will be needed to determine the extent to which consumer protections are to be included,[266] or excluded in a revised Article 2. Whether the scope will be enlarged to cover commercial service contracts and other currently excluded arrangements, and whether some "special" types of contracts should be treated specially are other difficult questions. But hard decisions are no excuse for no decisions.[267] We believe we have demonstrated that Article 2 needs review to determine the extent to which revision is essential. We invite the sugges-

---

statutes in derogation of the common law shall be strictly construed. The Pennsylvania statute is a bit unusual, reading "(a) The rule that statutes in derogation of the common law are to be strictly construed, shall have no application to the statutes of this Commonwealth enacted finally after September 1, 1937." *Id.* § 1928(a).

There is, thus, an attempt to preclude courts from applying the "equity of the statute," a doctrine well settled in English law. *See generally* Landis, *supra. See also* Eyston v. Studd, 75 Eng. Rep. 688 (1574) (pointing out that there is difference in scope between the "spirit" and the "letter" of many laws; scope of law should always be determined in light of its spirit to prevent codal obsolescence).

265. *See* UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, *supra* note 21. But there, the illustrative material is only on one side. Too much work cannot be assigned to official comments, as a court can readily rule that they are not a part of the statute.

266. Certain areas have been omitted from this article's survey of the interrelation of Article 2 and various states' consumer protection laws. For example, both Alaska and Indiana have made their door-to-door sales act part of their Code by non-uniform amendments. *See* ALASKA STAT. § 45.02.350 (1985); IND. CODE § 26-19-631 to -633 (19—). There are similar statutes on door-to-door sales in other states. Colorado refers to its Brand Inspection Law in a non-uniform U.C.C. § 2-511(4) and also in its U.C.C. § 2-401(5). *See* COLO. REV. STAT. § 4-2-511(4) (Supp. 1985); *id.* § 4-2-401(3) (1973). Montana and Oregon follow the same pattern. *See* MONT. CODE ANN. § 30-2-40-1(4), (5) (1983); OR. REV. STAT. § 72.4010(4), (5) (1984). Cattle bill of sale acts referring to brand inspections are on the books in many states.

We have also not considered many consumer statutes such as deceptive trade practices acts, retail motor vehicle installment sales acts or the "all goods" retail installment sales acts. Nor have we considered the impact of the many statutes awarding attorney's fees to successful plaintiffs.

267. Interestingly, even in the Code's relatively early stages of development and adoption the following statement appeared:

> If the Code is to stay current and vigorous, it must undergo periodic revision. This is the charge of the Editorial Board. Thus far the Code has been drafted and redrafted on the basis of how a number of experienced, responsible people thought it would work. The time has now come for detailed field studies to find how it actually is working and how it can be improved.

Warren, *Cutting Off Claims of Ownership Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 469, 493 (1963).

tions of others. Ultimately, if further comments by others support our conclusions, the Permanent Editorial Board should obtain funding for a thorough study and the drafting of revisions. Even though, in many cases where some confusion now exists, interpretation can lead to commercially appropriate results, it has not always done so. Amendments, although not of great length, can save much subsequent travail and woe, especially if enacted in the form of declaratory legislation.[268]

268. *See* U.C.C. § 11-108 (1978) ("*Presumption that Rule of Law Continues Unchanged.* Unless a change in law has clearly been made, the provisions of [new U.C.C.] shall be deemed declaratory of the meaning of the [old U.C.C.]."). We believe that the title and wording of § 11-108 could be more solicitously stated to provide that unless such interpretation is unreasonable, the changes made by amendments shall be construed as declaratory of and as clarifying the legislative intent of the Code as previously worded.