1988

U.C.C. Survey: General Provisions, Bulk Transfers, and Documents of Title

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General Provisions, Sales, Bulk Transfers, and Documents of Title

By David Frisch* and John D. Wladis**

This article reviews case law and related developments during 1987, under articles 1, 2, 6, and 7 of the Uniform Commercial Code.

GENERAL PROVISIONS

CONFLICT OF LAWS

Potentially important and complex choice of law questions can be avoided if the parties agree at the time of contracting which jurisdiction’s law shall govern in case of dispute. With specific exceptions,1 the Uniform Commercial Code ("U.C.C." or "Code") validates such choice of law agreements if the chosen jurisdiction bears a reasonable relation to the transaction.2 Courts continue to enforce these choice of law agreements.3 However, a note of warning is in order. Choice of law rules dictate only the applicable substantive law. The state in which suit is brought (the forum state) is always free to apply its own procedural law even when its choice of law rules require it to apply the substantive law of another state.4 Thus, for example, the forum state usually

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Editor's note: All citations to the U.C.C. are to the 1987 Official Text, unless otherwise noted.
1. U.C.C. § 1-105(2) and sections cited there.
2. U.C.C. § 1-105(1). This section is part of the conflict of laws rules of the forum state if that state has enacted the U.C.C. The section instructs the forum state to enforce the parties' agreement and apply the substantive law of the jurisdiction chosen by the parties if that jurisdiction bears a reasonable relation to the transaction and the agreement is valid under U.C.C. § 1-105(2).
4. Restatement (Second) of Conflict of Laws § 122 and comment (1971).
applies its own statute of limitations,\textsuperscript{5} raising the possibility that a court may not follow the parties' agreement on choice of law if the issue is a procedural one. This is precisely what the court did in \textit{Sierra Diesel Injection Service v. Burroughs Corp.}\textsuperscript{6} A federal district court in Nevada declined to enforce the parties' agreement that Michigan law would apply where the issue was whether the statute of limitations had expired. A computer had been sold that did not function properly. The seller attempted to repair, eventually replaced the computer, and when the replacement malfunctioned, attempted more repairs. Finally the buyer sued and the seller asserted the statute of limitations. On the issue of whether attempts to repair tolled the statute of limitations, the magistrate applied Michigan law pursuant to the parties' agreement and granted summary judgment for the seller. The district court rejected this part of the magistrate's report and applied the law of the forum state, Nevada, which the court found tolled the statute for repair attempts.\textsuperscript{7} The court did, however, enforce that portion of the parties' agreement, sanctioned by U.C.C. section 2-725(1), that reduced the period of limitation from four to two years.\textsuperscript{8}

In \textit{Cherry Creek Dodge, Inc. v. Carter},\textsuperscript{9} the Wyoming Supreme Court decided a choice of law question in the context of an article 2 priority dispute. The buyers, residents of Wyoming, telephoned a Colorado car dealer (Executive Leasing) and negotiated the purchase of a 1985 Dodge Ramcharger. The car dealer purchased the automobile from its supplier, another Colorado car dealer (Cherry Creek Dodge), which knew that the car was being purchased for resale. Payment to the supplier was by bank draft. The supplier retained the manufacturer's certificate of origin until the draft cleared.\textsuperscript{10} The seller delivered the car to the buyers in Wyoming and received payment there. Subsequently, the bank draft given by the seller to its supplier was dishonored. The supplier then sued the buyers in Wyoming to replevy the car. There was a true choice of law question for, under Colorado law, the supplier would win,\textsuperscript{11} while under the

\begin{itemize}
\item \textsuperscript{5} \textit{Id.} \textsuperscript{§} 142. If the forum state determines that the applicable state's substantive law has a statute of limitations that bars the right, not merely the remedy, then that statute of limitations is considered to be substantive and the forum state should apply it, rather than its own. \textit{Id.} \textsuperscript{§} 143 comment c (when a statute of limitation bars the right not just the remedy). See \textit{Johansen v. E.I. du Pont de Nemours & Co.}, 810 F.2d 1377, 3 U.C.C. Rep. Serv. 2d (Callaghan) 142 (5th Cir. 1987) (applying these rules to the Texas U.C.C. warranty statute of limitations).
\item \textsuperscript{6} 648 F. Supp. 1148, 3 U.C.C. Rep. Serv. 2d (Callaghan) 646 (D. Nev. 1986).
\item \textsuperscript{7} See infra notes 246-49 and accompanying text for a discussion of this part of the court's opinion.
\item \textsuperscript{8} Presumably, the reason is that U.C.C. \textsuperscript{§} 2-725(1) is part of the statute of limitations law of the forum state, Nevada.
\item \textsuperscript{9} 733 P.2d 1024, 3 U.C.C. Rep. Serv. 2d (Callaghan) 1791 (Wyo. 1987).
\item \textsuperscript{10} The supplier's retention of the manufacturer's statement of origin apparently was done with the intention of retaining title in the supplier until the draft cleared. Cf. \textit{Epling, Priorities Disputes in Motor Vehicles and Other Certificated Goods}, 41 Bus. Law. 361, 362 (1986). See U.C.C. \textsuperscript{§} 1-201(37) (this may be sufficient to create a security interest but not to perfect it).
\item \textsuperscript{11} \textit{Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank}, 519 P.2d 354, 14 U.C.C. Rep. Serv. (Callaghan) 40 (Colo. 1974). The court acknowledged that when the seller purchases goods and pays by check, he acquires a voidable title to the goods. U.C.C. \textsuperscript{§§} 2-511(3), 2-403(1)(b). Under
prevailing rule that the court adopted for Wyoming, the buyers would win. To resolve the choice of law question, the court, after noting the absence of agreement by the parties, applied the "appropriate relation" test of U.C.C. section 1-105(1) and concluded that the forum state, Wyoming, satisfied this test. In so concluding, the court relied upon an earlier Wyoming case and the fact that the negotiations, delivery, and payment in the sale to the buyers all occurred in Wyoming to find that the situs of this sale was in Wyoming. Therefore, the court applied Wyoming law to resolve the dispute.

**THE INTERACTION OF TORT AND CONTRACT: ECONOMIC LOSS**

Plaintiffs who sue in tort for purely economic loss have trouble recovering. Many courts continue to adhere to the view that contract-based law, such as the U.C.C. warranty provisions, rather than tort law, is the appropriate system for compensating economic losses caused by defective goods. These courts find the realm of tort law to be compensation for personal injury and property damage. Consequently, two cases denied recovery to plaintiffs suing in tort to recover solely for damage to the goods themselves. In *Aloe Coal Co. v. Clark Equipment Co.*, the Third Circuit Court of Appeals, applying Pennsylvania law, denied recovery to a plaintiff suing in negligence. The plaintiff sought the replacement cost of a tractor shovel destroyed by a fire allegedly caused by a defect in the tractor. The court concluded that this sort of loss was purely economic and that contract-based U.C.C. warranty law, not tort law, was appropriate.

A similar result obtained in *Florida Power & Light Co. v. Westinghouse Electric Corp.* A utility company had sued the manufacturer of leaky steam generators in negligence and for breach of warranty for the costs incurred to the Code, a person with voidable title can convey a good title to a good faith purchaser for value. U.C.C. § 2-403(1). Thus, the buyer ordinarily would prevail against the unpaid supplier. In *Guy Martin*, however, the court relied on a provision of the Colorado Certificate of Title Act to decide that no interest in the auto passed to the seller until he received a certificate of title from the supplier. Thus, under Colorado law, the buyers in *Cherry Creek Dodge* would not have prevailed because neither they nor the seller had received a certificate of title for the car.

12. See infra notes 111-13 and accompanying text.
14. The court did not describe the negotiations that occurred in Wyoming. Earlier in its opinion, it refers to telephone negotiations between the Wyoming buyers and the Colorado seller.
15. The court's result seems consistent with Restatement (Second) of Conflict of Laws § 245 (1971) (law of location of goods at time of subsequent sale controls).
18. There was no relevant decision of the Pennsylvania Supreme Court. Thus, the Third Circuit had to predict how that court would decide the question.
19. 510 So. 2d 899, 3 U.C.C. Rep. Serv. 2d (Callaghan) 1759 (Fla. 1987).
repair the generators. The Florida Supreme Court ruled that the negligence claim could not succeed because the loss for which compensation was sought was purely economic.  

Even when plaintiffs sue in warranty for purely economic loss, they often encounter difficulties. In Szajna v. General Motors Corp., the Illinois Supreme Court held that the non-privity plaintiff, a subpurchaser, seeking damages in warranty from a manufacturer for economic loss only, could not recover under that state's version of the Code. However, it did permit the plaintiff to recover under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson-Moss Warranty Act") because the manufacturer had given a written warranty. The purchaser of a new automobile commenced a class action against the manufacturer when he learned that he and others had purchased Pontiac Venturas equipped with Chevette transmissions. The primary claim was that the automobiles breached the implied warranty of merchantability under U.C.C. section 2-314 and under section 110d of the Magnuson-Moss Warranty Act. The manufacturer pleaded lack of privity as a defense. As to the Code-based implied warranty, the court held that, without privity, there could be no recovery for purely economic loss. Illinois has adopted alternative A to U.C.C. section 2-318, which does not abolish privity for a subpurchaser of the goods. The court noted that it had previously abolished privity for implied warranty suits seeking compensation for personal injuries, but it refused to do so where the damages were purely economic. The court then found that the Magnuson-Moss Warranty Act overrides state law privity requirements for both express and implied warranties where the manufacturer has given a written warranty. Since the manufacturer had given a written warranty, the court concluded that the Magnuson-Moss Warranty Act applied and that the plaintiff could recover purely economic loss for breach of the implied warranty of merchantability without showing privity.


25. The court declined to follow, by analogy, its extension of the implied warranty of habitability to subpurchasers of a house.

26. The reasoning is somewhat complex. The clearest explanation is in Schroeder, Private Actions Under the Magnuson-Moss Warranty Act, 66 Calif. L. Rev. 1, 16-17 (1978).

27. The plaintiff's other claims were based upon the description of the automobile, "1976 Pontiac Ventura," as either an express warranty that the automobile would contain a transmission designed and built for it, or a representation to that effect which the manufacturer knew to be untrue and which, therefore, was fraudulent. The court held that such a description was neither an express warranty nor a representation about the nature of the automobile's components.
ARTICLE II—SALES OF GOODS

CONTRACT FORMATION AND TERMS

Statute of Frauds

Each year it becomes more apparent that the U.C.C. does not exist in a statutory vacuum. Other statutes often impinge on transactions covered by the U.C.C., sometimes in a significant way. 28 Rajala v. Allied Corp. 29 posed the question whether, under New York law, a writing that met the requirements of U.C.C. section 2-201 also had to satisfy New York's more stringent non-Code statute of frauds if the alleged contract could not be performed within one year. 30 The buyer's trustee in bankruptcy produced a written memorandum indicating that a contract for sale was made and contained a quantity term, but the memorandum omitted any reference to the price, time and place of payment or delivery, and the general quality of the goods. Adopting the reasoning of the Sixth Circuit in Roth Steel Products v. Sharon Steel Corp., 31 the court found that since the two statutes presented an irreconcilable conflict, the special statute, U.C.C. section 2-201, must be deemed controlling.

Without regard to the correctness of the result, 32 the vacuousness of the court's reasoning is striking. For one thing, the purported conflict between the two statutes did not necessarily exist. The requirements of the so-called "general statute" are indeed more exacting, but more exacting is not conflicting. It is certainly reasonable to assume that most written contracts would satisfy both statutes. Moreover, the court ignored whatever policy reasons exist for a more rigorous statute of frauds where a contract cannot be performed within one year. 33 It may be that, when these reasons are considered, the result in Rajala is

30. New York's non-Code statute requires all material terms of the contract to be in writing. N.Y. Gen. Oblig. Law § 5-701 (McKinney Supp. 1988). In contrast, U.C.C. § 2-201 mandates no more than a signed writing sufficient to indicate that a contract was made and that contains a quantity term, because the contract is not enforceable beyond the quantity stated.
31. 705 F.2d 134, 35 U.C.C. Rep. Serv. (Callaghan) 1435 (6th Cir. 1983). The court in Roth stated:

Generally, when an irreconcilable conflict exists between a special statute and a general statute, the special statute prevails as an exception unless the legislature has expressly manifested a contrary intent. [U.C.C. § 2-201] is a special legislative attempt to tailor the statute of frauds to the unique characteristics of a commercial sales transaction.

Id. at 141, 35 U.C.C. Rep. Serv. (Callaghan) at 1445.
32. In reaching its conclusion, the court ignored persuasive authority to the contrary. See, e.g., E. Farnsworth, Contracts § 6.2 (1982); R. Nordstrom, Law of Sales § 28 (1970).
33. It has been said that "the design of the statute was, not to trust to the memory of witnesses for a longer time than one year." Smith v. Westfall, 1 Ld. Raym. 316, 317, 91 Eng. Rep. 1106, 1107 (K.B. 1697). One commentator, however, has remarked that "of all the provisions of the statute, it is the most difficult to rationalize." E. Farnsworth, supra note 32, § 6.4, at 391.
bad policy. Finally, what makes one statute general and another special? Could not section 2-201 be the general statute, applicable to the larger class of all contracts for the sale of goods for the price of $500 or more, while section 5-701 is the special statute, applicable to the much smaller class of contracts that take in excess of one year to perform?

A related matter is the frequently litigated issue of whether the contract in question is a “contract for sale” that is covered by the U.C.C. An interesting case, not involving the all too common sale-or-service conundrum, is Continental Can Co. v. Poultry Processing, Inc. Continental had agreed to supply Mendromak Canning Company with all the cans Mendromak required. When Continental became concerned about Mendromak’s ability to meet its obligations, Mendromak assigned the contract to the defendant, Poultry Processing, Inc., a related company. When sued by Continental to recover the purchase price of cans shipped to Mendromak, Poultry raised the statute of frauds, asserting the absence of written evidence that it had accepted the assignment of the contract. Although Poultry admitted the assignment, it argued that the transaction was not covered by section 2-201, hence, the judicial admissions exception did not apply.

In an opinion commendable for its pragmatism, the court thought it unnecessary to decide whether an assignment is a contract for sale within the meaning of section 2-201. As the court saw it, “the purpose of any statute of frauds is satisfied by defendant’s admission.” Once the contract is admitted, all of its terms, except for quantity, then become fair game for proof by either party.

Barbara v. Ross v. Lifetime Doors, Inc. is an example of the lengths to which some courts will go to find a sufficient writing. The buyer alleged that the seller had breached a requirements contract. The only written evidence of a contract mustered by the buyer were the seller’s sales brochures that promised new purchasers “continuous production availability ... in full proportion to

34. The U.C.C. contains no complete definition of the term “contract for sale” but does provide that it “includes both a present sale of goods and a contract to sell goods at a future time.” U.C.C. § 2-106(1). A “sale,” in turn, is defined as “the passing of title from the seller to the buyer for a price (section 2-401).” Id.


37. U.C.C. § 2-201(3)(b) provides:

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

....

(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 ....

If U.C.C. § 2-201 did not apply, then Me. Rev. Stat. Ann. tit. 33, § 51 (1978), would. But the latter statute does not contain an exception for admissions to the court.

38. 649 F. Supp. at 574, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 38 (emphasis added).

monthly needs,” ensuring that purchasers could “order flexible quantities” in shipments of a “desired number.” According to the Fourth Circuit, these written brochures were enough to permit proof that an oral agreement to form a requirements contract had been reached. The brochures met the signature requirement because the seller’s trademark appeared on the brochures and their reference to meeting the purchaser’s needs was a definite enough quantity term. But are sales brochures “sufficient to indicate that a contract for sale was made”? Despite what the Fourth Circuit said, it is hard to believe they are. In any event, sellers must now be cautioned that when they give away sales literature they may also give away the protection of U.C.C. section 2-201.

*Gestetner Corp. v. Case Equipment Co.* explored several of the statutory exceptions to the signed memorandum requirement of U.C.C. section 2-201(1). Case discovered that Gestetner’s stencil duplicators, with some modification, were suitable for use as part of a color transfer printing process Case had developed. Accordingly, Case contacted Gestetner about modifying and then selling its stencil duplicators as part of Case’s effort to market this process. As a result, Gestetner began to sell stencil duplicators, parts, and supplies to Case. Soon, however, the relationship soured. Gestetner brought suit against Case for goods sold and delivered and not paid for; Case counterclaimed for, among other things, breach of contract.

The First Circuit affirmed the district court’s decision that Case had successfully overcome the lack of a written contract and proved that Gestetner had established Case as the sole distributor of Gestetner equipment adapted to the color transfer printing process developed by Case. The circuit court held that the contract was enforceable pursuant to U.C.C. sections 2-201(2) and 2-201(3)(b). The admission occurred, first, when Gestetner alleged “an agreement” with Case in its complaint and, second, when Gestetner’s president testified that he knew Case would modify the Gestetner duplicators, rebox them, and market them under a different name, and that Gestetner’s relationship with Case was unique. The confirmatory memorandum was a letter sent from Case to Gestetner which stated that Case looked forward “to its continuing role as exclusive dealer for Gestetner.”

40. See U.C.C. § 1-201(39) (“‘Signed’ includes any symbol executed or adopted by a party with present intention to authenticate a writing.”).
41. See also American Original Corp. v. Legend, Inc., 652 F. Supp. 962, 964, 3 U.C.C. Rep. Serv. 2d (Callaghan) 65, 67 (D. Del. 1986) (holding that an agreement to sell “all surf clams” was a valid output contract and, as such, contained a quantity term sufficient for the purposes of the statute of frauds).
42. U.C.C. § 2-201(1).
43. 815 F.2d 806, 3 U.C.C. Rep. Serv. 2d (Callaghan) 1328 (1st Cir. 1987).
44. U.C.C. § 2-201(2) provides:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

45. See supra note 37.
The court next considered whether the absence of an express reference to the quantity of goods to be sold in either the letter or the admission evidence precluded recovery. Discussing the interplay between U.C.C. sections 2-201 and 2-306, the court held that the reference to Case's role as exclusive dealer for Gestetner was a sufficient quantity term to meet the technical statute of frauds requirement. 46

**Battle of the Forms**

U.C.C. section 2-207 does not apply if one party assents to the other's terms, as by signing the other's form. 47 When neither party has signed the other's form, one must grapple with that section, an enigma of statutory drafting.

U.C.C. section 2-207 expressly provides three routes to contract formation, and each route has its own procedure for determining the terms of the contract. The first route involves written confirmation of an informal agreement. Here the parties have, prior to their exchange of written forms, reached an informal agreement, usually by telephone. Each party intends its form to confirm this informal agreement, yet the forms also often contain terms not discussed. 48 When this happens, there is a contract based on the previous informal agreement; the fact that the confirmations do not match cannot undo the fact that the parties previously agreed. 49 The terms of the contract consist of the terms of the informal agreement, the terms on which the confirmations agree, and terms supplied by the Code including subsection 2-207(2). 50 The second route is contract formation by the exchange of forms where there is no prior informal agreement. Rather, the first form received is an offer and the second form, sent in response to the first, is an acceptance of that offer. 51 U.C.C. section 2-207(1) requires that the response to the offer be a “definite and seasonable expression of acceptance,” but the response need not precisely mirror the offer to satisfy that requirement. The drafters intended that the response could contain “minor suggestions or proposals” not in the offer and still be such an acceptance. 52 If


51. U.C.C. § 2-207 comment 1.

52. U.C.C. § 2-207(1) & comment 1. The drafters' intent seems to have been to adopt the common law line of cases deciding that a response stating that it was an acceptance, but indicating that additional minor terms were to be part of the contract, was an acceptance of the offer's terms plus a proposal to modify the resulting contract by including the minor terms contained in the acceptance. Cf. Second Draft of A Revised Uniform Sales Act, Alternative Section 3-H and Comment 80 (Dec. 1941), reprinted in 1 ALI & NCCUSL, Uniform Commercial Code Drafts 360 (1984); Lecture by Robert C. Braucher, Article 2—Sales (Feb. 1958), reprinted in ALI & A.B.A.,
there is such an acceptance with minor proposals then, unless the acceptance is expressly conditioned upon the offeror's assent to the proposals, there is an acceptance of the offer and a contract on the terms of the offer. The additional terms in the acceptance are proposals for addition to the contract and can become part of the contract under subsection 2-207(2) or if the offeror expressly agrees to them. The Code will supply additional necessary terms. The third route is where the parties had no informal agreement and the exchange of forms did not produce a contract under subsection 2-207(1), but nevertheless the seller ships and the buyer accepts the goods. Here a contract is implied from the conduct of both parties. The contract terms consist of those terms on which the forms agree together with supplementary terms provided by the Code. Courts sometimes confuse these routes.

The most glaring example of confusion this year was Skyline Steel Corp. v. A.J. Dupuis Co. A subcontractor on a building project (Dupuis) purchased a quantity of steel sheet piling and leased an additional quantity of such piling. A series of telephone conversations between the parties culminated in two oral contracts, one for the sale and the other for the lease. The seller/lessor (Skyline) confirmed each contract with a written invoice sent to the buyer/lessee. The buyer/lessee took delivery of the piling and later refused to pay in accordance with the invoices. The seller/lessor filed suit and the buyer/lessee counterclaimed. The court gave judgment for the seller/lessor on both its claim and the counterclaim.

Although this decision may be correct on the facts of this case, the analysis is confusing. The buyer/lessee raised the section 2-207 issue by defending on the ground that it had not agreed to several terms in the seller/lessor's invoices: i) the payment term, ii) the initial rental payment provision, iii) the liquidated damage clause, and iv) the interest on overdue payments provision. The court concluded that each term was part of the contract. As to the first three terms, it found that the buyer/lessee had agreed to these terms as part of the oral contract. Even if it had not so agreed, the court reasoned that the terms were part of the contract under subsection 2-207(2) because the buyer/lessee was a merchant and had neither objected in writing to the terms within a reasonable time after receipt of the invoices nor alleged that the terms materially altered the contract. In support of its conclusion that failure to object permitted the terms to


53. U.C.C. § 2-207(2).
54. U.C.C. § 2-207 comment 3.
56. U.C.C. § 2-207(3) & comment 7.
57. Id.
be part of the contract, the court did cite U.C.C. subsection 2-207(2)(c), though
it relied primarily on subsection 2-201(2). Subsection 2-201(2), unlike subsec-
tion 2-207(2)(c), requires objections to be in writing. The court, therefore,
disregarded testimony that the buyer/lessee orally had objected to the terms in
the invoice. 60 Here the court erred. The effect of a failure properly to object
under subsection 2-201(2) is merely to take away a statute of frauds defense;
U.C.C. subsection 2-207(2), not subsection 2-201(2), then governs whether
terms are part of the contract. 61 The oral objection did satisfy subsection 2-
207(2)(c). Thus, the terms should not have become part of the contract under
section 2-207.

The court compounded its error by applying the parol evidence rule to the
case. The buyer/lessee alleged that the payment term orally agreed to was not
the payment term in the invoice. The court, apparently taking the invoice as a
"writing intended by the parties as a final expression of their agreement," 62
disregarded, under the parol evidence rule, testimony that a different payment
term had been agreed to. Though the court did not explain why the invoice was
a final expression of the parties' agreement, its citation to a pre-Code case 63
indicates the court may have concluded that the buyer/lessee's failure to object
to the invoice in writing (even though an oral objection was alleged) rendered it
a final expression. Neither the Code nor policy supports such a result. Where
the issue is whether an invoice is a final expression, proof of an oral objection to
the writing for failing to reflect the agreement is precisely the kind of evidence
courts need to consider. Perhaps the court really did not believe that the parties
had discussed or agreed to a payment term different than that contained in the
invoice. In that event, since the case was tried without a jury, the court should
have so found, rather than apply the parol evidence rule to disregard the
testimony.

Brevel Motors, Inc. v. Vendo Co. 64 illustrates both a common misconception
about subsection 2-207(1) definite expressions of acceptance and a pitfall for the
seller in the manner in which the section determines the terms of the contract.
The buyer (Vendo) sought an additional supply source for motors to be used in
its vending machines. The buyer submitted designs and plans to the seller
(Brevel) and tested the seller's motors. In a purchase order, the buyer offered to
purchase 100,000 motors. The purchase order objected in advance to any of the

60. Id. at 366 n.3, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 484 n.3.
61. U.C.C. § 2-201 comment 3. U.C.C. § 2-207 comment 6 was amended in 1966 specifically to
emphasize this distinction, although the Michigan law applied to this case enacted the U.C.C.
before this amendment. Consequently, the amendment does not appear in Michigan's version of the
63. In the case cited, Watson-Higgins Milling Co. v. Graczyk, 253 Mich. 175, 234 N.W. 132
(1931), the court reasoned that an invoice was a final expression because the recipient did not object
to it.
64. 3 U.C.C. Rep. Serv. 2d (Callaghan) 1347 (D.N.J. 1986).
seller’s terms differing from those in the purchase order. The purchase order also provided that the seller would indemnify the buyer against all liability for damages incurred by the buyer for defective goods. The seller responded with an acknowledgment stating “we accept this order based on the following interpretation and terms.” The acknowledgment also contained a provision limiting the buyer’s damages to the original selling price and disclaiming liability for consequential damages.

Subsequently, the buyer requested and the seller shipped the first batch of motors. A dispute arose over the quality of the motors. The seller sued for the price and other damages. The buyer counterclaimed for damages including consequential damages, prompting the seller to move for partial summary judgment dismissing the buyer’s counterclaims on the ground that the seller’s disclaimer of liability for consequential damages was part of the contract. The court denied the motion, finding that the consequential damages liability disclaimer was not part of the contract. The court formed the contract under subsection 2-207(1), presumably concluding that the seller’s acknowledgment was a definite expression of acceptance not expressly conditioned upon the buyer’s assent to the seller’s terms.

This conclusion illustrates a common misconception about subsection 2-207(1) definite expressions of acceptance. The common misconception is that the typical acknowledgment form that agrees with the offer on the dickered terms but varies from the offer’s boilerplate terms in its own boilerplate is an acceptance of the offer under subsection 2-207(1) unless there is language in the acknowledgment expressly conditioning acceptance on assent to the terms of the acknowledgment. In effect, this kind of typical response is treated as a definite expression of acceptance. Yet, this is not what the drafters of the section intended. The drafters intended to treat as a definite expression of acceptance only a response with minor suggestions, because it could reasonably be interpreted as an acceptance of the buyer’s offer with a proposal to modify the ensuing contract by including the minor suggestions. A response to an offer that significantly varies the offer, either in dickered terms or boilerplate, is not a definite expression of acceptance. In Brevel Motors, the seller’s acknowledgment was such a response. Thus it was not a definite expression of acceptance.

65. "ANY ACKNOWLEDGMENTS which take exceptions to the terms specified on the face of this order, and on the back of this order, will not be considered as binding upon the Buyer unless such changes are agreed to by Buyer in writing." Id. at 1348.
67. See supra note 52.
68. Support for the view that a response substantially different in boilerplate from the offer can be an acceptance under § 2-207(1) usually is based on § 2-207(2)(b). That subsection provides that terms which materially alter the contract cannot become part of the contract. Thus, it is argued, the drafters foresaw that some contracts could be formed when a response materially altered the offer it accepted. In fact, this was not the drafters’ intent. The material alteration test is contained in § 2-207(2) to cover contracts based on informal agreement when the subsequent written confirmations vary substantially from the informal agreement. In this situation, the parties clearly had a deal and
Furthermore, the court could have interpreted the seller's acknowledgment to be expressly conditional upon assent to the seller's terms so that it was not an acceptance. Under either approach, there is no contract under subsection 2-207(1). There is, however, a contract under subsection 2-207(3), since the buyer requested, the seller shipped, and the buyer accepted part of the goods.

Regardless of whether the contract is formed under subsection 2-207(1) or (3), the seller's consequential damage liability disclaimer is not part of the contract. If the contract were formed under either subsection, the seller's disclaimer could be part of the contract only under subsection 2-207(2) or through trade usage, course of dealing, or course of performance. Under the facts of this case, the disclaimer cannot come in under subsection 2-207(2), because the buyer had objected both generally and specifically to the seller's disclaimer. The general objection under subsection 2-207(2)(a) is the purchase order provision that changes in the purchase order terms are not binding unless the buyer agrees to them in writing. The specific objection is implied from the fact that a provision in the purchase order would make the seller liable without limitation, the direct conflict between this provision and the seller's disclaimer constitutes an objection under subsection 2-207(2)(c). Since no evidence of a trade usage, course of dealing, or course of performance excluded liability for consequential damages, the seller's disclaimer did not become part of the contract.

This case also illustrates a pitfall for the seller in the manner that section 2-207 determines the contract's terms. If the buyer includes in his form a provision objecting generally to all terms other than those in his form, he is guaranteed that, if a contract is formed, he will have the benefit of the Code's gap fillers as they may be modified by trade usage, course of performance, or course of dealing. These gap fillers favor the buyer; for example, they give him the only question is the exact terms. Thus, in early drafts of this section, before the definite expression of acceptance and written confirmation routes were combined into one subdivision, the material alteration test applied only to the written confirmation route. See, e.g., Revised Uniform Sales Act, Third Draft, 1943:

SECTION 20. ADDITIONAL TERMS IN ACCEPTANCE OR CONFIRMATION.

(1) Where a definite expression of acceptance is accompanied by additional terms it shall be construed in case of doubt as constituting an acceptance accompanied by proposals for modification or addition.

(2) Where a contract for sale is followed within a reasonable time by a written confirmation stating terms additional to those originally agreed upon

(a) such additional terms are to be construed as proposals for modification or addition; and

(b) between merchants such additional terms, subject to the requirements of Section 24 with respect to unconscionable contracts, become part of the contract if they do not alter the essential terms and are not objected to within a reasonable time.


70. None of the seller's terms can become part of the contract. U.C.C. § 2-207(2)(a). Even if the buyer's terms are not part of the contract, the resulting gaps are filled with such terms as the Code supplies. U.C.C. § 2-207(3) & comment 6.
full warranty protection for all his injuries. Often this protection is more than a willing seller will give. Yet, short of getting the buyer's specific assent, the seller can do little to avoid the gap fillers. If he merely sends back his form containing his own terms and appropriate protests, and later he ships the goods and the buyer accepts them, the contract will consist of the terms on which the forms agree, together with the gap fillers. Short of refusing to ship until the buyer specifically assents to his terms, the seller cannot avoid the gap fillers. Thus, the moral of section 2-207 is *caveat venditor*.

*Maxon Corp. v. Tyler Pipe Industries* illustrates how section 2-207 often can make an easy decision difficult. The buyer (Tyler) sent a purchase order to the seller (Maxon) for two “pre-mix blower-mixer” units (“mixers”). The purchase order contained a provision stating that conditions in the seller’s acknowledgment that conflicted with the buyer’s terms were not binding unless accepted by the buyer in writing. It also contained a seller’s warranty against defects. The seller’s acknowledgment contained a buyer indemnity provision in favor of the seller; it also was expressly conditioned on the buyer’s assent to the seller’s terms. The goods were shipped and accepted. One of the mixers exploded, injuring the buyer’s employee. The employee sued the seller. The seller settled this suit. It then sued the buyer based on the indemnity clause in its acknowledgment. The trial court granted the buyer’s motion for summary judgment.

The decision was affirmed on appeal. On these facts, there was a contract under subsection 2-207(3), and the issue was whether the seller’s indemnity provision was part of the contract under subsection 2-207(2). The seller argued that whether the indemnity provision did not materially alter the contract under subsection 2-207(2)(b) and thus could be part of the contract, was a question of fact which could not be resolved by summary judgment. The court found the question to be one of law. The trial court could have placed its decision on firmer ground, making the court of appeal’s affirmance easier, by finding, as did the court in *Breve! Motors*, that the provision in the buyer's purchase order requiring the buyer’s written assent to the seller’s terms was a general objection to the seller’s terms under subsection 2-207(2)(a). In this view, the seller’s term was not part of the contract regardless of whether or not it was a material alteration.

71. U.C.C. §§ 2-312 to -315, 2-714, 715.
72. U.C.C. § 2-207(3)
73. The best the seller could do would be to prove a trade usage, course of dealing, or course of performance inconsistent with the relevant gap filler. In such a situation the gap fillers yield, because they apply only in the absence of agreement, and trade usage, course of dealing, and course of performance are part of the parties' agreement. U.C.C. § 1-201(3) & comment 3 (definition of "Agreement"); U.C.C. § 1-205 comment 4 (gap fillers yield to usages of trade).
75. Although this court cited authority for its conclusion, id. at 577, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 61, courts generally find the issue of material alteration to be a question of fact. See 2 R. Anderson, Uniform Commercial Code § 2:207:20 (3d ed. 1982 & 1987 Cum. Supp.).
The appellate court, in dictum, found the indemnity provision to be unenforceable because it was unconscionable under U.C.C. section 2-302, even if it were part of the contract. If found procedural unconscionability because the provision appeared at the very end of a long paragraph titled "Warnings and Covenants," the first two thirds of which dealt with installation and maintenance of the mixers. It found substantive unconscionability based upon Indiana public policy, manifested in its products liability statute, to prohibit the manufacturer of defective goods from shifting the risk of liability to others. 76

As the cases in this section illustrate, courts mostly arrive at fair results, although section 2-207 is so unhappily drafted that the courts' task in explaining their results is unduly complicated.

WARRANTIES

General

The sale of goods ordinarily carries with it the seller's warranty of title. 77 In Frank Arnold Contractors v. Vilsmeier Auction Co., 78 Pennsylvania law was applied to hold that the warranty of title is breached if the buyer is sued by someone claiming the goods, even if the claim is invalid, so long as it was a "substantial shadow" on the buyer's title.

An auctioneer (Vilsmeier) sold a hydraulic excavator on behalf (apparently) of its owner McGinn. The auctioneer announced that the equipment was free of any liens, encumbrances, or security interests. In fact, a secured party (ITT) claimed a perfected security interest in the excavator. The buyer (Arnold) purchased the excavator at the auction and began to use it. Subsequently, the secured creditor sued the buyer for possession of the excavator, and on advice of counsel, the buyer surrendered the excavator. The buyer then sued the auctioneer for breach of its warranty of title. The district court directed a verdict for the buyer on the liability issue. The jury then assessed damages.

On appeal, the auctioneer asserted that the directed verdict on liability was improper. It argued that there was a jury question as to the validity of the security interest and that this question precluded the directed verdict. The district court had determined that the validity of the security interest was irrelevant. 79 The Third Circuit agreed. Citing a long list of cases, the court predicted that Pennsylvania would adopt the rule that, so long as the third party claim was a "substantial shadow" on the buyer's title, it did not matter whether

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76. The court also held, in dictum, that the indemnity provision was unconscionable. Maxon Corp. v. Tyler Pipe Indus., 497 N.E. 2d 570, 3 U.C.C. Rep. Serv. 2d (Callaghan) 52 (Ind. Ct. App. 1986).
77. U.C.C. § 2-312(1), (2).
78. 806 F.2d 462, 2 U.C.C. Rep. Serv. 2d (Callaghan) 845 (3d Cir. 1986).
79. The fact that the buyer presumably had notice of the perfected security interest was also not relevant. Under U.C.C. § 2-312(1)(b), knowledge, not notice, of the asserted encumbrance is necessary to avoid the warranty. See U.C.C. § 2-312 comment 1. "Knowledge" and "notice" are defined in U.C.C. § 1-201(25).
the claim was valid. The court then found the secured creditor’s claim to be a cloud on the buyer’s title and affirmed the directed verdict for liability.

Several cases involved the question of whether the seller’s statements, made after agreement had been reached, could constitute warranties. In Gold’N Plump Poultry v. Simmons Engineering Co., Minnesota law was applied to hold that seller’s statements after delivery, made to encourage the buyer to pay the purchase price, cannot constitute warranties. Armour Foods had purchased from the manufacturer (Simmons) two chicken processing machines. Problems with the machines ensued because Armour’s chickens were larger than the chickens for which the manufacturer had designed the machines. Armour was aware of the size problem when it purchased the machines. The manufacturer then offered to take back the machines, but Armour insisted that the manufacturer attempt to modify them. The manufacturer agreed. To induce Armour to pay the purchase price, the manufacturer sent a letter to Armour promising to refund the purchase price if the machines did not function “within reasonable tolerance.” This letter satisfied Armour and it paid the purchase price. Shortly thereafter, Armour sold its plant, including the machines, to Gold’N Plump. Although it knew of Armour’s problems with the machines, Gold’N Plump purchased them “as is” and paid Armour a sum equal to Armour’s original purchase price. For several weeks the manufacturer continued its efforts to modify the machines. Apparently the efforts were unsuccessful, for Gold’N Plump sued the manufacturer seeking a refund of the original purchase price. After a bench trial, the district court entered judgment for the manufacturer.

On appeal, the Eighth Circuit affirmed with one dissent. Gold’N Plump had failed to get an assignment of Armour’s rights against the manufacturer; thus Gold’N Plump had to argue that the manufacturer’s letter promising a refund to Armour was an express warranty of which Gold’N Plump was a third party beneficiary under U.C.C. section 2-318. The circuit court disagreed. It concluded that the manufacturer’s promise was not an express warranty because it was not made at the time of sale; the court reasoned that title passed to the buyer at this time, which was usually the time of delivery. It then ruled that, since U.C.C. section 2-318 applies only to “seller’s warranty” and since the manufacturer’s promise was not a warranty, U.C.C. section 2-318 did not

80. See 806 F.2d at 464, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 848–49 (other cases cited). See also Editor’s Note, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 845–46.


82. 805 F.2d 1312, 2 U.C.C. Rep. Serv. 2d (Callaghan) 1232 (8th Cir. 1986).

83. Minnesota basically has enacted alternative C to U.C.C. § 2-318, Minn. Stat. Ann. § 336 2-318 (West Supp. 1987). However, the Minnesota version cannot be excluded or limited under any circumstances.

84. The court based its reasoning upon the definition of “sale” in U.C.C. § 2-106(1).
apply. Thus Gold'N Plump could not assert a right of refund under the manufacturer's letter.

In the dissent, Judge Heaney argued that there was no requirement that statements be made before or at the time of sale to constitute warranties. He would have held the promise of a refund to be a warranty and Gold'N Plump to be a third party beneficiary of that warranty under U.C.C. section 2-318.

The circuit court's decision that statements made after delivery of the goods cannot be warranties seems unduly restrictive. U.C.C. section 2-313(1) does not explicitly impose a temporal element for statements to qualify as warranties, though many courts find a temporal element in the requirement that express warranties be part of the "basis of the bargain." Clearly the drafters intended that statements made after the deal had been closed could be warranties. But how soon after? The following analysis provides a partial answer to this question. There are two essential elements to the contract of sale: the seller's obligation to deliver conforming goods and the buyer's obligation to accept and pay for these goods. If statements made to induce the buyer to take delivery are warranties, then statements made to induce the buyer to pay the purchase price should also be warranties. In both cases, the statements are made to induce the buyer to perform his essential obligations. In a sense, these statements are part of the "basis of the bargain." If the statements are made after the original deal has been negotiated so that they are not part of that deal, the comments state that the statements become a modification of the original deal. The statements are thus part of the basis of the modified bargain and so are warranties. In essence then, the question should not be whether the statements are made after delivery but whether the statements may fairly be regarded as modifications of the original contract. If so, they are enforceable without consideration and can be warranties. Statements made to induce a buyer to perform its essential obligations under a deal clearly qualify under the foregoing test. Thus, in Gold'N Plump, the manufacturer's promise of a refund that induced the buyer to pay the purchase price would seem to be a warranty and, as such, Gold'N Plump should be able to recover on it pursuant to U.C.C. section 2-318.

86. U.C.C. § 2-313 comment 7.
87. It also may have the undesirable effect of making the issue of whether after-sale statements are warranties turn on title questions. One of the express purposes of article 2 was to minimize the significance of title. U.C.C. § 2-401 preamble & comment 1. See also U.C.C. § 2-101 comment; infra note 148.
88. U.C.C. § 2-301.
89. U.C.C. § 2-313 comment 7.
91. U.C.C. § 2-209(1). The modification must be sought for a legitimate commercial reason to be enforceable without consideration. U.C.C. § 2-209 comment 2.
Moldex, Inc. v. Ogden Engineering Corp.\textsuperscript{92} is another case involving after-deal statements. The case involved a contract for the sale of oriented nylon. After partial delivery, the buyer inquired of the seller whether dyeing the nylon would change its properties and was told it would not. The buyer then took delivery of additional nylon. When a customer of the buyer claimed the nylon was defective, the buyer refused to pay the seller and the seller sued.\textsuperscript{93} One of the buyer's defenses was breach of express warranty based upon the seller's statement that dyeing would not change the properties of the nylon. On the seller's motion for summary judgment, the court ruled that if the statement were not a warranty, it could still be enforceable as a modification of the original deal. Concluding that whether the statement was enforceable was a jury question, the court denied the summary judgment motion.\textsuperscript{94}

Ingram River Equipment v. Potts Industries\textsuperscript{95} considered the relationship between the implied warranties of merchantability and fitness for a particular purpose where the seller submitted construction plans for the goods sold to the buyer. The buyer (Ingram, a barge operator) contracted with the seller (Potts, a boat builder) for four barges equipped with a steam-coil system that facilitated unloading by heating heavy liquid cargo. The seller submitted plans for the barges including the steam-coil system to the buyer and the buyer approved them. The seller expressly warranted that the barges would conform to the plans.\textsuperscript{96} After taking delivery of the barges, the buyer discovered leaks in the steam coils caused by residual water collecting at low points in the coils, freezing and splitting the coils. The buyer sued the seller alleging negligent design, strict liability in tort, breach of the implied warranties of merchantability and fitness for a particular purpose, and breach of an oral express warranty.\textsuperscript{97} The district court gave judgment for the buyer on the negligent design and breach of implied warranty of fitness for a particular purpose.\textsuperscript{98} It rejected the warranty of merchantability theory on the ground that the seller's express warranty that the

\textsuperscript{92} 652 F. Supp. 584, 3 U.C.C. Rep. Serv. 2d (Callaghan) 572 (D. Conn. 1987).
\textsuperscript{93} In a related state court suit, the buyer's customer sued the buyer, who then vouched in the seller. The court found the buyer liable to its customer and the seller liable to the buyer. Ogden Health Pros. v. Ogden Eng'g Corp., Civ. No. C-84-198 (Ind. Cir. Ct. Mar. 18, 1985) (findings of fact and conclusions of law), aff'd on other grounds sub nom. Moldex, Inc. v. Ogden Health Pros., 489 N.E.2d 130, 42 U.C.C. Rep. Serv. (Callaghan) 1304 (Ind. Ct. App. 1986).
\textsuperscript{94} The court also discussed the binding effect of the judgment in a related suit in which the buyer had vouched in the seller under U.C.C. 2-607(5). For a discussion of this point, see infra text accompanying notes 138-43.
\textsuperscript{95} 816 F.2d 1231, 3 U.C.C. Rep. Serv. 2d (Callaghan) 977 (8th Cir. 1987).
\textsuperscript{97} Id.
\textsuperscript{98} Id. The district court rejected the strict liability in tort theory because the defective design had not made the barges unreasonably dangerous. It rejected the oral express warranty theory, finding that the oral statements in question were not warranties because they were made while the barges were being built.
goods would conform to the plans displaced the warranty of merchantability. 99 Eventually the negligent design theory was rejected, 100 so that the Eighth Circuit had before it only the implied fitness warranty theory. It affirmed the district court's decision that the particular purpose warranty had been made and breached. The court concluded that the "particular purpose" which gave rise to the warranty could not be an "ordinary purpose" of the barge. 101 The court may have believed it was compelled so to conclude because the district court had found (and the buyer did not appeal) that the seller had warranted the fitness of the barge for a particular purpose but not its fitness for ordinary purposes. 102 In any event, the Eighth Circuit joined a long list of other courts in concluding that, to give rise to a particular purpose warranty under U.C.C. section 2-315, the buyer's "particular purpose" must be something other than an "ordinary purpose" of the goods. 103

99. The district court cited comment 9 to U.C.C. § 2-316 and § 2-317(c) to support its conclusion. Comment 9, however, analyzes the situation in which the buyer furnishes the plans to the seller. In that circumstance, there is no implied warranty of fitness for a particular purpose, presumably because the buyer has not relied upon the seller. Nor is there an implied warranty of merchantability, for that warranty has been displaced under U.C.C. § 2-317(c) by the usual express warranty that the goods will comply with the plans. Under the analysis in the comment, the buyer bears the risk that the goods, if constructed in conformity to his plans, will not suit his purpose. This result is fair, since the buyer designed the goods and the seller merely followed the buyer's design. Where the seller used his own plans, as in Ingram River, and absent unusual circumstances, the seller's express warranty that the goods will conform to the design should not displace the implied warranty of merchantability. Where the seller has designed the goods, the buyer should not have the risk that the goods, if built as designed by the seller, will not be fit for their ordinary purposes. Courts agree; thus, sellers often are held liable for defective design on a theory of breach of implied warranty of merchantability. See 3 R. Anderson, Uniform Commercial Code § 2-314:83 (3d ed. 1983 & 1987 Supp.). In Ingram River, the seller designed the steam-coil system. Though the buyer approved the plans, the district court found that the buyer had no special expertise and was relying upon the seller to furnish proper plans. Thus, the court should have found that the seller made an implied warranty of merchantability for the steam-coil system it designed and built.

100. In a previous appeal, the Eighth Circuit had affirmed the district court on the negligent design theory. 756 F.2d 649 (8th Cir. 1985). The Supreme Court later decided that neither negligence nor strict liability in tort would lie where the defect caused purely economic loss such as damage to the goods sold. East River S.S. Corp. v. Transamerica Delaval, Inc., 106 S. Ct. 2295, 1 U.C.C. Rep. Serv. 2d (Callaghan) 609 (1986). Consequently, the Supreme Court vacated the Eighth Circuit's affirmance in Ingram River on the negligent design theory and remanded for further consideration. 106 S. Ct. 3269 (1986).

101. "[T]he key inquiry is ... whether the buyer's use is sufficiently different from the customary use of the goods to make it not ordinary." Ingram River Equip. v. Potts Indus., 816 F.2d 1231, 1233–34, 3 U.C.C. Rep. Serv. 2d (Callaghan) 977, 981 (8th Cir. 1987).

102. See supra note 99.

PERFORMANCE
Title, Creditors, and Good Faith Purchasers

Decisions during this last reporting period indicate a continuing tension between U.C.C. section 2-403 and state statutes that govern certificates of title and the registration of motor vehicles. An attempt to defeat the application of section 2-403 failed in Dartmouth Motor Sales v. Wilcox. Dartmouth Motor Sales sold a car to Wilcox, who purported to be a dealer but was not, and whose check subsequently bounced. Wilcox thereafter sold the car to Campbell, a dealer, who in turn sold it to Willis, a consumer. The outcome of Dartmouth’s suit to recover the car from Willis rode on whether U.C.C. section 2-403 took precedence over the New Hampshire automobile title statute.

If it did, then the case becomes classic textbook: Wilcox’s fraudulent purchase resulted in his receiving voidable title and when he transferred the car to Campbell, a good faith purchaser, that title ripened into a good title that was later transferred to Willis. The hitch, however, was that because Wilcox was mistakenly treated as a dealer by both Dartmouth and Campbell, the transfer to him from Dartmouth and from him to Campbell did not comply with the title statute. What the Supreme Court of New Hampshire had to decide was whether such noncompliance voided all of the transfers including the later transfer between Campbell and Willis.

In an opinion marked by the court’s obvious objective of not letting noncompliance with a technical statute deprive an innocent party of a valuable property right, the court simply ignored the language of the title statute and held that since the transfers were made by a facially valid title certificate, section 2-403 controlled the outcome. The reason: awarding the car to Dartmouth would serve neither statute’s purpose since Dartmouth was in a better position than the others to have detected and foiled Wilcox’s scheme.

Similarly, Cherry Creek Dodge, Inc. v. Carter held that provisions of the Wyoming title statutes would not supersede the U.C.C. The buyers, residents of Wyoming, telephoned a Colorado car dealer (Executive Leasing) and negotiated the purchase of a 1985 Dodge Ramcharger. The car dealer purchased the

105. The language of the title statute leaves no room for the application of the good faith purchase doctrine embodied in U.C.C. § 2-403. See N.H. Rev. Stat. Ann. § 261:14 (1982) (“a transfer by an owner is not effective until the provisions of this section and RSA 261:19 have been complied with . . .”).
106. See U.C.C. § 2-403(1)(b), (c).
107. Id. § 2-403(1).
109. If the title certificate was facially invalid, it would make no difference which statute controlled. The recipient of such a title could hardly qualify as a good faith purchaser under U.C.C. § 2-403(1).
110. 128 N.H. at 530, 517 A.2d at 807, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 899–900.
automobile from its supplier, another Colorado car dealer (Cherry Creek Dodge), who knew that the car was being purchased for resale. Payment to the supplier was by bank draft. The supplier retained the manufacturer's certificate of origin until the draft cleared. The seller delivered the car to the buyers in Wyoming and received payment there. Subsequently, the bank draft given by the seller to its supplier was dishonored. The supplier then sued the buyers in Wyoming to repley the car.\footnote{112} Without so much as a reference to the substance of the pertinent motor vehicle statute nor even the slightest stab at analysis, the Wyoming Supreme Court summarily stated that it agreed with the majority rule that U.C.C. section 2-403 was controlling.\footnote{113}

Unfortunately, motor vehicle statutes are not the only statutes that can cause litigation over section 2-403's scope of application. Farmers Livestock Exchange of Bismarck v. Ulmer\footnote{114} involved a purported conflict between section 2-403 and a North Dakota statute governing auction sales of livestock.\footnote{115} Ulmer, a cattle buyer, purchased cattle on credit from Farmers Livestock on the false representation that he was buying on consignment for someone else. Ulmer then sold the cattle through a livestock auction market to which he was already indebted. To satisfy that debt, the proceeds of the sale were applied to Ulmer's account. For unexplained reasons, Farmers Livestock sued the auction market to recover the sale proceeds. An explanation was needed because the cattle were owned by an undisclosed third party who had consigned them to Farmers Livestock. This fact defeated Farmers Livestock's claim under the auction statute, but not before the North Dakota Supreme Court, relying on U.C.C. section 2-102, recognized that statute's supremacy over the Code.\footnote{116} The court next considered the respective rights of the parties under section 2-403 and correctly decided that the auction market lacked the status of either a buyer\footnote{117} or a purchaser.\footnote{118} What finally decided the case was the court's view that the loss should be borne by the party who best could have avoided it, Farmers Livestock. The court overlooked the obvious point that recovery from the auction market would do no more than return it to its pre-transaction position.

\footnote{112. Wyoming law is applied because Wyoming was the situs of the ultimate sale. 733 P.2d at 1027, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1794–95. But why should the place of the last sale be given more weight than the place of the fraudulent sale? For a discussion of this portion of the court's opinion, see supra notes 9–15 and accompanying text.}
\footnote{113. Although the court cites several cases representative of the majority view, 733 P.2d at 1028, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1796–97, it cites none for "the minority view followed only by Colorado and possibly Missouri." 733 P.2d at 1027, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1795. See Epling, Priorities Disputes in Motor Vehicles and in Other Certificated Goods, 41 Bus. Law. 361 (1983), for an excellent discussion of the U.C.C. and certificate of title statutes.}
\footnote{114. 393 N.W.2d 65, 2 U.C.C. Rep. Serv. 2d (Callaghan) 1194 (N.D. 1986).}
\footnote{115. See N.D. Cent. Code § 36-05-12 (1980) (providing in part that "[t]he operator of each livestock auction market . . . shall be liable to the rightful owner of any livestock sold through the auction market for the net proceeds in cash received therefor.").}
\footnote{116. U.C.C. § 2-102 expressly preserves "any statute regulating sales to consumers, farmers, or other specified classes of buyers."}
\footnote{117. See U.C.C. § 2-103(1)(a).}
\footnote{118. See U.C.C. § 1-201(33).}
Goods held on "sale or return" are subject to the holder's creditors by virtue of U.C.C. section 2-326. Consignors often seek to escape the application of this section by arguing that the consignee must be the seller of consignor's goods. In past years, most courts have been unreceptive to this argument. This year has been no different. The most interesting case in this area is *First National Bank of Blooming Prairie v. Olsen.* Cattle were delivered to a feedlot operator who was also engaged in the business of selling cattle. This bailment, however, was for the purpose of fattening the cattle, not for the purpose of sale. Notwithstanding the limited nature of the bailment, the feedlot's secured creditor sought to fatten its coffers by laying claim to the cattle. The trial court held that U.C.C. section 2-326 did not apply because the cattle were not delivered for sale. It also believed that because the secured creditor knew or should have known that a substantial number of cattle were being custom-fed it was estopped from claiming the benefits of the section.

The Minnesota Court of Appeals affirmed, but not because section 2-326 was inapplicable. The court was reluctant to treat the delivery of goods to a person who deals in like goods under a different name than that of the consignor as anything but a sale or return, regardless of the intended character of the transaction. Rather, its affirmation was based on the secured creditor's actual knowledge of the consignment. The court carefully noted that its determination did not depend upon equitable principles but was dictated by its interpretation of U.C.C. section 2-326.

This case nicely illustrates the excessive influence that ostensible ownership concerns continue to exert on courts and commentators alike. The fear that the effect of divorcing ownership from possession will somehow mislead those who come into contact with the possessor seems to be the strongest, and perhaps the only, justification for stretching U.C.C. section 2-326 so as to encompass not-for-sale bailments. But as recent scholarship suggests, such concern is based on too many untested assumptions and ignores too many competing policies to warrant the position of influence it now holds.

The related proposition that a creditor with knowledge of the consignment loses the benefits of section 2-326 is also questionable. This too assumes the

120. 403 N.W.2d 661, 3 U.C.C. Serv. 2d (Callaghan) 554 (Minn. Ct. App. 1987).
121. When a secured creditor is the claimant, U.C.C. § 2-326 must be read in conjunction with U.C.C. § 9-114.
122. This year, the same view also surfaced in Escrow Connection v. Haas, 189 Cal. App. 3d 1640, 235 Cal. Rptr. 200, 3 U.C.C. Serv. 2d (Callaghan) 547 (1987).
123. The court's conclusion is based on a misreading of U.C.C. § 2-326(3)(b). What is generally known by creditors is relevant; what is known by a particular creditor is not.
124. When stretched this far, U.C.C. § 2-326 begins to look a great deal like a creditors' version of U.C.C. § 2-403(2) (merchant has power to transfer title of entruster to buyer in the ordinary course of business).
The paramount importance of ostensible ownership concerns. However, the cost of interposing into section 2-326 litigation the issue of what each creditor knew and the distortion that different degrees of knowledge among competing creditors could have on the application of fairly predictable priority rules is not mentioned.

**TENDER, CURE, AND NOTICE**

Tender of delivery often becomes a significant event through the application of various U.C.C. sections. Regardless of the reason for the inquiry, being able to tell if and when a tender has occurred is important. Unfortunately, the Supreme Court of Nebraska's opinion in *Crowder v. Aurora Co-Operative Elevator Co.* offers very little guidance in this regard. The case involved a contract for the sale of corn that required delivery at the buyer's elevator. The trial court concluded that the seller had duly tendered and directed a verdict in his favor. According to the seller's evidence, the tender consisted of repeated communications with the buyer concerning its willingness to take delivery. The corn, however, was never actually hauled to the elevator. In setting aside the seller's judgment, the court read U.C.C. section 2-301 in conjunction with U.C.C. section 2-503 and stated that "[a]ctual delivery, not mere present ability to fulfill all the conditions imposed on a tendering party, is necessary to constitute 'tender.'" Then, in the very next sentence, an Iowa case is cited for the proposition that although actual delivery to the elevator may not be required, "mere inquiry" regarding delivery is not a tender. The court does not say what more than mere inquiry is necessary.

*Long Island Lighting Co. v. Transamerica Delaval, Inc.* raised the question of whether tender occurs upon delivery or upon installation when the seller has responsibility for supervising the installation. The buyer purchased several emergency diesel generators for use in its nuclear power plant. The generators were delivered in 1976 but were not installed until 1981. It was during pre-

126. See U.C.C. §§ 2-301, 2-401(2), 2-507(1), 2-509, 2-725(2) for a sampling.
127. The Code's basic prescription for "tender of delivery" is located in U.C.C. § 2-503.
128. 223 Neb. 704, 393 N.W.2d 250, 2 U.C.C. Rep. Serv. 2d (Callaghan) 1292 (1986).
129. See U.C.C. § 2-301 ("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."). See also U.C.C. § 2-507(1) ("Tender entitles the seller to acceptance of the goods and to payment according to the contract.").
130. The seller testified that the buyer "refused to take my corn." 223 Neb. at 707, 393 N.W.2d at 253, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 1295.
131. 223 Neb. at 223, 393 N.W.2d at 256, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 1300. The fact that the seller never tendered delivery does not mean that the buyer will prevail. If the seller's version of the facts is believed, tender would have been excused because of the buyer's repudiation of the contract. See U.C.C. § 2-610. Thus, the case was remanded for a new trial.
132. The case cited in *Sand Seed Serv. v. Bainbridge*, 246 N.W.2d 911, 20 U.C.C. Rep. Serv. (Callaghan) 654 (Iowa 1976). The court described the holding as follows: "[A]lthough a seller may not be required to actually haul contracted grain to an elevator for an effective tender of delivery, mere inquiry regarding delivery does not satisfy tender of delivery. . . ."
operational testing that cracks were discovered. The federal district court held that the goods were tendered when they were delivered and that the statute of limitations then began to run.134 Interestingly, the court suggests a means for forestalling the delivery date. Perhaps a different result would have been achieved had the contract provided "that the goods be tested to assure conformance with the contract before delivery was complete."135

U.C.C. section 2-607(3)(a) poses a potential trap for any buyer seeking damages for breach after acceptance. Specifically, section 2-607(3)(a) requires a buyer to give the seller notice of any breach within a reasonable time after the buyer discovers or should have discovered the breach. One issue that continues to plague the courts is whether remote beneficiaries down the distributive chain from the actual buyer and remote manufacturers or distributors up the distributive chain from the immediate seller are subject to the burdens and benefits of the subsection.

In Malawy v. Richards Manufacturing Co.,136 an Illinois court properly assumed that even a consumer buyer is obligated to notify remote manufacturers or distributors of any breach in order to impose liability up the distributive chain beyond the immediate seller.137 That case involved an action for personal injuries arising out of a malfunctioning metal bone plate installed in the plaintiff's broken leg. The manufacturer of the plate first received notice more than three years after the plate had been removed from the plaintiff's leg. The court wisely concluded that because notice was given as soon as the plaintiff learned the actual manufacturer's identity, it was within a reasonable time as a matter of law. The plaintiff's immediate seller, the hospital, had received adequate notice of breach when its employees removed the plate after it broke.

Following the U.S. Supreme Court's recent retreat from expanding notions of personal jurisdiction,138 increased reliance on the common law concept of vouching-in now codified in U.C.C. section 2-607(5)(a) is anticipated. The effect of that subsection is to bind the vouchee to facts determined in the prior proceeding, provided they are common issues relevant to both determinations.

Two cases make clear that compliance with section 2-607(5)(a) does not necessarily insure success. In the first case, Moldex, Inc. v. Ogden Engineering

134. The court noted that "even tender of non conforming goods is considered delivery." 646 F. Supp. at 1455, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 1337–38 (emphasis in original).
135. 646 F. Supp. at 1455, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 1337.
the district court emphatically made the point that the first action is of no consequence unless it is "(a) full dress, good faith, adversary proceeding." This was not the case where (i) both parties to the first action were controlled by the same individual, (ii) counsel for the voucher in the second suit was counsel for its adversary in the first, (iii) discovery in the first suit was not conscientious, and (iv) the findings of fact and conclusions of law adopted in the first suit were not the result of adversarial give and take. Furthermore, the court said that even if the issues litigated in the first action were binding on the vouchee in the second, the voucher would still have to establish that those decided issues established a right of indemnification.

In the second case, *Oates v. Diamond Shamrock Corp.*, the Massachusetts Appellate Court reversed a decision of the trial court that had allowed the voucher to recover from the vouchee the costs incurred in its successful defense of the first action. The court ruled that compliance with section 2-607(5)(a) does not answer "the threshold question whether the seller is 'answerable over' to the buyer." Absent a special relationship a retailer has no implied right of indemnification from a faultless manufacturer.

**RISK OF LOSS**

The most significant risk of loss case decided during the last reporting period was *Commonwealth Propane Co. v. Petrosol International, Inc.* The Sixth Circuit was called upon to sort out the rights of buyers and sellers of propane gas where the underground gas storage facility collapsed and the gas could no longer be removed. On November 5 and 18, Cal Gas Corporation ("Cal Gas") entered into separate contracts with Petrosol for the sale and delivery of 10,000 barrels of liquid propane gas stored at Lake Underground Storage ("Lake Underground"), a storage facility in Ohio. Each contract required Cal Gas to deliver the propane on demand on or before March 31, 1983. Also on November 5 and 18, Petrosol resold the propane to Commonwealth with delivery to occur on or before March 31, 1983. After each set of contracts, the same basic sequence of events followed. Petrosol sent Commonwealth a form entitled "Sales Acknowledgment," which Commonwealth accepted, and sent Cal Gas a form entitled "Purchase Acknowledgment," which Cal Gas accepted.

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141. Id. at 588, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 578. Since the vouchee was never made a party to the first action, the "answerable over" issue could not, consistent with due process, be decided against it in that action.


144. 818 F.2d 522, 3 U.C.C. Rep. Serv. 2d (Callaghan) 1778 (6th Cir. 1987).

145. The court's casual use of the term "accepted" in its recitation of facts is unfortunate. If, as the court says, there was already a contract, what then was being accepted? Perhaps the court would
wealth then paid Petrosol for the propane, and Petrosol, in turn, paid Cal Gas. After receiving Petrosol's payment, Cal Gas sent a "Confirmation of Distribution" to both Lake Underground and Petrosol indicating a product flow from Cal Gas to Petrosol to Commonwealth and acknowledging delivery from Cal Gas to Petrosol. In February 1983, a wall in the cavern of Lake Underground collapsed and the propane was lost or destroyed.146

The Sixth Circuit first decided who bore the risk of loss as between Cal Gas and Petrosol. The district court had granted summary judgment to Petrosol based on what it perceived to be an agreement on risk allocation in the Purchase Acknowledgments.147 In reaching its conclusion, the district court relied on a provision stating that title would pass to the buyer upon the occurrence of certain events, none of which had occurred. The court of appeals disagreed. It quite properly recognized that the location of title is no longer the determinant of risk allocation.148 Hence, an agreement on title is not an agreement on risk of loss. Without a "contrary agreement" of the parties to guide it, the court next looked to the remainder of U.C.C. section 2-509 for an answer.149 It agreed with Cal Gas that the propane was in the hands of a bailee and, as between Cal Gas and Petrosol, was to be delivered without being moved. The transactions, therefore, were governed by section 2-509(2).150 But were the Confirmations of Distribution "written direction[s] to deliver"? The court said this did not need to be decided, since Petrosol had clearly accepted the tender of delivery when it resold the propane to Commonwealth.151 The logic of the conclusion can be have been on firmer ground had it characterized the forms as "confirmations" and stated that what was being accepted were "proposals for addition to the contract." U.C.C. § 2-207(2).

146. During the period in question, Commonwealth also purchased propane stored at Lake Underground from parties other than Petrosol. After the collapse, Commonwealth apparently was able to salvage some propane and, none of which it allocated to its contract with Petrosol. If it is ultimately decided that, as between Petrosol and Commonwealth, the former bore the risk of loss, the question of whether Commonwealth is free to allocate the retrieved propane in any manner it chooses will have to be decided. See 818 F.2d at 530–31, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1790. The issue is an interesting twist on the seller's duty to allocate production and deliveries under U.C.C. § 2-615(b).

147. Both the district court and the court of appeals assumed that the terms of the purchase and the sales acknowledgments were binding on the recipient. This assumption might be correct, but it is far from obvious. See supra note 145. See also U.C.C. § 2-207.

148. The demise of title was an integral part of Llewellyn's plan to rationalize and modernize commercial law. Its unimportance is a theme the Code's drafters thought worthy of repetition. See U.C.C. §§ 2-101 comment, 2-401 & comment 1, 2-505 comment 1, 2-706 comments 3 & 11, 9-101 comment, 9-202 & comment, 9-311 comment 2.

149. Resort to the provisions of U.C.C. § 2-509 becomes necessary only in the absence of an agreement on risk of loss. See U.C.C. § 2-509(4).

150. Under U.C.C. § 2-509(2)(c), risk of loss passes to the buyer when the buyer receives a "non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503." This latter section provides that "tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects .... " U.C.C. § 2-503(4)(b).

151. Acceptance of goods occurs when the buyer "does any act inconsistent with the seller's ownership." U.C.C. § 2-606(1)(c).
faulted on two counts. First, unless the buyer has received a written direction to the bailee to deliver the goods, no tender has taken place and no reason for a seasonable objection by the buyer exists. Second, it is difficult to envision how a contract to resell is inconsistent with the ownership interest of Cal Gas. This is no more than an effort to realize the economic value of a contractual expectation. In any event, the court ruled that, as between Cal Gas and Petrosol, the risk of loss was on Petrosol.

The Sixth Circuit then considered the contracts between Petrosol and Commonwealth. The district court found that the Sales Acknowledgments also contained a "contrary agreement" within the meaning of U.C.C. section 2-509(4) that shifted the risk of loss to Petrosol. Indeed, the acknowledgments specifically covered risk of loss. Each unambiguously stated that the risk shifted to the buyer when the propane was delivered according to the method stipulated on the face of the acknowledgment. The problem was that, although different types of delivery methods were listed on the forms, there was no indication which method, if any, the parties had agreed upon. Consequently, there was no way to know from the acknowledgments whether the parties contemplated the movement of the propane as part of its delivery. In light of this unresolved factual issue, the appellate court held that the district court's entry of summary judgment was improper. 152

Despite its order of remand, the court responded to several points raised by Commonwealth relative to the application of section 2-509(2). It rejected as untenable Commonwealth's contentions that (i) to be effective, "written direction to deliver" must come from the immediate seller—in this case Petrosol; 153 (ii) since the delivery period ran until March 31, 1983, its time for "seasonably objecting" to the tender also ran to that date; 154 and (iii) the bailee's need eventually to lift the propane from the underground cavern to a surface loading platform is sufficient movement to render section 2-509(2) inapplicable. 155

REPUDIATION

Courts continue to grapple with the diverse time-reference issues lurking in U.C.C. section 2-610. The issue this year involved the running of a contractual limitations period for commencing suit. In American Cyanamid Co. v. Mississippi Chemical Corp., 156 MCC contracted with Cyanamid for the installment purchase of phosphate rock to be used in the production of fertilizer. The contract provided a one-year statute of limitations. Because of a downturn in the farm economy, MCC did not require as much phosphate rock as it first thought

152. Curiously, the court never mentioned excuse under U.C.C. § 2-613, maybe because it was never raised by Petrosol. Under that section, Petrosol's performance would be excused if it bore the risk of loss.


154. Id. at 530, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1788.

155. Id. at 530, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1788-89.

156. 817 F.2d 91, 3 U.C.C. Rep. Serv. 2d (Callaghan) 1411 (11th Cir. 1987).
it might need. Accordingly, on September 3, 1982, MCC wrote to Cyanamid that only "forty-five percent of the quantity of phosphate rock previously budgeted" was needed. Again, on December 22, 1982, MCC wrote that "we simply cannot purchase from American Cyanamid any more phosphate rock than that expressed in my letter of September 3, 1982." On March 2, 1984, Cyanamid brought suit to recover damages for MCC's breach of contract.157 The district court granted summary judgment to MCC on the ground that the suit was barred by the contractual statute of limitations. The court was of the opinion that Cyanamid's cause of action for breach accrued not later than December 22, 1982, when MCC repudiated the contract.

The Eleventh Circuit, applying New Jersey law, affirmed. Its reasoning was straightforward and simple. Under New Jersey law, a cause of action accrues and the statute of limitations begins to run the moment the right to sue arises. Under U.C.C. section 2-610, the aggrieved party has the right to sue the repudiating party immediately. Thus, the limitations period began to run when the contract was repudiated by MCC.158 Regrettably, the issue was not so straightforward and simple. The aggrieved party's option under section 2-610 to await and even encourage performance by the repudiating party is the complicating factor. The Eleventh Circuit found that this provision does no more than "overturn the harsh common law rule that one who urged the other party to perform after repudiation forever lost his right to complain of the repudiation."159 But should not the right to await performance and not treat the repudiation as final be exercisable without that right being compromised?160 Also, the Eleventh Circuit says nothing of the other contexts in which similar issues involving section 2-610 have arisen. For example, does it make sense to hold that the limitations period begins to run on the repudiation date but that some other date is more appropriate as the breach date for purposes of U.C.C.

157. Cyanamid's position was that, because performance of the contract was to extend into mid-1983, its suit was timely since it was brought within one year of the end of the contract's term.

158. The court still had to address the fact that the contract was an installment contract. Although the two letters sent by MCC amounted to a breach, were they a breach of the whole contract? The Eleventh Circuit thought that "New Jersey courts would hold that the anticipatory breach of an installment contract creates a single unitary cause of action, at least unless the parties have mutually agreed that a severable cause of action arises for each defaulted installment." 817 F.2d at 94, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1415. One subcommittee member who commented on the case suggested that although U.C.C. § 2-612(3) does not apply to this case, it could have been applied by analogy. If so, the anticipatory repudiation that would substantially impair the value of the whole contract would be a breach of the whole contract.

159. 817 F.2d at 94, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1414.

160. If the aggrieved party elects to forestall a breach but the limitations period has nevertheless begun to run, the actual time period from breach to bar would be effectively less than it would otherwise be if the repudiation had been treated as an immediate breach.
If not, the court should have said why the repudiation date is the date on which to measure an aggrieved buyer's damages.\textsuperscript{162}

The Eighth Circuit entered the fray in \textit{Gibbs, Nathaniel (Canada) Ltd. v. International Multifoods Corp.}\textsuperscript{163} A seller of peanuts was to guarantee that the peanuts would pass inspection by the U.S. Food and Drug Administration ("FDA") and was to have the "option of Blanching/Reconditioning/Replacing any quantity which fail[ed] initial entry but [was] not bound to do so." On June 3, 1981, when 330,690 pounds of peanuts failed inspection, the buyer informed the seller by letter that it was cancelling the contract. In July, the buyer had a change of heart and agreed to accept 66,965 pounds of substitute peanuts and to accept the peanuts rejected by the FDA if they could be reconditioned so as to pass inspection by July 25, 1981. The seller tried, but again the peanuts failed. By letter dated August 21, 1981, the buyer reminded the seller that it had cancelled the contract on June 3 and, therefore, had no obligation to accept further shipment. The peanuts finally passed inspection on October 16, 1981, but the buyer rejected their tender as untimely and the seller brought suit.

The Eighth Circuit concluded that the buyer's letter of June 3 constituted a repudiation but its later willingness to accept substitute and reconditioned peanuts which passed FDA inspection by July 25 constituted an effective retraction under U.C.C. section 2-611. It was the seller not the buyer who was in breach, said the court. The seller's breach occurred on July 25, when it failed to tender conforming peanuts. The outcome would have been the same even if the buyer had not retracted its repudiation. To collect damages for an anticipatory breach, an aggrieved party must show that it would have been capable of performing when the time for performance came.\textsuperscript{164} This the seller could not do.

The term "repudiation" was left undefined by the drafters of the U.C.C. The official comment to section 2-610 that "an 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" is commonly accepted starting point for analysis. The problem is that manifestations of intention by words or other conduct often lack such a degree of clarity. It is, therefore, left for the courts to decide these matters on a case by case basis. In \textit{Gatoil (U.S.A.), Inc. v. Washington Metropolitan Area Transit Authority},\textsuperscript{165} the District of Columbia Circuit Court of Appeals ruled that the seller's communications to the buyer detailing its difficulties in obtaining a

\textsuperscript{161} See Comment, \textit{Anticipatory Repudiation Under the Uniform Commercial Code: An Examination of the Measurement of a Buyer's Damages}, 21 Hous. L. Rev. 505 (1984), for an overview of this topic.

\textsuperscript{162} If the court meant to imply that the breach date should be the same regardless of the context, its opinion is unpersuasive without consideration of the other contexts.

\textsuperscript{163} 804 F.2d 450, 2 U.C.C. Rep. Serv. 2d (Callaghan) 1312 (8th Cir. 1986).

\textsuperscript{164} As the court put it, "The rationale is that if the nonbreaching party could not have performed, no repudiation would 'substantially impair the value of the contract' under \textit{U.C.C. § 2-610}." \textit{Id.} at 453, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 1316.

\textsuperscript{165} 801 F.2d 451, 2 U.C.C. Rep. Serv. 2d (Callaghan) 151 (D.C. Cir. 1986).
source of fuel from which to supply the buyer did not permit a finding that the seller had "unequivocally and positively" repudiated the contract. The substance of what the buyer was told was that the seller was having trouble obtaining fuel, that it would be unable to begin deliveries on July 1 as had previously been agreed, and that it was seeking alternative sources of supply and hoped to secure one by July 5.

**REMEDIES**

*Rejection and Revocation of Acceptance*

*Aubrey's R.V. Center v. Tandy Corp.* involved an attempted "rescission" of a contract for the purchase of a computer system. Aubrey's contacted Radio Shack Computer Center ("Radio Shack") about purchasing a system capable of performing a number of designated functions. They agreed that Tandy, Radio Shack's parent company, would supply the hardware and most of the software and that the purchaser would be Dolsen Leasing Company ("Dolsen"), which would lease the system to Aubrey's. Aubrey's encountered problems with two of the programs immediately after the computer was installed. For approximately nine months thereafter, Tandy repeatedly tried, without success, to solve the various problems. Aubrey's eventually sent a letter to Tandy asking for rescission of the contract and return of the purchase price. Tandy responded with several more futile attempts to straighten things out. When Tandy finally gave up, Aubrey's filed suit. The trial judge ordered the contract rescinded and awarded Aubrey's damages.

On appeal, the Washington Court of Appeals affirmed. The court saw no harm in Aubrey's request for rescission, now more properly called "revocation of acceptance." To withhold the latter remedy only because the term rescission was used, would be, in the court's view, "excessively technical and overly formalistic." The reasonableness of Aubrey's notice of revocation, which came approximately nine months after delivery, was still left for decision. The court held that the time frame was reasonable; Tandy's repeated assurances that

166. 801 F.2d at 457, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 159.
167. If in doubt whether a communication rises to the level of a repudiation, the aggrieved party may have the option of demanding adequate assurance of performance under U.C.C. § 2-610. If the demand is rightful, the failure to provide assurance is a repudiation. U.C.C. § 2-610(4).
169. The right of the buyer to revoke its acceptance is governed by U.C.C. § 2-608. Though the court is correct in its characterization of "revocation of acceptance" as the Code name for the common law remedy of rescission, there is still life after the Code for an independent common law remedy of rescission. U.C.C. § 2-608 is predicated on the seller's breach, but at times the remedy of rescission is appropriate where there is no breach, e.g., mutual mistake. The non-Code remedy then enters the case via U.C.C. § 1-103.
170. 46 Wash. App. at 601, 731 P.2d at 1128, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 111.
171. On the subject of notice, buyers should be reminded that notifying the seller of defects is not enough. To be sufficient, the seller must be told of the buyer's intention to revoke. Unfortunately, this was a lesson the buyer learned too late in C.R. Daniels, Inc. v. Yazoo Mfg. Co., 641 F. Supp. 205, 2 U.C.C. Rep. Serv. 2d (Callaghan) 481 (S.D. Miss. 1986).
the problems would be cured worked to extend the period for revocation of acceptance.\textsuperscript{172} But according to Tandy, even if the notice was timely, Aubrey's waived revocation of acceptance by continuing to use some of the software after sending the letter of revocation. The court disagreed. Whether continued use of the goods vitiates the revocation depends on the reasonableness of that use. Applying a five-factor test to the facts,\textsuperscript{173} the court concluded that Aubrey's continued use of the system was not inconsistent with its revocation.\textsuperscript{174}

Perhaps the most interesting aspect of the case was the one that got away. No one seemed to question the propriety of Tandy as the defendant, even though at least formally Dolsen was the purchaser and Aubrey's its lessee.\textsuperscript{175} Even assuming that the lease was in fact a disguised sale, making Aubrey's a "buyer" and allowing it to exercise the remedy of revocation of acceptance against Tandy totally disregards the actual transfer of title from Tandy to Dolsen.\textsuperscript{176} This, however, is just what the Third Circuit Court of Appeals did in \textit{General Electric Credit Corp. of Tennessee v. Ger-Beck Machine Co.}.\textsuperscript{177}

In \textit{Ger-Beck}, the issue was whether a party who finances a three-way equipment lease-purchase transaction may be treated as a seller for the purpose of a revocation of acceptance. The jury, on special interrogatories, found that the

\textsuperscript{172} Similar reasoning can be found in other cases decided during this reporting period. \textit{See Sierra Diesel Injection Serv. v. Burroughs Corp.}, 651 F. Supp. 1371, 3 U.C.C. Rep. Serv. 2d (Callaghan) 538 (D. Nev. 1987) (because of repeated assurances, revocation six years after delivery was reasonable); \textit{Alpert v. Thomas}, 643 F. Supp. 1406, 2 U.C.C. Rep. Serv. 2d (Callaghan) 99 (D. Vt. 1986) (because of repeated assurances, revocation one year after delivery was reasonable).

\textsuperscript{173} In this regard, the court borrowed from \textit{McCullough v. Bill Swad Chrysler-Plymouth}, 5 Ohio St. 3d 1181, 449 N.E.2d 1289, 36 U.C.C. Rep. Serv. (Callaghan) 513 (1983). According to \textit{McCullough}, the reasonableness of post-revocation use depends on the answers to the following five questions:

\begin{enumerate}
\item 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?
\end{enumerate}


\textsuperscript{174} The court did, however, make the needless point that "retention and continued use beyond the time this judgment is satisfied is unacceptable." \textit{Aubrey's R.V. Center, Inc. v. Tandy Corp.}, 46 Wash. App. 595, 605, 731 P.2d 1124, 1130, 3 U.C.C. Rep. Serv. 2d (Callaghan) 105, 114 (1987). The point was needless because revocation requires that the goods be returned or at least tendered to the seller. \textit{See U.C.C. §§ 2-602(2)(b), (c), 2-608(3)}.

\textsuperscript{175} In addition to the actual purchase price of the computer, Aubrey's was awarded as consequential damages the finance charges it incurred to Dolsen.


\textsuperscript{177} 806 F.2d 1207, 2 U.C.C. Rep. Serv. 2d (Callaghan) 769 (3d Cir. 1986).
transaction between the manufacturer of a lathe and GECC was a true sale and that the purported lease transaction between GECC and Ger-Beck was also a true sale in which the lease was intended to provide only a security interest. Notwithstanding a formal seller-buyer relationship between GECC and Ger-Beck, the trial court ruled that article 2 did not apply to the transaction as a matter of law and, therefore, revocation of acceptance was not an available remedy against GECC.

The Third Circuit affirmed, holding that where the lessor provided nothing except the money to finance the ultimate passage of title from the manufacturer to a nominal lessee, its status is, as a matter of law, solely that of a financer. Consequently, the transaction between GECC and Ger-Beck was, as a matter of law, intended only as a security transaction to which, by its terms, the remedial provisions of article 2 do not apply.178 One judge dissented, noting that the article "covers actual sales transactions in which the seller retains a security interest, since the section excludes those transactions which are intended to operate only as security transactions." 179 Judge Becker felt that to give conclusive weight to the nature of GECC's business as financer and to ignore the reality of how the transaction was actually structured is to be ruled by "the tyranny of labels." 180 It seems that new article 2A of the U.C.C. offers little guidance on the issue raised in Ger-Beck and the one not raised in Tandy Corp. If a transaction labelled a lease is actually a sale, then article 2A does not apply and cases like these are outside its intended scope. 181 In fact, the drafters of article 2A have explicitly not taken a stand on the correctness of Ger-Beck. 182 That nontraditional transactions have made traditional modes of analysis unworkable is becoming increasingly apparent. What were once functional categories are now suspect labels. Judge Becker's "tyranny" admonition should be kept in mind.

178. U.C.C. § 2-102 excludes from the scope of article 2 any transaction that is intended "to operate only as a security transaction." Anticipating how the New Jersey Supreme Court would rule on the issue, the court gave significant weight to the lower court case of Miller Auto Leasing Co. v. Weinstein, 189 N.J. Super. 543, 461 A.2d 174 (Law Div. 1983), aff'd per curiam, 193 N.J. Super. 328, 473 A.2d 996 (App. Div. 1984), cert. denied, 97 N.J. 676, 483 A.2d 192 (1984). That case held that a party in the position of GECC was not a "seller" for purposes of article 2 warranties. In a dissenting opinion, Judge Becker asserted that "even where warranties cannot be implied, the separate Article Two remedy of revocation of acceptance is available . . ." 806 F.2d at 1211, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 775 (Becker, C.J., dissenting). But without any implied warranties, there could be no breach by GECC. If no breach, why would Ger-Beck be afforded a remedy?


180. 806 F.2d at 1217, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 783 (citing Snyder v. Massachusetts, 291 U.S. 97, 114 (1934)).

181. See U.C.C. § 2A-102 ("This article applies to any transaction, regardless of form, that creates a lease.").

182. See U.C.C. § 2A-516 comment.
Courts continue to struggle with the application of U.C.C. provisions to used goods. In *Web Press Services Corp. v. New London Motors*, the Connecticut Supreme Court held that section 2-608 applies to the sale of used vehicles. Moreover, the standard for substantial impairment is no different from the standard two-pronged test applicable to new vehicles. The focus is first on the needs and circumstances of the particular buyer ("subjective"), then on whether the value of the goods to the buyer has in fact been impaired ("objective"). It is difficult to fault the court for adopting a test consisting of an objective/subjective mix. To ignore the objective is to accept the unlikely proposition that the trier of fact can decide the truth of subjective assertions divorced from objective perceptions of reasonableness.

A final case meriting brief comment is *Alpert v. Thomas*. The court's erroneous conclusion that once a buyer is found to have properly revoked its acceptance the burden of proof shifts from the buyer to the seller is noteworthy. This requires the seller to prove that the goods and their tender were conforming. Not only would this approach permit an inefficient relitigation of an issue already decided, but it is inconsistent with the rationale underlying U.C.C. section 2-607(4). The burden of proving a nonconforming tender shifts to the buyer upon acceptance only because claims of breach in connection with accepted goods are often made long after delivery, increasing the possibility that the defect was a consequence of the buyer's misuse, abuse, or neglect of the goods. Conversely, the burden remains with the seller if the goods have been rejected, as it is less likely that the buyer has had sufficient time to cause any provable defect. Consistency with this scheme mandates that the burden of proof following revocation of acceptance should remain with the buyer. It is doubtful whether the post-acceptance concerns reflected by U.C.C. section 2-607(4) are in any way diminished by the act of revocation.

**RECLAMATION**

Although the traditional heading of this section remains unchanged, the one case mentioned this year is only incidentally a reclamation case. It speaks primarily to the seller's right to stop the shipment of goods in transit pursuant to U.C.C. section 2-705.

In *In re Pester Refining Co.*, the debtor-in-possession, Pester, operated a refinery and on numerous occasions purchased natural gas products from Burke Energy Corporation ("Burke") and MAPCO Gas Products, Inc. ("MAPCO").

185. Was not the conformity of the tender already decided when the propriety of the revocation was decided?
187. U.C.C. § 2-705(1) provides in part: "The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent."
The three used a pipeline operated by Mid-America Pipeline Company ("Mid-America") for their transactions. Burke and MAPCO would ship their products to a major station in the Mid-America pipeline system designated as Group 140. There, Pester and the seller would execute a product transfer order ("PTO") directing Mid-America to transfer title of a specified amount of product from the seller to Pester. What occurred afterwards followed no set pattern. Sometimes Pester would have the gas transferred to another location; sometimes it would remain stored at Group 140. When Pester filed a voluntary chapter 11 petition in bankruptcy, Burke and MAPCO directed Mid-America to stop the shipment of gas products in transit to Pester and to deliver the products to them. Accordingly, Mid-America transferred out of Pester's account the products stored at Group 140 traceable to sales from Burke and MAPCO.

Whether Pester could be deprived of the gas depended upon the timeliness of the stoppage; bankruptcy judge Stageman ruled that it came too late. U.C.C. section 2-705(2) sets forth a laundry list of events that will cut off the right to stop delivery. The events enumerated in subparagraphs (b) and (d) of that subsection were easy to dispose of; clearly neither had occurred. Subparagraph (a) was a bit more difficult to deal with. Pester argued that it had received the product because the delivery obligations of Burke and MAPCO had been performed. The court disagreed. Receipt requires physical possession, and Pester will not have possession until the gas passes through Pester's meter at its refinery. Subparagraph (c) was the last on the list for consideration. Mid-America gave the required acknowledgment when it processed the PTO forms and sent confirmations to Pester showing the change in inventory, and Judge

189. If untimely, the gas would have become property of the bankruptcy estate under 11 U.S.C. § 541(a)(1) (1982) and would have to be turned over to Pester pursuant to 11 U.S.C. § 542(a) (1982). On the other hand, if the right to stop delivery was properly exercised, the estate could gain possession of the gas only if the contracts were assumed under 11 U.S.C. § 365(b) (1982).

190. U.C.C. § 2-705(2) reads:

(2) As against such buyer the seller may stop delivery until
(a) receipt of the goods by the buyer; or
(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or
(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or
(d) negotiation to the buyer of any negotiable document of title covering the goods.

191. Mid-America was a carrier, not just a bailee, and no negotiable document covering the goods had been issued.


One curious aspect of the opinion is the court's decision that MAPCO's demand for reclamation under U.C.C. § 2-702(2) had also come too late. After making the point that receipt requires possession, the court adds without explanation, "Receipt of the goods, within the meaning of U.C.C. § 2-702(2), occurred when the seller's right to stop the goods in transit were cut off under U.C.C. § 2-705(2)(c)." 66 Bankr. at 814, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 518.
Stageman held it acknowledged "as warehouseman." Once the gas arrived at Group 140, Mid-America was acting in a capacity distinct from its original role as carrier. The reasons: (i) the gas had reached its final destination under the original shipment contracts, (ii) no freight charges had to be paid before Pester could assert control over the gas, and (iii) Pester could store the gas at Group 140 as long as it wanted.

**BUYER'S MONEY REMEDIES AND THEIR LIMITATIONS**

This survey more than once makes the point that courts should be sensitive to the risk that the unthinking application of U.C.C. remedies will produce a "windfall" or "double benefit" to the aggrieved party. Unfortunately, this point was lost on the New York Court of Appeals in *Fertico Belgium S.A. v. Phosphate Chemicals Export Association.*

Fertico contracted with Phosphate to purchase two separate shipments of fertilizer for resale to Altaweed, Iraq's agricultural ministry. When Fertico learned that both shipments would be delivered late, it immediately covered so as to avoid a breach of its contract with Altaweed. On the same day Fertico acquired cover, its president renegotiated its contract with Altaweed. In return for a postponed delivery date and an additional payment of $20.50 per ton, Fertico agreed to make direct inland delivery rather than delivery to the seaport of Basra. Notwithstanding Phosphate's late delivery of the first shipment and the intervening cover, Fertico felt compelled to accept the renegotiations because Phosphate had successfully drawn on Fertico's $1.7 million letter of credit. This shipment was later resold at a profit of $454,000.

The first issue concerned the increased costs Fertico incurred in performing the Altaweed contract. Rather than delivering at seaport as originally intended, it was forced to deliver inland because of the delay caused by Phosphate's breach. Although an additional expense of this type would ordinarily constitute a recoverable item of consequential damages, the court correctly denied its recovery because Altaweed compensated Fertico for the additional costs, thus insulating it from any loss. The appellate division held, however, that the $20.50 per ton additional reimbursement that Fertico obtained from Altaweed was an expense saved as a consequence of Phosphate's breach. The Court of

193. See U.C.C. § 2-705 comment 3 ("Acknowledgment by the carrier as a 'warehouseman' within the meaning of this article requires a contract of a truly different character from the original shipment, a contract not in extension of transit but as a warehouseman.").

194. See infra text accompanying notes 230-36.


196. The second shipment was never tendered because Fertico cancelled before the shipment was loaded for delivery.

197. See U.C.C. § 2-715(2).

198. If it were, Phosphate would be entitled to have its liability reduced accordingly. See U.C.C. § 2-712(2).
Appeals disagreed. The expense would not have been incurred in the absence of a breach; it was no more than compensation for the additional shipment responsibilities incurred by Fertico.

The next issue in Phosphate Chemicals concerned the correctness of the appellate division's decision to reduce Fertico's damages by the profit it obtained on the resale of Phosphate's first and only shipment of fertilizer. The Court of Appeals ruled that the offset was improper. Under the "exceptional" circumstances, Fertico had the right to cover even in the face of accepting late delivery of a portion of the fertilizer. To then reduce its "cover" damages by the profit earned on the resale of Phosphate's fertilizer would be to deprive it of a profit it would have otherwise earned. Without Phosphate's fertilizer on hand, the sale would have been made anyway; Fertico could always have obtained what it needed from the marketplace. The dissent argued that a buyer cannot both sue for cover and accept the goods. By claiming "cover" damages, Fertico had therefore impliedly rejected the fertilizer and consequently held it only as security for the payments made to Phosphate. Its later sale, therefore, was for Phosphate's account. To hold otherwise would allow Fertico to "benefit twice from what was a single bargain—a result that is unacceptable under U.C.C. § 1-106."

Both the majority and dissenting opinions seem a bit wide of the mark. First, there is nothing inherently improper in permitting the recovery of cover damages when the goods have been accepted. If Fertico had not covered when it did, Phosphate would have had to compensate it for the entire profit lost on its contract with Altaweed. In effect, cover damages in this case represent no more than a portion of that profit lost because of an increase in the acquisition cost of the fertilizer sold to Altaweed. First, the majority erred in blindly accepting the fact that Fertico would have made the sale even without Phosphate's fertilizer. Second, assuming that sale could have been made, the profit received would depend on the then market price of fertilizer. In a rising market, to give Fertico the full profit on the sale of the fertilizer purchased from Phosphate is, indeed, to give it more than it would have earned from full performance of the Phosphate contract.

In the non-U.C.C. case of Barco Auto Leasing Corp. v. House, the Connecticut Supreme Court nevertheless decided a U.C.C. issue of some importance. The buyers sought rescission of an installment sales contract for an

199. 70 N.Y.2d at 82–83, 510 N.E.2d at 337, 517 N.Y.S.2d at 468–69, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1817. The court is probably correct in its assessment of the unexceptional case as one where cover is obtained because the promised delivery is never made.

200. See U.C.C. § 2-711(3).

201. 70 N.Y.2d at 87, 510 N.E.2d at 340, 517 N.Y.S.2d at 471, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1820 (Titone, J., dissenting).

202. There was no evidence of the market supply of fertilizer. 70 N.Y.2d at 88, 510 N.E.2d at 341, 517 N.Y.S.2d at 472, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1821.

203. There was no evidence of the market price at the time Fertico would have gone into the market to acquire additional fertilizer. Id.

automobile, alleging numerous violations of the state Retail Installment Sales Financing Act ("RISFA"). The trial court found that the seller had violated RISFA and ruled that the buyers were entitled to rescind the contract and to recover as damages the payments made to the seller without having to account for the substantial use value of the automobile prior to its return to the seller. The supreme court affirmed. Noting that the U.C.C. was inapplicable, the court then looked to the U.C.C. as an appropriate model by which to adjudge the proper remedy under RISFA. The analysis consisted of little more than comparing U.C.C. section 2-711(1) with U.C.C. section 2-718(3). Because the former makes no mention of an offset for the buyer’s use of the defective good and the latter does, the court concluded that a seller must “return the buyer’s purchase price in toto when he has delivered non-conforming goods under circumstances that afford a buyer a right to reject or to revoke acceptance.” Without elaboration, the court stated in a footnote “that certain circumstances may compel the award of such an offset to the seller.” Time will tell what those circumstances might be.

The Supreme Court of New Jersey decided a remedial issue of importance in Kearney & Trecker Corp. v. Master Engraving Co. The issue, which has occasioned considerable case law and commentary, was whether a contractual exclusion of consequential damages will survive the failure of the buyer’s contractually limited remedy to achieve its essential purpose. Kearney involved a contract for a computer-controlled machine tool that, according to the buyer’s evidence, was inoperable twenty-five to fifty percent of the time during its first year of use despite repeated attempts by the seller to correct the defects. The buyer sought damages for lost profits on customer orders allegedly unfilled


206. According to the evidence, the buyers drove the automobile approximately 65,000 miles. There was testimony that this use had a value of $16,150.

207. Under U.C.C. § 2-711(1), a buyer who “rightfully rejects or justifiably revokes acceptance” is entitled to recover “so much of the price as has been paid.”

208. U.C.C. § 2-718(3), which pertains to a defaulting buyer’s right of restitution, expressly provides for the right to an offset for “the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.”

209. 202 Conn. at 115, 520 A.2d at 167, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 128. The court did recognize that there is case law supporting an offset for use. However, the court thought these cases unpersuasive because either they involved the buyer’s use following revocation of acceptance or they failed to take into account U.C.C. § 2-718(3).

210. 202 Conn. at 116 n.5, 520 A.2d at 167 n.5, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 129 n.5.


because the machine was inoperable. Both the trial court and the appellate division allowed recovery notwithstanding the parties' specific agreement to preclude recovery of consequential damages. The courts reasoned that "the allocation of risk through exclusion of consequential damages was inextricably tied to the limitation of remedies." Because the jury had found that the repair and replacement warranty failed of its essential purpose, the damages exclusion was also rendered unenforceable.

The New Jersey Supreme Court reversed. It was greatly influenced by what it perceived as two of the pillars of policy on which the remedial structure of the U.C.C. was built: freedom of contract and the availability of minimum adequate remedies. Only a validation of the exclusion of consequential damages would give due recognition to both. A "beneficial risk-allocation device" agreed to by both parties would be given effect and the buyer would be provided a "fair quantum of remedy." The presumption that in most cases enforcement of the contractual ban on recovering consequentials would be consistent with the intent and expectation of the parties was central to the supreme court's conclusion. But if the purpose of the limited remedy was to provide the buyer with workable goods, denying consequentials when the goods remained unworkable would run counter to the parties' intent. One could just as easily surmise that the parties intended to insulate the seller from liability for damages suffered during a reasonable repair period and thereafter, if in fact the goods were repaired or replaced. Instead, the court suggests the parties intended to preclude the recovery of consequentials occasioned by the seller's failure to repair or replace.

Section 2-718(1) defines when a liquidated damage term is enforceable. Section 2-718(1) specifies the criteria a court should use in determining whether any particular liquidated damage provision is reasonable or is unenforceable as a penalty: (i) whether the amount seems reasonable in light of the anticipated damage from any breach; (ii) the problems of proving the actual damages resulting from any breach; and, (iii) the inconvenience, unavailability, or impracticability of any other adequate remedy. A recent case shows how vague a standard reasonableness becomes in determining the enforceability of a liquidated damage clause when reasonableness is detached from these criteria.

In Skyline Steel Corp. v. A.J. Dupuis Co., the parties entered into both a contract for the sale of steel sheet piling and a contract for the lease of additional steel sheet piling. The lease provided that the lessor was entitled to liquidated damages.

214. The court divines this pillar from U.C.C. § 1-102 & comments 1 & 2.
215. This has its source in U.C.C. § 2-719 comment 1.
216. Thus, the court stated: "It is only when the circumstances of the transaction, including the seller's breach, cause the consequential damage exclusion to be inconsistent with the intent and reasonable commercial expectations of the parties that invalidation of the exclusionary clause would be appropriate under the Code." 107 N.J. at 600, 527 A.2d at 438, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1698.
damages based on the purchase price in the contract of sale if the lessee defaulted on its obligation to make monthly lease payments. The court held that the liquidated damage provision in the lease was reasonable under section 2-718(1) and thus enforceable. However, the court did not consider whether the plaintiff would have experienced difficulty in proving actual damages or whether failure to enforce the liquidated damage clause would deprive the plaintiff of any effective remedy. In fact, the opinion indicates that there was an established market for the goods in question so that the plaintiff's actual damages were easily determinable. There is nothing to indicate the remedy of actual contract damages would have subjected either party to any greater inconvenience than that generated by the seller's enforcement of the liquidated damage provision.

In essence, the court assumed its conclusion by focusing on whether or not the liquidated damage clause was "reasonable" without considering the explicit statutory definition for determining the reasonableness of all liquidated damage clauses under section 2-718(1). The analytical shortcomings of the court's decision may seem insignificant, since the seller's actual damages would probably have approximated the actual price contained in the contract of sale. But one can infer that the seller would have sought to recover actual damages if the market price of the pilings had markedly increased since the date of contract.

SELLER'S MONEY REMEDIES

Stokes v. Roberts considered a seller's right to recover incidental damages under U.C.C. section 2-710. The Stokeses entered into an agreement to sell their store (inventory, fixtures, and equipment) and a registered quarter horse to the Robertses. Soon after the buyers took possession of the store, they repudiated the contract, stopping payment on the checks given in payment of the purchase price. Having no reason to believe that the checks would not be paid when presented, the sellers paid off some outstanding debts including a balance of $31,000 on an existing mortgage on their home, apparently obtained to finance their business. When the Robertses' checks bounced, the Stokeses borrowed to cover the checks they had written and they again mortgaged their home to secure the debt. The trial court awarded damages to the Stokeses measured by the difference between the contract price and the value of the inventory and fixtures.

The Arkansas Supreme Court affirmed. It found no merit in the Stokeses' contention that the interest incurred on the loan should have been included in

218. The court, relying on U.C.C. § 2-102, applied the U.C.C. to both components of the transaction because "[t]he contracts at issue involve a 'transaction in goods': the purchase and lease of steel." 648 F. Supp. at 364, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 481.
219. Id. at 374-75, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 491.
220. See supra notes 58-63 and accompanying text for a discussion of other issues raised in this case.
221. 289 Ark. 319, 711 S.W.2d 757, 2 U.C.C. Rep. Serv. 2d (Callaghan) 520 (1986).
222. This is the standard measure of damages provided for in U.C.C. § 2-708(1).
the award as an item of incidental damages. The court acknowledged a recent innovation in the application of section 2-710 permitting recovery of interest expenses on borrowed money by aggrieved sellers. But the court said this is permitted only where the money was borrowed to enable the seller to perform the contract in question. In this case, neither the original nor the second loan was necessary to cover expenses incurred by performance in reliance on the contract. Rather, the original loan antedated the contract and the second was obtained only because of the Stokeses decision to use the proceeds to pay off a pre-existing debt.

Another approach was possible. The court could have said that the interest expense fell under the heading of consequential damages and that consequential are not recoverable by a seller. But the question remains, why no consequentials for a seller? In this case, at least, there was a reason. When the Stokeses voluntarily retook possession of their store, they traded in their right to the purchase price for the right to damages measured by the market-contract differential. Since the sellers chose to forego the purchase price, it would be anomalous to compensate them for nonpayment.

Courts must be ever vigilant for awards that overcompensate, since complaining parties inevitably will seek them. Such was the lesson in Commonwealth Edison Co. v. Decker Coal Co. In order to safeguard an adequate supply of low sulphur coal, Commonwealth Edison agreed to purchase from Decker an interest in coal deposits. But when alternate energy sources became

223. The court was unsure whether the claim was for interest on the first or second loan but thought the result would be the same in either case. 289 Ark. at 320, 711 S.W.2d at 758, 2 U.C.C. Rep. Serv. 2d (Callaghan) at 522.
224. U.C.C. § 2-708(1) permits the recovery of incidental damages in accordance with U.C.C. § 2-710. This latter section provides for reimbursement of "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." U.C.C. § 2-710.
226. Nowhere does the Code explicitly authorize the seller's recovery of consequential damages. The situation is different for a non-breaching buyer. The buyer's market-contract rule permits a recovery of consequentials. U.C.C. § 2-713(1). Where the buyer has covered, consequentials are also recoverable. U.C.C. § 2-712(2).
227. To deny the seller, in all cases, the recovery of consequentials would seem to run counter to the remedial policy expressed in U.C.C. § 1-106 that the aggrieved party should be placed in the position it would have been in had the breaching party fully performed.
228. Although not explicitly stated in the opinion, the facts given and the measure of damages approved by the court strongly suggest that the Stokeses regained possession of the store following the Robertses' breach.
229. A seller in possession of goods is generally not entitled to recover the price. See U.C.C. § 2-709.
more economical, Commonwealth Edison reneged. When Decker sued, Commonwealth Edison admitted there was no market for these now valueless reserves. What more could Decker ask for? The admission meant Decker was qualified to recover the purchase price under U.C.C. section 2-709(1)(b). But if Commonwealth Edison paid the purchase price, it would be entitled to get the reserves. Trying to get the price and the coal reserves too, Decker argued that notwithstanding its right to the price under section 2-709 it could elect to recover its lost profits under U.C.C. section 2-708(2), which, coincidentally, equalled the purchase price. Relying on (i) the remedial policy expressed in U.C.C. section 1-106, (ii) the statutory language of sections 2-708 and 2-709, (iii) case law, and (iv) the intent of the drafters of section 2-708, Judge Moran had little difficulty deciding that the U.C.C. does not condone a windfall. Hence, Decker's recovery was limited to whatever would be available to it in an action on the price.

Universal Power Systems v. Godfather's Pizza is a case exploring the calculation of damages for breach of a requirements contract. The parties entered into a contract whereby Universal was to be Godfather's exclusive supplier of deep dish pizza pans and supplies. Subsequently, Godfather's underwent a change in ownership and operation and its new operators refused to recognize a commitment to purchase from Universal. Instead, they issued a purchase order to Chicago Metallic Products ("Chicago Metallic") for $1,675,626.48 worth of goods. As it turned out, Godfather's was unable to complete its contract with Chicago Metallic and only $911,927.35 worth of goods were actually delivered and paid for under the contract.

231. The reason for assigning a zero value to the reserves is that the cost of mining and removing the coal would exceed the obtainable sale price.

232. The court mistakenly refers to U.C.C. § 2-709(1)(a) as the relevant section when, in fact, the controlling provision is U.C.C. § 2-709(1)(b). An action for the purchase price may be maintained "if the seller is unable after reasonable effort to resell [the goods] or the circumstances reasonably indicate that such effort will be unavailing." U.C.C. § 2-709(1)(b). Ordinarily no other measure of general damages will generate a recovery quite as large as the purchase price. For this reason, most cases involving U.C.C. § 2-709 are those where the seller attempts to convince a court of its applicability.

233. See U.C.C. § 2-709(2).

234. It equalled the purchase price because, according to Decker, the resale credit was $0.00. This same result could have been achieved under U.C.C. § 2-708(1) by subtracting the market price ($0.00) from the contract price.

235. The only support for Decker's contention that the court was able to locate was the statement in U.C.C. § 2-703 comment 1 that "the remedies are essentially cumulative in nature." Reading this statement in the context of the Code's underlying purpose and policies, the court refused to believe that it authorized a windfall. 653 F. Supp. at 845, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 607.

236. As an item of incidental damages, the court also allowed recovery of delay damages, i.e., prejudgment interest. The court, for no apparent reason other than convenience, used the contract rate of interest to calculate the award. Id. at 845, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 607.

237. 818 F.2d 667, 3 U.C.C. Rep. Serv. 2d (Callaghan) 1748 (8th Cir. 1987).
The first issue was whether the district court erred in admitting the Chicago Metallic $1.6 million purchase order into evidence. The district court ruled that the purchase order was relevant to Universal's damages because it permitted a finding by the jury that had Godfather's not breached its contract with Universal, Universal would have received the order. The Eighth Circuit disagreed. It concluded that where a requirements contract is involved, the relevant issue is not the volume of goods the buyer believed it would require, but the buyer's actual good faith requirements during the period in question. To establish the latter, one has to look at actual "purchases from any other source during some relevant and comparable time period." 238

The second issue in Godfather's was related to the first. When Godfather's failed to complete its contract with Chicago Metallic, it paid Chicago Metallic an additional $411,816.65 in settlement of an apparent breach of contract claim. Universal contended that this sum should be included in the damage base for Universal's lost profits 239 because, but for Godfather's breach, it would have been paid the $400,000 for nonfulfillment of the $1.6 million dollar purchase order it would have received. The court concluded that this reasoning was fatally flawed because Universal did not have a "firm" contract for a specific amount of goods; Godfather's would have bought only what it needed. Thus, the proper damage base was $911,927.35, the goods actually paid for and supplied by Chicago Metallic.

With the damage base established, the Eighth Circuit next focused on the jury's acceptance of 31.4% as the correct profit margin. In particular, the court had to decide whether the profit margin should be reduced to account for three items of overhead: warehouse expense, depreciation on the deep dish equipment, and salary increases resulting from the increased sales. Correctly interpreting the "reasonable overhead" language of U.C.C. section 2-708(2) to include fixed overhead costs but not variable overhead costs, the court held that substantial evidence supported the jury's determination that these were fixed costs.

STATUTES OF LIMITATIONS

Previous surveys have noted that the argument that a party is estopped from raising the statute of limitations is rarely successful. 240 The argument typically arises in a breach of warranty case where the conduct allegedly raising the estoppel is the promise of repair or failed attempts at repair. 241

238. 818 F.2d at 672, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 1754. In the court's opinion, a contract to purchase manifests only an expectation of "possible requirements." Id.

239. Universal's entitlement to its lost profits is assumed throughout the opinion. Perhaps the absence of discussion means the court thought that the point was obvious. It is undoubtedly true that a manufacturer of goods who has yet to manufacture the goods can only be made whole if recovery is had under the lost profits formula of U.C.C. § 2-708(2).


241. In past years, buyers have also argued, with little success, that the seller's standard repair or replacement warranty constituted a future performance warranty. This year, buyers fared a bit
This year's factually atypical case was *L.R. Foy Construction Co. v. South Dakota State Cement Plant Commission*. Cement Plant agreed to supply Spearfish Ready-Mix ("Ready-Mix") with its 1978 requirements for cement. Cement Plant did not have enough cement to perform its obligations in full and worked out an accommodation with Ready-Mix without revealing that, contrary to a public statement that South Dakota residents would be given preference, it had entered into a substantial contract with a new customer in Colorado that was given preference. Ready-Mix did not learn of this preference until 1984, at which time it brought an action against Cement Plant on a breach of contract theory. The trial court dismissed the action on the grounds that it was untimely. The Supreme Court of South Dakota held that the facts alleged would equitably estop Cement Plant from raising the statute of limitations and remanded the case for further proceedings. The court noted the following elements to the estoppel: "[i] false representations or concealment of material facts must exist; [ii] the party to whom it was made must have been without knowledge of the real facts; [iii] the representations or concealment must have been made with the intention that it should be acted upon; and [iv] the party to whom it was made must have relied thereon to his prejudice or injury."

While this is not a breach of warranty case and the acts of Cement Plant are not savory, the case is troublesome. The court struggles with whether there were separate tort and breach of contract claims. If there were separate claims, the court should have analyzed the breach of contract claim more closely. Cement Plant was obliged to deliver cement; shortfalls in performance of this obligation would be excused if Cement Plant followed the procedures set out in U.C.C. section 2-615. It failed to do so and, therefore, was not excused from its obligations. The failure to perform would be a breach of contract which would accrue at the time when delivery was due. On these facts, the statute of limitations would have run. The plaintiff would not be without a remedy because a separate cause of action would lie for the tort of misrepresentation that would have its own statute of limitations and rules on accrual of the cause of action.


244. Ready-Mix alleged tort claims of fraud and deceit, negligent misrepresentation, and tortious interference with contract. The court does not decide whether these independent tort claims exist. In a special concurrence, however, Justice Henderson would allow the case to proceed under alternative theories that sound in either contract or tort, and points out that the tort claims are not subject to the U.C.C. statute of limitations. 399 N.W.2d at 349–51, 3 U.C.C. Rep. Serv. 2d (Callaghan) at 643–44.
Even if, as the court concluded, equitable estoppel applies to the running of the statute of limitations on the contract claim, it would have been preferable if the court had relied on the law on tolling of statutes of limitations which is explicitly saved by U.C.C. section 2-725(4). Under general rules on tolling, presumably the statute would only be tolled until the plaintiff knew or should have known of the breach—a refinement that the blunter instrument of equitable estoppel does not clearly recognize.

The most noteworthy of this year's factually typical cases was *Sierra Diesel Injection Service v. Burroughs Corp.* The seller of a computer attempted to modify and replace a computer model in order to fulfill the contract but these attempts were ultimately unsuccessful and the buyer purchased another computer. In subsequent litigation claiming, inter alia, breach of contract and warranty, the buyer argued that the attempted repairs tolled the statute of limitations under U.C.C. section 2-725(4). The court concluded that the attempts did toll the statute, citing cases that the court characterized as both stating the "general rule" and being "the more persuasive opinions." The court is probably wrong in its statement of the general rule and it makes no attempt to discuss the less persuasive opinions. Moreover, the court provides no reasons for arriving at the result it does and is therefore little help in developing reasoned jurisprudence.

With the proliferation of statutes and new theories of liability, it is hardly surprising to discover that sometimes a sought-after remedy or cause of action can bear two different names. It is for courts to decide whether the name matters and two recent cases suggest that the name matters little.

In *Bancorp Leasing & Financing Corp. v. Augusta Aviation Corp.*, the Ninth Circuit Court of Appeals was called upon to decide which statute of limitations was controlling, U.C.C. section 2-725 or Oregon's two-year product

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246. 648 F. Supp. 1148, 3 U.C.C. Rep. Serv. 2d (Callaghan) 646 (D. Nev. 1986). Although the contract provided for application of Michigan law, the court decided that the law of the forum, Nevada, was controlling on statute of limitations issues. See supra notes 6–8 and accompanying text.


250. 3 U.C.C. Rep. Serv. 2d (Callaghan) 627 (9th Cir. 1987), opinion amended, 813 F.2d 272, 3 U.C.C. Rep. Serv. 2d (Callaghan) 1415 (9th Cir. 1987).
The buyer sought recovery for property damage to its helicopter when the landing gear collapsed, allegedly due to a design defect. The court was of the opinion that the Oregon legislature intended the products liability statute to be applicable to all products-related claims even if the claim bore the name “breach of warranty.”

The other case was Firestone & Parson, Inc. v. Union League of Philadelphia. More than four years after purchasing an oil painting, the buyers learned that it was probably not painted by the artist that the parties originally assumed. The buyers attempted to escape the stricture of section 2-725 by characterizing their suit as a claim for rescission of contract based upon mutual mistake of fact. The attempt failed. The district court could not see how this claim was any different from litigation predicated on the U.C.C. remedy of revocation of acceptance. The court also noted that, to the extent the buyers were asking for damages, their lawsuit was indistinguishable from one for breach of warranty.

Now that the United Nations Convention on Contracts for the International Sale of Goods has come into force on January 1, 1988, there will be more interest in related conventions. An earlier U.N. convention is particularly relevant to the statute of limitations: the Convention on the Limitation Period of the International Sale of Goods, 1974, as amended by a 1980 Protocol. Eight countries have ratified or acceded to the unamended 1974 convention—Argentina, Czechoslovakia, Dominican Republic, Egypt, Ghana, Hungary, Norway, and Yugoslavia—but not all these countries have adopted the 1980 Protocol. Ten states must become party to the convention before the convention will come into force. The United States has taken no formal steps to accede to the convention.

**DOCUMENTS OF TITLE**

There was one case of interest under article 7. U.C.C. section 7-204(2) permits a warehouseman to limit his liability for loss of or injury to goods stored


252. The court, citing with approval East River S.S. Corp. v. Transamerica Delaval, Inc., 106 S. Ct. 2295, 1 U.C.C. Rep. Serv. 2d (Callaghan) 609 (1986), intimated that if it were free to ignore Oregon law, it would label as a breach of warranty claim any claim not involving personal injury or damage to property other than the product itself. See 1987 Survey, supra note 28, at 1219-22.


with him, unless the warehouseman has converted the goods to his own use. When the disappearance of stored goods is unexplained, who has the burden of proof on the conversion question? In *International Nickel Co. v. Trammel Crow Distribution Corp.*, the Fifth Circuit Court of Appeals, applying Texas law, predicted that Texas courts would not presume that the warehouseman had converted the goods to its own use. The loss of some 71,000 pounds of nickel worth over $260,000 was unexplained. On appeal from a summary judgment for the warehouseman, the court refused to invalidate, by presuming conversion, a limitation of liability provision that would permit the bailor to recover only $11,000. However, the court did conclude that the limitation provision might be unenforceable because of misrepresentations by the warehouseman that annual physical inventories had been performed; thus, it reversed and remanded.

**BULK TRANSFERS: ARTICLE 6 REVISION**

A drafting committee of the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute, under the chairmanship of Gerald L. Bepko, has been considering the revision of U.C.C. article 6 since 1985. The drafting committee is expected to recommend that the NCCUSL present each state with the option of either (i) replacing the existing bulk sales article with a revised article 6, or (ii) repealing article 6 and not replacing it.

At this writing, revised article 6 has not been finalized, but the salient features of the February 1988 draft are likely to remain unchanged. The revised article 6 is likely to define a "bulk sale" as a sale, not in the ordinary course of the seller's business, of more than half the seller's personal property as measured by value, where the buyer has notice, or after reasonable inquiry would have notice, that the seller will not continue to operate the same or a similar kind of business after the sale.

Thus, unlike existing article 6, which applies only to sales of inventory and related equipment by businesses that are principally engaged in the sale of merchandise from stock, revised article 6 is likely to apply to sales of all personal property held for business use by all types of businesses. In sales that are subject to revised article 6, the buyer will have the duty of notifying the seller's creditors of the sale. Where the seller has a large number of creditors, the buyer may either file a notice with the secretary of state or give notice to each creditor individually. Where the seller has a small number of creditors, the buyer must give individual notice. The notice must include a copy of a schedule stating to whom the purchase price will be distributed.

255. 803 F.2d 150, 2 U.C.C. Rep. Serv. 2d (Callaghan) 594 (5th Cir. 1986).


Unlike existing article 6, which allows aggrieved creditors to reach the transferred property in the hands of a noncomplying buyer, the revised article is likely to provide for a damages remedy against the buyer who fails to comply with the notice requirements of the article. Damages will be limited by the amount of the creditor's claim against the seller and by the amount of the purchase price, and a buyer who makes a good faith effort to comply with the article but fails to do so may be entitled to credit for amounts paid to other creditors of the seller.258

258. Members of the Ad Hoc Committee on Bulk Transfers, chaired by Howard Ruda and Steven L. Harris, have received drafts of revised article 6. Mr. Ruda, who succeeded Mr. Harris as the ABA's advisor to the drafting committee when the latter joined William D. Hawkland as a co-reporter, has informed interested ABA members of developments in the drafting process and conveyed the reactions of ABA members to the drafting committee.

Any Business Law Section member who wishes to join the Ad Hoc Committee on Bulk Transfers should contact Howard Ruda at Hahn & Hessen, 350 Fifth Avenue, New York, New York 10118. Anyone wishing a copy of revised article 6 should write to the Executive Secretary, National Conference of Commissioners on Uniform State Laws, 676 N. St. Clair Street, Chicago, Illinois 60611.