

Symposium on Commercial Law

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THE MERCHANT OF ARTICLE 2

DOUGLAS K. NEWELL*

Statutory definitions give the reader a sense of confidence by supplying apparently precise meaning. In addition to establishing meaning a draftsman may, by defining a term, provide a basis for clear, brief and consistent usage and a tag for reference in later parts of the statute. But as one author has pointed out,

[t]he rewards are so alluring that it is easy to overlook the prime difficulty—the process of defining—and the attendant burden of remembering to follow [one's] own definitions. The UCC has opted for the rewards and blinked at the difficulties.¹

Nowhere are the difficulties of definition more apparent than in subsections (1) and (3) of 2-104 of the Uniform Commercial Code, wherein the definitions of “merchant”² and “between merchants”³ are found. The language in these definitions has been variously described as ambiguous,⁴ awkward,⁵ odd,⁶ difficult to construe⁷ and leading to conclusions which do not make much sense.⁸

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1. Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 186 (1967).

2. The Uniform Commercial Code [hereinafter cited as UCC] § 2-104(1) (1972 Official Text) provides:

“Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Unless otherwise indicated, all references to the Code are to the 1972 Official Text.

3. UCC § 2-104(3) provides: “‘Between merchants’ means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.”

4. Professor Kripke’s remarks in *Hearing Before Enlarged Editorial Board, January 27-29, 1951*, 6 BUS. LAW. 164, 183 (1951).

5. Lattin, *The Law of Sales in the Uniform Commercial Code*, 15 OHIO ST. L.J. 12, 21 (1954).

6. Waite, *The Proposed New Uniform Sales Act*, 48 MICH. L. REV. 603, 618 (1950) (referring to an earlier version of 2-104 which contained quite similar language).

7. Note, *Merchant Provisions in the Uniform Commercial Code—Sales*, 39 GEO. L.J. 130, 131 (1951) (referring to an earlier version of 2-104 which contained quite similar language).

8. BENDER’S U.C.C. SERVICE, DUESENBERG & KING, SALES AND BULK TRANSFERS § 1.02 (1966) [hereinafter cited as BENDER].

The purpose⁹ of this article is to examine the merchant definitions. At a minimum it is hoped that much of the case law and commentary concerning the merchant of Article 2 can be compiled in one place so that those who face a merchant question in the future will have a useful starting point. More ambitiously, an attempt will be made to clarify this murky area of the law. Various interpretations of the merchant sections will be suggested and discussed. The author's thesis is that the merchant definition in 2-104(1) is more complex than necessary and that a resort to common sense and the nature and purpose of the special rules for merchants will lead to a greater understanding of the merchant concept.

Four parts comprise the body of this article. In Part I, some of the causes of the definitional difficulties are explored in order to provide a perspective for the remainder. In Part II, the merchant definitions contained in 2-104(1) and the variations in other Code sections¹⁰ are divided into 13 possible variations of the definition of merchant. In Part III, the significance of the differences among the 13 possible variations is discussed. In Part IV, methods of interpreting the sections which establish special rules for merchants (as opposed to the general rules for both merchants and non-merchants) are examined.

I. CAUSES OF DEFINITIONAL PROBLEMS

One can never be certain why the talented people who drafted the merchant definitions were unable to arrive at a clearer statement. However, among the more significant reasons would appear to be (1) a lack of basic agreement, (2) a conflict of drafting philosophies and (3) the choice of "merchant" as the word to describe the category.

Lack of Basic Agreement

The individuals who drafted, reviewed and adopted the Code seem to have been unable to agree on which persons ought to be included in the merchant category. Discussing the historical basis and the need for distinguishing merchants from other persons, the late Karl Llewellyn stated:

An early Nineteenth Century period in which the idea

9. This, of course, assumes there must be some purpose other than lifting the author from total obscurity to relative anonymity on a professional rating scale.

10. *I.e.*, 2-312(3), 2-314(1) and 2-403(2).

of the merchant's obligations threatened to be lost was followed by the recapture and re-establishment of the idea. The whole law, developed now over more than a hundred years, on foreign trade terms and letters of credit—and the whole current effort to establish by bankers' and merchants' negotiation "uniform" interpretations and clauses and "customs"—and the whole current successful movement to build, association-wise, "standard terms"—all of these rest on a vital need for *distinguishing merchants from housewives and from farmers and from mere lawyers.*¹¹

Yet, a comment to 2-104 (defining merchant), in referring to 2-201(2), 2-205, 2-207 and 2-209, states:

For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . ." since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants." But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant.¹²

The negative implication of the last quoted sentence is that a lawyer in his "mercantile capacity" is a merchant under Article 2. The implication of the earlier quoted language of 2-104(1) is that a farmer could also be a merchant. If this is the case, Llewellyn's quoted statement¹³ before a body considering adoption of the Code is more than a little perplexing.

Similar difficulties arise from the statement in the same comment that "[t]he term 'merchant' as defined here roots in the 'law merchant' concept of a professional in business."¹⁴ It is questionable whether a busy lawyer would have the time or inclination to chase down this reference; if he does, he will discover that the law mer-

11. 1 NEW YORK REPORT OF THE LAW REV. COMM'N FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 107-08 (1954) (emphasis added).

12. UCC § 2-104, Comment 2.

13. See note 11 *supra* and accompanying text.

14. UCC § 2-104, Comment 2.

chant dealt primarily with traders and peddlers and thus concerned a much smaller class of persons than is apparently intended by the Code.¹⁵

Like problems of definition seem to have occurred at meetings of the Editorial Board and at subsequent meetings concerning the adoption of the Code. The following statement was made by Professor Kripke at the January 28, 1951 meeting of the Editorial Board.

In correspondence I had last week with Miss Mentschikoff and continued yesterday by notes back and forth across the table, I think we isolated, at least to my satisfaction, an ambiguity in the concept of merchant which I think ought to be called to the attention of the Editorial Board, the term "merchant" being someone that has knowledge or skill peculiar to the practices or the goods involved in the transaction.

Now, the word "practices" leads to one thing. The word "goods" leads to another, and that is the ambiguity I wanted to point out.

If you throw the emphasis on "goods" a merchant is a person who deals with a particular kind of thing. A grocer is a merchant as to groceries and not as to steel. If you throw the emphasis on practices you reach the conclusion that a commercial lawyer is a merchant with respect to all kinds of sales, or that a professional purchasing agent in a corporation is a merchant as to all kinds of goods, whether or not he has ever dealt with the particular kind of goods involved.

Miss Mentschikoff makes it clear to me that that is in fact her intention.

Now we have two types of rules applicable to merchants in this Article. One is the type which assumes that the man deals in a particular kind of goods involved and therefore can be given an additional responsibility with respect to that kind of goods. If he is a merchant and he rejects the goods as noncomplying with the contract, he has to go out and sell them for the seller because by assumption he has facilities in that line of business.

15. F. WHITNEY, *THE LAW OF MODERN COMMERCIAL PRACTICES* § 111 (1958).

If you switched, however, to the other concept of merchant, he may be merely a commercial lawyer or a purchasing agent. He may have no facility with respect to the particular kind of goods involved.

The other set of provisions applicable to merchants here are those provisions which merely assume that the man has ordinary business competence and experience and owes an obligation to act with ordinary business prudence—specifically, to answer his mail. Thus a merchant is under a duty to reply to a memo by the other party stating his understanding of the deal. A merchant is under a duty to give his reason for rejection of the goods.

Those types of provisions have nothing to do with the question whether the man is an expert with respect to the particular goods. They have merely to do with the question whether he has business experience, and as I have said before, can be expected to answer his mail.

The effect of the ambiguity in the definition, I think, is to make those provisions which assume a knowledge of the goods too broad; and on the other hand, those which merely assume ordinary business knowledge are either too narrow or inadequate, depending on how you read the definition.

In my opinion, the definition cannot properly be read or has no meaning if you take it merely to mean general business knowledge. But unless you take it that way, these provisions which assume merely ordinary business knowledge are too narrow.

Therefore, I should like to suggest that as to that second group we spell out the concept of merchant, and, if you don't want the provision to be generally applicable, make it applicable to everyone but, say, a consumer purchaser. In other words, everyone but the consumer who by assumption of the draftsman of this Code won't have any business experience, is bound to exercise the ordinary business courtesy of answering his mail, and then confine the concept of merchant only to people who are experts with respect to the particular kind of goods involved.¹⁶

16. Professor Kripke's remarks, *supra* note 4, at 183.

The ambiguity of definition referred to by Professor Kripke was carried forward to a joint meeting of the sponsor organizations, where the definition was approved in a manner which indicates that not everyone had a full understanding of who was to be included in the merchant category. As Professor Kripke reports:

I then opposed the definition on the floor at the joint meeting of the sponsor organizations, on the ground that the application of this artificial definition to lawyers, purchasing agents of institutions, and others would unfairly take such persons by surprise. Another speaker said that he would support my opposition if the definition had this surprise element, but that the definition could not possibly mean what I suggested as to lawyers. No member of the drafting staff corrected his misapprehension, and the definition was therefore approved by the joint meeting.¹⁷

Cries that the definitions of merchant did not clearly specify who is a merchant were heard frequently during the preparation of the Code.¹⁸ Nonetheless, the definition was not modified to any significant extent. The major reason for the lack of modification appears to have been the feeling of many that most of the merchant rules were "intended to apply to non-merchants except when there is some element of harshness or unfair surprise."¹⁹

Conflict of Drafting Philosophies

The problem of a definition that means different things to different people is compounded by and is partially the result of a conflict in drafting philosophies. On the one hand the drafters opted for the technique of centrally defining those persons who should be subject to special rules, and thus created a term to be used throughout Article 2 whenever the drafters wished to refer to such persons.²⁰ The justification for this technique has been stated as follows:

Drafting techniques of this kind, consistently followed

17. Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 325-26.

18. See, e.g., Waite, *The Proposed New Uniform Sales Act*, 48 MICH. L. REV. 603, 617-19 (1950); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 572-73 (1950); *Report of the Committee on the Proposed Commercial Code*, 6 BUS. LAW. 119, 126 (1951).

19. *Report on Article 2—Sales By Certain Members of Faculty of Harvard Law School*, 6 BUS. LAW. 151, 154 (1951).

20. See UCC § 2-104, Comment 1.

through the Code, can be of great value in achieving the precision and consistency of language desired in any statute. Of course, the use of specifically defined terms also avoids much repetition in language.²¹

On the other hand, the drafters have:

(1) Included various definitions within 2-104 (definition of merchant) and used other definitions in certain of the sections which establish special rules for merchants;²²

(2) Suggested in the comments that reference must be made to the nature of each section which deals with merchants to determine which of the different definitions is applicable;²³ and

(3) Indicated that a general drafting concept of the Code is "that proper construction follows the reason and is limited or extended by it;"²⁴ consequently, the courts should be free to broaden a definition or apply a rule to persons not directly covered if the reason of the rule so dictates.²⁵

If "merchant" (whomever it may designate) means the same persons in 2-201(2) (Statute of Frauds between merchants) as it does in 2-603 (duties of merchant as to goods rejected rightfully), the drafters have created a useful legal shorthand. If it means different persons in different sections, then the drafters might have been better off to leave the matter to be determined in each section.²⁶ Consistency of meaning is extremely important to sound legislative drafting;²⁷ without consistency, the Code may "cause confusion instead of clarification and perhaps make the Code the despair of busy lawyers."²⁸

The Choice of the Word "Merchant"

Even had there been complete agreement on which persons were merchants and consistent application of the term, there would

21. *Report of the Committee on the Proposed Commercial Code*, 6 BUS. LAW. 119, 125 (1951).

22. See notes 44-51 *infra* and accompanying text.

23. UCC § 2-104, Comment 2.

24. S. MENTSCHIKOFF, *COMMERCIAL TRANSACTIONS, CASES AND MATERIALS* 6 (1970) (emphasis added).

25. *Id.*

26. Williston, *supra* note 18, at 572-73.

27. See STAFF OF OREGON LEGISLATIVE COUNSEL COMM., *BILL DRAFTING MANUAL* 21 (1968).

28. *Report*, *supra* note 21, at 143-44.

still have been problems because of the selection of the word "merchant" to designate the category. In discussing the subject of statutory interpretation, the late Justice Frankfurter noted:

Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of feudalism. Holmes made short shrift of a contention by remarking that statutes used "familiar legal expressions in their familiar legal sense." The peculiar idiom of business or of administrative practice often modifies the meaning that ordinary speech assigns to language. And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.²⁹

There is much "old soil" attached to the word "merchant." Clearly, the drafters meant to define "merchant" in some unique ways and expected courts and lawyers to acquiesce. Most people would certainly agree that interpretation of a statutory term should begin with the statutory definition;³⁰ however, it should have been expected that old definitions of a common term would be resurrected, particularly when the comments often refer to other meanings.³¹

The problem is exemplified by the best known case which interpreted the merchant definition: *Cook Grains, Inc. v. Fallis*.³² In that case, the Arkansas Supreme Court had the task of determining whether the defendant Fallis was a merchant. The determination was crucial to the parties, for if Fallis were deemed a merchant his Code Statute of Frauds³³ defense to an alleged oral contract for the sale and delivery of soybeans would have been lost.³⁴ Fallis, a farmer

29. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) (footnote omitted).

30. See *id.* at 535-36.

31. See, e.g., UCC § 2-104, Comment 2.

32. 239 Ark. 962, 395 S.W.2d 555 (1965).

33. UCC § 2-201(1).

34. UCC § 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 ten days after it is received.

The court apparently misconceived the effect of finding Fallis to be a merchant, stating "if appellee is a merchant he would be liable on the alleged contract because he did not,

who regularly grew soybeans on 325 acres of his 550 acre farm, seemed to fit the merchant definition as a "dealer of goods of the kind,"³⁵ or one who "by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction"³⁶ Nonetheless, the court ignored the Code's merchant definition in 2-104(1) and relied instead on the maxim, "In construing a statute its words must be given their plain and ordinary meaning."³⁷ By referring to *Words and Phrases*,³⁸ the court found various pre-Code cases to support its holding that Fallis was not a merchant.³⁹

The above case may, if one wishes, be dismissed as an aberration. However, when a common everyday merchant,⁴⁰ a merchant subject to the law merchant,⁴¹ and a merchant as defined in pre-Code law⁴² are different from each other and from the merchant defined in the Code,⁴³ the seeds of confusion are present.

II. THIRTEEN POSSIBLE DEFINITIONS

Putting aside the non-Code definition of merchant suggested above,⁴⁴ one is still faced with a large number of possibly different definitions of merchant under various sections of the Code. As a starting point, it should be noted that the basic definition in 2-104(1) refers to "a person"; resort to the Code definitions shows that "person" includes a variety of entities. First, the Code defines "person" to include an "individual" or an "organization."⁴⁵ Pushing forward through the definitions, one is told that

"[o]rganization" includes a corporation, government or

within ten days, give written notice that he rejected it." 239 Ark. at 963, 395 S.W.2d at 556.

35. UCC § 2-104(1).

36. *Id.*; see also Comment, *A Farmer Is Not a "Merchant" Under the Uniform Commercial Code—Cook Grains, Inc. v. Fallis*, 65 MICH. L. REV. 345 (1966); cf. *Azevedo v. Minister*, 86 Nev. 576, 471 P.2d 661 (1970) (hay ranchers conceded that they were "merchants").

37. 239 Ark. at 964, 395 S.W.2d at 557.

38. *Id.* at 963-64, 395 S.W.2d at 556-57.

39. *Id.*

40. P. ROGET, ROGET'S INTERNATIONAL THESAURUS 828.2 (3d ed. 1962) defines "merchant" as, e.g., "shopkeeper," "storekeeper" and "businessman."

41. F. WHITNEY, *supra* note 15, § 111.

42. For example, in 27 WORDS AND PHRASES, *Merchant* (1961), every case but one listed under the "Manufacturer" subheading distinguished a merchant from a manufacturer. *Id.* at 139-41. The cases listed under the "Farmer" subheading distinguished a merchant from a farmer. *Id.* at 136.

43. See UCC § 2-104(1).

44. See notes 40-42 *supra* and accompanying text.

45. UCC § 1-201(30).

governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.⁴⁶

Thus, for purposes of analysis, it is sufficient to recognize that *any* conceivable individual or entity may be a merchant if he or it satisfies the other requirements of the definition.

Excluding the variations provided by the definition of person, 2-104 suggests nine theoretically variant definitions of merchant:

- (1) A person who deals in goods of the kind;
- (2) A person who by his occupation holds himself out as having *knowledge* peculiar to the *practices* involved in the transaction;
- (3) A person who by his occupation holds himself out as having *knowledge* peculiar to the *goods* involved in the transaction;
- (4) A person who by his occupation holds himself out as having *skill* peculiar to the *practices* involved in the transaction;
- (5) A person who by his occupation holds himself out as having *skill* peculiar to the *goods* involved in the transaction;
- (6) A person to whom *knowledge* peculiar to the *practices* involved in the transaction may be imputed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge;
- (7) A person to whom *knowledge* peculiar to the *goods* involved in the transaction may be imputed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge;
- (8) A person to whom *skill* peculiar to the *practices* involved in the transaction may be imputed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such skill;
- (9) A person to whom *skill* peculiar to the *goods* involved in the transaction may be imputed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such skill.

The above nine variations of the definition of merchant are

46. *Id.* § 1-201(28).

based upon distinctions between "skill" and "knowledge," between "goods" and "practices," and among three concepts which one commentator described as follows:

(a) Dealer. He may be a person who deals in goods of a kind involved. Whether he deals in other goods is immaterial. He must deal in goods of the kind involved in the transaction in order to come within this first category.

(b) Representation. He may be a person who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. Whether he actually has such knowledge or skill is immaterial if he so holds himself out.

(c) Principal. He may be a person who employs an agent, broker, or other intermediary who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.⁴⁷

In addition to the basic 2-104(1) definitions of merchant, four other varieties of merchants are suggested in other sections of Article 2:

(10) A party who is "chargeable with the knowledge or skill" of a merchant;⁴⁸

(11) One who is "a merchant regularly dealing in goods of the kind"⁴⁹

(12) One who is "a merchant with respect to goods of that kind"⁵⁰

(13) One who is "a merchant who deals in goods of that kind"⁵¹

III. ANALYZING THE DIFFERENCES AMONG THE MERCHANT DEFINITIONS

The express goal of the drafters in establishing different or special rules for merchants was to distinguish between "professionals in a given field" and "a casual or inexperienced seller or buyer."⁵²

47. 1 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-104:4, at 220 (2d ed. 1970).

48. UCC § 2-104(3).

49. *Id.* § 2-312(3).

50. *Id.* § 2-314(1).

51. *Id.* § 2-403(2).

52. *Id.* § 2-104, Comment 1.

For such a seemingly simple task they nonetheless created the variations of merchant identified in Part II. In this part, an attempt will be made to analyze the differences among the variations. Differences in definitions resulting from the drafters' use of redundant phrases, undefined terms, and slight word variations among Code sections will be examined, and the phrase "mercantile capacity" (referred to in a comment⁵³ as limiting the scope of the merchant class) will be discussed.

Variations in Definition

1. "Goods of the Kind"

If a merchant is a dealer in goods of the kind under 2-104(1), does one entrust possession of goods under 2-403(2) (entrusting to a merchant)⁵⁴ to a dealer in goods of the kind who deals in goods of that kind? Does a "merchant *regularly* dealing in goods of the kind"⁵⁵ deal with goods more frequently or systematically than "a merchant who deals in goods of that kind"⁵⁶ or "a merchant with respect to goods of that kind"⁵⁷? Is "a merchant with respect to goods of that kind"⁵⁸ ever someone other than a dealer? These questions must be asked when one attempts to ascertain whether there are any significant differences among variations 1, 11, 12 and 13 set out in Part II of this article.

The redundancy created by defining a merchant as "a dealer in goods of the kind"⁵⁹ and then, in three other sections, designating a merchant as one "regularly dealing in goods of the kind,"⁶⁰ "with respect to goods of that kind,"⁶¹ or "who deals in goods of that kind"⁶² apparently resulted from a failure of the drafters to coordinate the drafting of 2-104(1) with that of Sections 2-312(3) (warranty against infringement), 2-314(1) (warranty of merchantability)

53. *Id.* § 2-104, Comment 2.

54. UCC § 2-403(2) provides:

Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business.

55. UCC § 2-312(3) (emphasis added).

56. *Id.* § 2-403(2).

57. *Id.* § 2-314(1).

58. *Id.*

59. *Id.* § 2-104(1).

60. *Id.* § 2-312(3).

61. *Id.* § 2-314(1).

62. *Id.* § 2-403(2).

and 2-403(2) (entrusting to a merchant). The references to "goods of the kind" in 2-312(3), 2-314(1) and 2-403(2) designate these as sections which are concerned with a merchant who must be associated with the goods involved in the transaction as opposed to a merchant who is only familiar with business practices. The Code definitions would have been much easier to follow if similar references to goods had been made in all sections which are goods oriented⁶³ and the "dealer" phraseology had been deleted from 2-104.

The apparent variations in definition among Sections 2-312(3), 2-314(1) and 2-403 should be examined by looking at the respective sections. Section 2-312(3), which deals with the warranty against infringement, provides:

Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

As noted above, there is a question whether use of the word "regularly" means that a dealer who warrants against "infringement or the like" is different from other dealers.

Although the comments to this section suggest that perhaps only retailers are bound by such warranty,⁶⁴ most authorities have concluded that manufacturers and wholesalers should also be included.⁶⁵ Thus the most difficult problem of interpretation is whether a manufacturer who manufactures a piece of equipment only once or twice "regularly" deals in goods of the kind.

One author suggests that a lawyer or judge deciding the issue of whether an infrequent seller warrants against infringement should first ask whether it is "reasonable to presume that the seller by reason of the extent of his dealing in the goods has superior knowledge of the patents relating to the goods,"⁶⁶ and second, whether the imposition of this risk on the seller would comport with

63. *E.g.*, 2-402(2), 2-509(3) and 2-603.

64. *See* UCC § 2-312, Comment 3.

65. BENDER § 5.04, at 5-18, 5-19.

66. Dudine, *Warranties Against Infringement Under the Uniform Commercial Code*, 36 N.Y. St. B.J. 214, 218 (1964).

the Code policy of preserving flexibility in commercial transactions and encouraging continued expansion of commercial practices.⁶⁷ What the answer to this two-pronged test would reveal is not stated by the author. From the tenor of his article, though, it appears that he would find that such a manufacturer is not "a merchant regularly dealing in goods of the kind" under this section. The contrary view, however, has been asserted by other authorities:

Logically, the definition should apply where the seller is in the business of manufacture and he manufactures goods of the type generally, and not necessarily goods of the type specifically. The whole idea behind the warranty seems to be that the seller is in a better position to conduct the necessary searches and would have a superior fund or source of knowledge than would the buyer. This policy would be consistent in situations where the seller is a manufacturer but manufactures this one piece of equipment to do one particular job that this buyer needs, and where the seller may not have occasion to go through the process in the future.⁶⁸

However, it was conceded that such result might come more from the policy of the section than from the language of the Code or comments.⁶⁹ While there are cases interpreting 2-314(1) (implied warranty of merchantability) which hold that a person dealing in goods of the general rather than the specific type is a merchant,⁷⁰ the only case interpretation of 2-312(3) concerned an insurance company which sold a stolen car.⁷¹ Putting aside the probable misapplication of the section,⁷² it is clear that insurance companies are not car dealers.

The next section pertaining to goods to be considered is 2-

67. *Id.*

68. BENDER § 5.04, at 5-20.

69. *Id.* at 5-20, 5-21.

70. *Mutual Services of Highland Park, Inc. v. S.O.S. Plumbing and Sewerage Co.*, 93 Ill. App. 2d 257, 235 N.E.2d 265 (1968) (building supplies dealer selling a new type of hammer and bit); *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. 1972) (auctioneer).

71. *John St. Auto Wrecking v. Motors Ins. Corp.*, 56 Misc. 2d 232, 288 N.Y.S.2d 281 (Dist. Ct. 1968).

72. The warranty under 2-312(3) seems designed to reach infringements of patents, trademarks, copyrights and similar proprietary rights. See *Dudine, supra* note 66, at 220.

314(1), which deals with the implied warranty of merchantability. It provides in part:

Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

The major question posed by the language of this section is whether the omission of the words "deals," "dealing" or "dealer" means that some persons other than dealers could be included. Each of the other sections⁷³ referring to goods of the kind concerns dealers, and the predecessor of 2-314(1) in the Uniform Sales Act referred to a "seller who deals in goods."⁷⁴ The easy answer is that the omission makes no difference; at least one commentator has so intimated, although he failed to specify the reason for his belief.⁷⁵ Others appear to have reached a contrary result, suggesting that a washwoman selling her washing machine⁷⁶ or a gun collector selling one of his guns⁷⁷ might be deemed to warrant the merchantability of the goods sold.

A conclusion that the omission of the "dealing" language has no significance can be supported on several grounds.⁷⁸

(1) A comment refers to "a merchant in a given line of trade"⁷⁹

(2) One of the principal drafters opens the warranties section

73. Sections 2-104(1), 2-312(3) and 2-403(2).

74. UNIFORM SALES ACT § 15(2).

75. 1 R. ANDERSON, *supra* note 46, § 2-312:23, at 475 n.12.

76. Waite, *supra* note 6, at 618 n.20.

77. Note, *supra* note 7, at 131.

78. The author is aware that this view is not shared by some eminent authorities. See, e.g., J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 289 (1972). Much of the apparent disagreement may be a matter of form rather than substance. It is my belief that if the sale or service problem concerning the scope of Article 2 is resolved in favor of treating the installation of plumbing, for example, as a sale of goods, then a plumber would be a dealer in the plumbing supplies which he installs as well as being a person who holds himself out as familiar with the goods. If this installation of supplies is the situation that Professors White and Summers are intending to cover when they assert that a plumber is a merchant under the "holds himself out" language rather than the "deals in goods of the kind" language, then our difference is one of terminology. If they mean, however, that a plumber gives an implied warranty of merchantability if he sells an old sink or one of his tools in an isolated transaction, then we simply disagree on the proper interpretation of 2-314(1).

79. UCC § 2-314, Comment 2.

of her casebook with an excerpt from a classic work⁸⁰ which discusses the Uniform Sales Act warranty of merchantability and the dealers that gave such warranty.⁸¹ No questions are asked or comments made in the book's warranties section concerning the absence of any reference to dealers in 2-314(1);

(3) The cases that have interpreted 2-314(1) have all involved dealers (*i.e.*, manufacturers,⁸² wholesalers⁸³ and retailers⁸⁴), with the difficult cases discussing whether the person dealt in goods generally or in goods of the particular kind,⁸⁵ or whether a sale of goods has been made.⁸⁶

80. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

81. S. MENTSCHIKOFF, *supra* note 24, at 114.

82. Greenspun v. American Adhesives, Inc., 320 F. Supp. 442 (E.D. Pa. 1970) (adhesives); Burks Motors v. International Harvester Co., 250 Ark. 29, 466 S.W.2d 907 (1971) (truck); International Harvester Co. v. Pike, 249 Ark. 1026, 466 S.W.2d 901 (1971) (truck); Regina Grape Products Co. v. Supreme Wine Co., 357 Mass. 631, 260 N.E.2d 219 (1970) (wine).

83. Safeway Stores, Inc. v. L.D. Schreiber Cheese Co., 326 F. Supp. 504 (W.D. Mo. 1971), *rev'd on other grounds*, 457 F.2d 962 (8th Cir. 1972) (cheese); International Harvester Co. v. Pike, 249 Ark. 1026, 466 S.W.2d 901 (1971) (truck).

84. Construction Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505 (7th Cir. 1968) (conveyor system); Marion Power Shovel Co. v. Huntsman, 246 Ark. 152, 437 S.W.2d 784 (1969) (machine parts); Georgia Timberlands, Inc. v. Southern Airway Co., 125 Ga. App. 404, 188 S.E.2d 108 (1972) (used airplanes); Mutual Services of Highland Park, Inc. v. S.O.S. Plumbing & Sewerage Co., 93 Ill. App. 2d 257, 235 N.E.2d 265 (1968) (building supplies); Woodruff v. Clark County Farm Bureau Cooperative Ass'n, ___ Ind. App. ___, 286 N.E.2d 188 (1972) (chickens); Massey-Ferguson, Inc. v. Utley, 439 S.W.2d 57 (Ky. Ct. App. 1969) (farm equipment); Hunt v. Perkins Machinery Co., 352 Mass. 535, 226 N.E.2d 228 (1967) (diesel engines); Ambassador Steel Co. v. Ewald Steel Co., 33 Mich. App. 495, 190 N.W.2d 275 (1971) (steel); Regan Purchase & Sales Corp. v. Primavera, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. 1972) (auctioneer); Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972) (mobile homes); S.F.C. Acceptance Corp. v. Ferree, 39 Pa. D. & C.2d 225, 3 U.C.C. Rep. Serv. 808 (C.P. Pa. 1966) (vending machines); Allen v. Savage Arms Corp., 52 Luzerne Leg. Reg. Rep. 159, 2 U.C.C. Rep. Serv. 975 (C.P. Pa. 1962) (hardware).

85. Prince v. LeVan, 486 P.2d 959 (Sup. Ct. Alas. 1971) (fishermen sold their boat); Mutual Services of Highland Park, Inc. v. S.O.S. Plumbing & Sewerage Co., 93 Ill. App. 2d 257, 235 N.E.2d 265 (1968) (dealer in building supplies sold a new type of hammer and bit); Regan Purchase & Sales Corp. v. Primavera, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. 1972) (auctioneer sold restaurant equipment).

86. Gable v. Silver, ___ Fla. Supp. ___, 10 U.C.C. Rep. Serv. 316 (Dist. Ct. App. 1972) (builder of condominiums); Wentzel v. Berliner, ___ Fla. Supp. ___, 204 So. 2d 905 (Dist. Ct. App. 1967) (caterer acted as church volunteer); Schuchman v. John Hopkins Hosp., 9 U.C.C. Rep. Serv. 637 (Md. Super. Ct. 1971) (hospital); Carter v. Inter-Faith Hosp. of Queens, 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969) (hospital administered contaminated blood); Hoffman v. Misericordia Hosp. of Philadelphia, ___ Pa. D. & C.2d ___, 6 U.C.C. Rep. Serv. 779 (C.P. Pa. 1969), *vacated & remanded*, 439 Pa. 501, 267 A.2d 867 (1970) (hospital administered contaminated blood).

Dealers give a warranty of merchantability because they are expected to stand behind the goods; the warranty thus does not depend on actual knowledge or reason to know of possible defects. Consequently, retail dealers consistently have been held liable when selling goods in containers which have been sealed by the manufacturer.⁸⁷

A dealer in the general type of goods who has never sold the specific type of article before should be held to warrant merchantability under the spirit of 2-314(1). Two cases so indicate. In *Mutual Services of Highland Park, Inc. v. S.O.S. Plumbing & Sewerage Co.*,⁸⁸ a retail building supply dealer was held to warrant the merchantability of a drilling hammer and bit; the dealer sold a general line of merchandise from the same manufacturer but did not ordinarily sell this particular type of hammer and bit. *Regan Purchase & Sales Corp. v. Primavera*⁸⁹ suggested that an auctioneer who sold different kinds of goods on an ongoing basis would be held to warrant the merchantability of a particular item where the circumstances implied the likelihood of repeated sales of similar goods. The comments, however, suggest that an isolated sale of goods is not enough.⁹⁰

The most heavily cited merchant section in case law is probably 2-403(2) (entrusting to a merchant), which provides:

Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

Most of the cases interpreting this section involve retailers⁹¹ and

87. Prosser, *supra* note 80, at 150.

88. 93 Ill. App. 2d 257, 235 N.E.2d 265 (1965).

89. 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. 1972).

90. UCC § 2-314, Comment 3; *see also* Comment, *supra* note 36, at 349 n.26; *cf.* Fear Ranches, Inc. v. Berry, 470 F.2d 905, 12 U.C.C. Rep. Serv. 27 (10th Cir. 1972) reported after this article was written in which the court narrowly interpreted the "goods of the kind" portion of the 2-401(1) merchant definition.

91. General Electric Credit Corp. v. R.A. Heintz Constr. Co., 302 F. Supp. 958 (D. Ore. 1969) (construction equipment, trucks); Commercial Credit Corp. v. Associates Discount Corp., 246 Ark. 118, 436 S.W.2d 809 (1969) (auto); Security Pacific Nat'l Bank v. Goodman, 24 Cal. App. 3d 131, 100 Cal. Rptr. 763 (1972) (boats); English v. Ford, 17 Cal. App. 3d 1038, 95 Cal. Rptr. 501 (1971) (auto); Dowell v. Beech Acceptance Corp., 4 Cal. App. 3d 750, 84 Cal. Rptr. 654 (1970), *aff'd*, 3 Cal. 3d 544, 91 Cal. Rptr. 1, 476 P.2d 401 (1970), *cert. denied*, 404 U.S. 823 (1972) (airplanes); Harmony Homes, Inc. v. Zeit, ___ Fla. Supp. ___, 260 So. 2d 218 (Dist. Ct. App. 1972) (auto); Correria v. Orlando Bank and Trust Co., ___ Fla. Supp. ___, 235 So. 2d 20 (Dist. Ct. App. 1970) (auto); Christopher v. McGehee, 124 Ga. App. 310, 183 S.E.2d 624 (1971), *aff'd*, 228 Ga. 466, 186 S.E.2d 97 (1971) (used car); Charles S. Martin Distrib. Co. v. Banks, 111 Ga. App. 538, 142 S.E.2d 309 (1965) (furniture & appliances);

wholesalers⁹² who obviously deal in goods of that kind. One case interpreting 9-307(1) (protection of buyers of goods) in a similar situation defined "merchant" as "one who engages in an economic enterprise on a systematic basis, not merely an isolated transaction."⁹³

The major problem of interpretation concerning the entrusting section quoted above is determining whether the entrusting party must know or have reason to know that he is entrusting to a dealer. Professor Warren argues that the entruster need not know; his argument is that a factual inquiry into the entruster's knowledge frustrates the Code policy which rejects the doctrine of caveat emptor in favor of a more unfettered negotiability of goods.⁹⁴ He admits, however, that others take the opposing view—that both the entruster and the purchaser must know that the seller is a dealer in goods of the kind.⁹⁵ The opposing view is based on the premise that the entruster should only lose if he is estopped by his entrustment to a person whom he knows to be a merchant. Although Professor Warren urges that this is the very theory rejected by the drafters,⁹⁶ one case has held that it is still the rule under the Code.⁹⁷ That court

Humphrey Cadillac & Oldsmobile Co. v. Sinard, 85 Ill. App. 2d 64, 229 N.E.2d 365 (1967) (auto); Litchfield v. Dueitt, 245 So. 2d 190 (Miss. 1971) (crane); Godfrey v. Gildsford, 86 Nev. 714, 476 P.2d 3 (1970) (auto); Palmer v. Booth & Cowley, Ltd., 7 U.C.C. Rep. Serv. 182 (Sup. Ct. N.Y. 1970) (auto); Cosgriff v. Liberty Nat'l Bank & Trust Co., 58 Misc. 2d 884, 296 N.Y.S.2d 517 (Sup. Ct. 1968) (auto); Makransky v. Long Island Reo Truck Co., 58 Misc. 338, 295 N.Y.S.2d 240 (Sup. Ct. 1968) (truck); Sherman v. Roger Kresge, Inc., 67 Misc. 2d 178, 323 N.Y.S.2d 804 (County Ct. 1971) (auto); Medico Leasing Co. v. Smith, 457 P.2d 548 (Okla. 1969) (auto); Linwood Harvestore, Inc. v. Cannon, 427 Pa. 434, 235 A.2d 377 (1967) (silos); Sterling Acceptance Co. v. Grimes, 194 Pa. Super. 503, 168 A.2d 600 (1961) (auto); Weisel v. McBride, 191 Pa. Super. 411, 156 A.2d 613 (1959) (auto); Gricar v. Bairhalter, 11 Pa. D. & C.2d 723 (1957) (auto); Williams v. Western Surety Co., 6 Wash. App. 300, 492 P.2d 596 (1972) (mobile homes), Couch v. Cockroft, 490 S.W. 2d 713 (Tenn. Ct. App. 1972, cert. denied, Tenn. S. Ct. 1973).

92. Independent News Co. v. Williams, 293 F.2d 510 (3d Cir. 1961) (comic book wholesaler).

93. Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc., 68 Misc. 2d 228, 327 N.Y.S.2d 77 (Civ. Ct. 1971).

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

One author has gone so far as to suggest that the main purpose of all the merchant provisions was to reverse the doctrine of caveat emptor. Vanmeveren, *The Uniform Commercial Code—Sales—Special Treatment for Merchants*, 7 AM. BUS. L.J. 219 (1970). Although 2-403(2) and 2-312(3) certainly affect the doctrine, his assertion appears too broad.

95. Warren, *supra* note 94, at 473-74.

96. *Id.* at 476-78.

97. Atlas Auto Rental Corp. v. Weisberg, 54 Misc. 2d 168, 281 N.Y.S.2d 400 (Civ. Ct. 1967) (used car dealer); cf. Linwood Harvestore, Inc. v. Cannon, 427 Pa. 434, 235 A.2d 377 (1967) (silos).

ruled that the purchaser had to prove that the entruster knew he was entrusting his automobile to a wholesale auto dealer before the entruster's rights would be cut off under 2-403(2).⁹⁸

2. "Who by his Occupation Holds Himself Out"⁹⁹

Probably one of the least discussed and most important portions of the merchant definition is the above captioned phrase. Two early critics of the merchant definition stressed the possibility that hobbyists such as gun collectors¹⁰⁰ or amateur sailors¹⁰¹ might be merchants because they have knowledge or skill peculiar to goods. If occupation, which is not defined in the Code, is used in its commercial sense,¹⁰² hobbyists would seem to be excluded.

The "holds himself out" language seems designed to include in the merchant category a person who *represents to others* that he has knowledge or skill peculiar to the practices or goods involved in the transaction. Holding such a person to the special standards set for merchants is analogous to negligence rules which establish higher standards of care for a person holding himself out as an expert in a given field.¹⁰³ At least two authorities have acknowledged that the merchant status under this portion of the definition depends upon a representation.¹⁰⁴ Both have further opined that, since representation is the key element, it is unnecessary that a person included in the merchant definition actually have the requisite knowledge and skill.¹⁰⁵ It would seem that the reverse proposition may also be true, *i.e.*, if a person does not by his occupation hold himself out as having the requisite knowledge or skill, he should not be a merchant under this portion of the definition even if he actually has such knowledge or skill.

There has been much discussion of whether a lawyer familiar with commercial practices is a merchant under this portion of the

98. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168, 281 N.Y.S.2d 400 (Civ. Ct. 1967) (used car dealer).

99. UCC § 2-104(1).

100. Note, *supra* note 7, at 131.

101. Waite, *supra* note 18, at 618 n.20.

102. "Occupation" has been defined as "the principal business of one's life: a craft, trade, profession or other means of earning a living: EMPLOYMENT, VOCATION . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1560 (1966).

103. See PROSSER, *LAW OF TORTS* 161-66 (4th ed. 1971).

104. 1 R. ANDERSON, *supra* note 47, § 2-104:4, at 220; Comment, *supra* note 36, at 347.

105. 1 R. ANDERSON, *supra* note 47, § 2-104:4, at 220; Comment, *supra* note 36, at 347.

definition.¹⁰⁶ An argument for excluding him is that a lawyer may or may not be expert in commercial practices depending, for example, on whether he specializes in commercial law or personal injury law. A person holding himself out as a lawyer, therefore, should not be deemed to represent that he is familiar with commercial practices unless he further holds himself out as a commercial lawyer. A lawyer who buys or sells goods (*e.g.*, office furniture)¹⁰⁷ ordinarily would not, and perhaps ethically should not, hold himself out as a specialist in commercial law. Even if such a lawyer knew the practices he should not be deemed to be a merchant unless his special knowledge is represented to the other party.

Presumably, the drafters would reject this argument as doing violence to the spirit of the merchant rules and proper techniques of interpretation.¹⁰⁸ Nonetheless, support for the argument can be found in some language of the Code.

3. "Knowledge or Skill"¹⁰⁹

Does the word "skill," which is not defined in the Code, add anything to the merchant definition? Both the dictionary¹¹⁰ and the thesaurus¹¹¹ equate skill with knowledge. Perhaps a person with knowledge may not always have skill, but a person who has skill must surely have knowledge.¹¹² Including skill in the definition does no particular harm,¹¹³ although it is doubtful that any person is covered who would not otherwise be covered under the knowledge portion of the definition.

4. "Practices"¹¹⁴

A major feature of 2-104(1) and its comments is the distinction drawn between *practices* and *goods* by reason of the "practices" language. The comments suggest that in certain situations lawyers,

106. BENDER § 1.02, at 1-11.

107. *Id.*

108. See S. MENTSCHIKOFF, *supra* note 24, at 6.

109. UCC § 2-104(1).

110. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2133 (1966).

111. P. ROGET, ROGET'S INTERNATIONAL THESAURUS 731.7 (3d ed. 1962).

112. "Skill" has been defined as "the ability to use one's knowledge effectively and readily in execution or performance." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2133 (1966).

113. It is common to think of some types of expertise in terms of knowledge (*e.g.*, a lawyer's knowledge of the law), while other types of expertise are thought of in terms of skill (*e.g.*, a carpenter's skill with a hammer).

114. UCC § 2-104(1).

purchasing agents and bank presidents, among others, may be merchants.¹¹⁵ As already noted, there are problems in defining "occupation" and "holds himself out" and in distinguishing "skill" from "knowledge." The problems do not stop there. Nowhere in the Code are "practices" defined. The comments indicate that the section refers to "normal business practices" which are or ought to be familiar to any person in business.¹¹⁶ The lone example given is answering mail,¹¹⁷ in apparent reference to 2-201(2) (Statute of Frauds between merchants) and 2-207(2) (additional terms in acceptance). The comments probably fairly represent the intent of the drafters, *i.e.*, that the merchant sections be liberally construed.¹¹⁸ Unless one equates "practices" with general business knowledge, as the comments suggest, the number of persons added to the merchant category by the inclusion of the word "practices" may not be significant¹¹⁹—a person with knowledge of the special practices involved in a transaction would in most cases also have knowledge of the goods.

It is difficult, however, to construe "practices . . . involved in the transaction"¹²⁰ as meaning general business knowledge; the language seems to direct the lawyer to the particular practice or practices involved in the transaction. Under 2-205 (offer and acceptance), for example, a merchant's firm offer is not revocable for lack of consideration provided the other requirements of the section are satisfied.¹²¹ The practice involved in the transaction would seem to be that most firm commercial offers are recognized as binding.¹²² Thus, if a person by his occupation holds himself out as one who ought to know that such offers are binding, he would be a merchant; otherwise, not.

115. *Id.* § 2-104, Comment 2.

116. *Id.*

117. *Id.*

118. See S. MENTSCHIKOFF, *supra* note 24, at 6.

119. See Professor Kripke's remarks in *Hearing*, *supra* note 4, at 183.

120. UCC § 2-104(1).

121. UCC § 2-205 provides:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

122. See Keyes, *Causes and Consideration in California—A Re-Appraisal*, 47 CALIF. L. REV. 74, 83 (1959).

5. "May be Attributed by his Employment"¹²³

The merchant definition also establishes an agency rule which deems a person a merchant when the requisite knowledge or skill as to goods or practices involved may be imputed to him by his employment of someone having such skill or knowledge. For example, if one employs a merchant to handle a transaction, the employee's merchant status may be attributed to the principal. While it is possible to hypothesize certain problems arising from this rule,¹²⁴ none have appeared in the cases. Although the word "attributed" is not defined in the Code, it apparently means that a person's merchant status is caused by his employment of a merchant.¹²⁵ Agency principles have dealt with the problem of imputing knowledge of specific facts to a principal by reason of his agent's knowledge;¹²⁶ the part of the merchant definition captioned above seems to extend those principles to a more generalized knowledge concerning practices or goods. For our purposes, it should be sufficient to note two points: first, that a person not otherwise a merchant will not often employ a merchant,¹²⁷ and second, that questions relating to the nature and sufficiency of knowledge or skill peculiar to goods or practices should be the same whether we are considering principals or their agents.

6. "Chargeable with the Knowledge or Skill of Merchants"¹²⁸

It is questionable whether there is or ever was any need to create a separate definition for "between merchants" once "merchant" had been defined. It seems only reasonable to conclude that in a transaction between merchants both parties must be merchants. The Code drafters, however, not only felt the need to state the obvious but were further compelled to state it in an innovative manner; thus, they stated that both parties must be "chargeable with the knowledge or skill of merchants."¹²⁹ As one commentator noted with respect to this drafting technique, "The problem posed

123. UCC § 2-104(1).

124. BENDER § 1.02, at 1-10, 1-11.

125. "Attributed" has been defined as "to explain as caused or brought about by . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 142 (1966).

126. RESTATEMENT (SECOND) OF AGENCY §§ 272-82 (1957).

127. In my research, I have found no case applying the principal-agent portion of 2-104(1). See UCC § 2-104, Comment 2, referring to a university employing a purchasing agent as an example of this rule.

128. UCC § 2-104(3).

129. *Id.*

for the lawyer by any variation of word usage is that he must at least pause to consider whether variation has produced significance."¹³⁰

In this instance it appears that no significance was intended. There is no indication in either the Code or the comments that anything special was intended; further, research has failed to disclose any significance in the "chargeable" language. The additional phrase appears to be a reference back to the several parts of the 2-104(1) definition relating to skill or knowledge; no additional party not already a merchant under that definition is designated by the phrase.

Mercantile Capacity

In Comment 2 to section 2-104, the drafters suggest that a person is a merchant only if he is acting in his mercantile capacity. While a degree of circuitry is involved in this proposition, the apparent intent was to distinguish between business and non-business efforts.¹³¹ If followed, the "mercantile capacity" comment would minimize the significance of classifying a person (such as a purchasing agent) as a merchant. If he is a merchant only when acting as a purchasing agent, his merchant classification will be important solely when he is employed by a non-merchant, *i.e.*, if he is employed by a merchant to conduct the transaction, the application of the merchant section would be governed by his employer's merchant status.

Summary of Part III

In Part II of this article, 13 definitions suggested by the Code were described. Such multiplicity of definition is unnecessary. First, it appears that there is no significance in the slight variations in language among the "goods of the kind" sections.¹³² If a person is a merchant in one of these sections and not in another it is because of the nature and purpose of the section and the circumstances of a particular situation,¹³³ not because of minor word variations. Second, neither the use of "skill" in addition to "knowledge" in 2-104(1) nor the definition of merchants as "parties . . . chargeable with the knowledge or skill of merchants" in 2-104(3) adds any

130. Mellinkoff, *supra* note 1, at 207.

131. UCC § 2-104, Comment 2; see Note, *Contract Draftsmanship Under Article Two of the Uniform Commercial Code*, 112 U. PA. L. REV. 564, 576-77 (1964).

132. *I.e.*, Sections 2-104(1), 2-312(3), 2-314(1) and 2-403(2).

133. See Part IV, *infra*.

persons who would not otherwise be included in the merchant category. Third, few persons would be added to the merchant category by the agency rule of 2-104(1) because in most cases the principal would himself be a merchant. Fourth, the number of persons in the merchant category could be reduced by interpreting "occupation" to mean gainful employment, "holding out" to mean representation and "practices" to mean specific practices rather than general business knowledge—not many persons who are not dealers in goods of the kind and thus already merchants could be held to have represented to others by the nature of their work that they have knowledge peculiar to the specific practices of a particular transaction. Finally, if a person is only a merchant while in his mercantile capacity, all noncommercial sales or purchases of goods would be excluded.

What remains, then, are (1) dealers in goods of the kind, (2) certain persons who hold themselves out as having knowledge peculiar to the goods¹³⁴ and (3) other persons who hold themselves out as having knowledge peculiar to the practices involved in the transaction.¹³⁵ As suggested above, the latter two groups may be significantly reduced if restrictive meanings are given to the various words and phrases found in 2-104(1) which the Code left undefined.

IV. WHO IS A MERCHANT WITHIN THE CODE SECTIONS ESTABLISHING SPECIAL RULES FOR MERCHANTS?

Several Code sections use the term "merchant" without further indicating the class of persons meant to be included thereby.¹³⁶ In such a situation, courts must necessarily construe the scope of the term; most courts thus far have only been concerned with "dealers in goods of the kind."¹³⁷ Whether such dealers will always be mer-

134. *E.g.*, repairmen or truck drivers.

135. *E.g.*, dealers in goods *not* of the kind, purchasing agents or bank officials; see *Couch v. Cockroft*, 490 S.W.2d 713 (Tenn. Ct. App. 1972, *cert. denied*, Tenn. S. Ct. 1973) reported after this article was written in which the court found that the sale of an automobile by a used car dealer to the defendant who had ten years' experience as an auto dealer was not a transaction "between merchants" where defendant's experience had ended fifteen years prior to the trial date and before the adoption of the UCC in Tennessee.

136. UCC §§ 2-103(1)(b), 2-201(2), 2-205, 2-207(2), 2-509(3), 2-603, 2-605.

137. Cases concerning 2-103(1)(b) are *Massachusetts Gas & Elec. Light Supply Corp. v. V-M Corp.*, 387 F.2d 605 (1st Cir. 1967) (phonographs); *National Car Rental v. Fox*, 11 U.C.C. Rep. Serv. 320 (Ariz. Ct. App. 1972) (autos); *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. 1972) (autos); *Swift v. J.I. Case Co.*, ___ Fla. Supp. ___, 11 U.C.C. Rep. Serv. 190 (Dist. Ct. App. 1972) (tractors); *Columbus Milk Producers' Cooperative v. Dept. of Agriculture*, 48 Wis. 2d 451, 180 N.W.2d 617 (1970) (milk producer, milk cooperative).

Cases applying 2-201(2) are *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (7th Cir. 1968) (construction company, equipment supplier); *Associated Hardware Supply Co. v. The Big Wheel Distr. Co.*, 355 F.2d 114 (3d Cir. 1965) (housewares wholesaler, wholesaler/retailer); *Southwest Engineering Co. v. Martin Tractor Co.*, 205 Kan. 684, 473

chants and whether other persons will ever be merchants depends not only upon the matters discussed in Part III, but also upon the way the various sections establishing special rules for merchants are interpreted. Three problems must be considered:

(1) Are dealers in goods of the kind *always* merchants in each section which establishes a special rule for a merchant? If not, when and why not?

(2) Are other persons who *may* come within the general 2-104 definition of a merchant (*e.g.*, a dealer in goods not of the kind, a purchasing agent, a commercial lawyer,¹³⁸ a truck driver or a bank official) *always* merchants in each section which establishes a special rule for merchants if the application of the particular section is not limited to "dealers in goods of the kind"?¹³⁹ If not, when and why not?

P.2d 18 (1970) (construction company, equipment supplier); American Parts Co. v. American Arbitration Ass'n, 8 Mich. App. 156, 154 N.W.2d 5 (1967) (fabric supplier, seat cover manufacturer); Campanelli v. Conservas Altamira, S.A., 86 Nev. 838, 477 P.2d 870 (1970) (food wholesaler, food distributor); Azevedo v. Minister, 86 Nev. 576, 471 P.2d 661 (1970) (hay ranchers); Reissman Int'l Corp. v. J.S.O. Wood Products, Inc., 10 U.C.C. Rep. Serv. 1165 (Civ. Ct. 1972) (cabinet wholesaler, cabinet retailer); Trafalgar Square Ltd. v. Reeves Bros., Inc., 35 App. Div. 2d 194, 315 N.Y.S.2d 239 (Sup. Ct. 1970) (textile dealers); Reich v. Helen Harper, Inc., 3 U.C.C. Rep. Serv. 1049 (Civ. Ct. 1966) (fabric seller, fabric mill); John H. Wickersham Eng'r & Constr., Inc. v. Arbutus Steel Co., 58 Lanc. L. Rev. 164, 1 U.C.C. Rep. Serv. 49 (C.P. Pa. 1962) (construction company, steel supplier); Harry Rubin & Sons, Inc. v. Consolidated Pipe Co. of America, 396 Pa. 506, 153 A.2d 472 (1959) (plastic pipe supplier, Hula Hoop manufacturer); Hurricane Steel Industries Co. v. Maurice Pincoffs Co., 464 S.W.2d 387 (Tex. Civ. App. 1971) (supplier of metal rods, manufacturer of chain link fence).

A case applying the merchant language of 2-205 is *E.A. Coronis Associates v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 216 A.2d 246 (1966) (steel supplier, construction company).

Cases applying 2-207 are *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972) (carpet manufacturer, carpet dealer); *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330 (5th Cir. 1970) (bronze panel dealer, construction company); *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962) (glue manufacturer, plastic bag manufacturer); *Th. Van Huijstee, N.V. v. Faehndrich*, 10 U.C.C. Rep. Serv. 598 (Civ. Ct. N.Y. 1972) (egg exporter, egg importer).

Cases applying 2-509 are *Ellis v. Bell Aerospace Corp.*, 315 F. Supp. 221 (D. Ore. 1970) (helicopter retailer); *Mercanti v. Persson*, 160 Conn. 468, 280 A.2d 137 (1971) (boat builder); *Hayward v. Postma*, 31 Mich. App. 720, 188 N.W.2d 31 (1971) (boat retailer).

Cases applying 2-603 are *Traynor v. Walters*, 342 F. Supp. 455 (M.D. Pa. 1972) (Christmas tree wholesaler); *Mitchell Rubber Products, Inc. v. Hub Auto Supply, Inc.*, 28 Mass. App. Dec. 109, 5 U.C.C. Rep. Serv. 837 (Mun. Ct. 1964) (auto supply dealer).

A case applying 2-605 is *SCA International, Inc. v. Garfield & Rosen, Inc.*, 337 F. Supp. 246 (D. Mass. 1971) (shoe wholesaler).

138. See note 106 *supra* and accompanying text for an argument against classifying a lawyer as a merchant.

139. Sections 2-312(3), 2-314(1) and 2-403(2) specify that they are limited to merchants in goods of the kind.

(3) May any person who does not come within the 2-104 definition of a merchant *ever* be a merchant in any section which establishes a special rule for a merchant? If so, when and why?

To answer these questions it is necessary to consider the roles, if any, played by the nature or purpose of the different merchant rules and the circumstances of the particular situation. Two extreme positions can be taken which make the answers to the above questions much simpler. If one takes the position (hereinafter referred to as Approach #1) that definitions should be applied consistently to achieve certainty,¹⁴⁰ he may assert that neither the nature or the purpose of a particular section nor the underlying circumstances should affect the definition. The answers to the above questions under this approach would be (1) that dealers in goods of the kind would always be merchants; (2) other persons within the 2-104(1) definition would be merchants except in Sections 2-312(3), 2-314(1) and 2-403(2) (which are explicitly limited to merchants in goods of the kind) and (3) no other person could ever be a merchant or have a merchant rule applied to him. At the other extreme is the position (hereinafter referred to as Approach #2), apparently taken by the drafters,¹⁴¹ that the nature and purpose of the rule together with the underlying circumstances should determine whether a merchant rule should be applicable. If the nature and purpose of a rule or the underlying circumstances indicate that a particular person should or should not be subject to that rule, this approach would include or exclude him from the section based upon those factors—not upon the definition.

Between the two extremes are two other positions which would rely on the nature and purpose of the rule and the underlying circumstances to refine the merchant definition. Under either of these approaches, a person, to be subject to a merchant rule, would have to fit the 2-104(1) definition. The first of these approaches (hereinafter referred to as Approach #3) is suggested by Comment 2 of 2-104, which provides:

The professional status under the definition may be based

140. See note 20 *supra* and accompanying text.

141. S. MENTSCHIKOFF, *supra* note 24, at 6. It should be noted that the Code and comments specifically provided that merchant sections could be applied to persons who did not come within the strict definition of a merchant. The Code provision and the comments were deleted over the strong objection of the drafters. See Professor Kripke's remarks in *Hearing, supra* note 4, at 181-82.

upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

Under this approach, the nature or purpose of a section would be used solely to determine which type of specialized knowledge is required to make a person a merchant within that section; any person who had the requisite knowledge would then be a merchant within that section. This approach thus assumes agreement with the apparent intent of the drafters of the comment quoted above that "business practices" means general business knowledge.¹⁴²

The final position (hereinafter referred to as Approach #4) takes Approach #3 one step further. Having determined that X fits the merchant definition of 2-104(1), that the section being interpreted is one in which, for example, specialized knowledge of general business practices is required, and that X has the requisite specialized knowledge, a final question is asked: Is there any reason why X should be excluded from the merchant category when the underlying circumstances of the situation are considered?

Each of the last three approaches suggested refers to the nature or purpose of the merchant sections and to the underlying circumstances. To complete the analysis, therefore, a limited examination of those particular sections must be attempted. This task is complicated by the fact that, while the general purpose of a section may be reasonably clear, the specific reason for limiting application to merchants is often not nearly as clear.¹⁴³ That warning noted, we will proceed.

The drafters of the Code have attempted to designate those sections which require each type of specialized knowledge by establishing three groups of sections which mention merchants.¹⁴⁴ These three groups are discussed below.

142. See note 116 *supra* and accompanying text.

143. See Hall, *Article 2—Sales—"From Status to Contract"?*, 1952 WIS. L. REV. 209. Perhaps the major reason for this difficulty is that the drafters and others expected a liberal interpretation of the merchant provisions that would include nonmerchants in most cases. See *Report on Article 2, supra* note 19, at 154.

144. UCC § 2-104, Comment 2 provides:

The term "merchant" as defined here roots in the "law merchant" concept of a professional in business. The professional status under the definition may be based

Group I sections rest on *normal business practices* which are or ought to be typical of and familiar to *any person in business*. For purposes of these sections almost every businessman would, therefore, be deemed to be a merchant, since the practices involved in the transaction are nonspecialized business practices such as answering mail. Sections 2-201(2) (Statute of Frauds between merchants), 2-205 (firm offers), 2-207(2) (additional terms in acceptance between merchants) and 2-209(2) (special rule for exclusion of modification between merchants) are in this group.

Group II sections require a *professional status as to particular kinds of goods* and is a much smaller group than everyone who is engaged in business. Sections 2-314(1) (warranty of merchantability), 2-402(2) (special rule for merchants who retain goods sold) and 2-403(2) (entrusting to a merchant of goods of the kind) are in this group.

Group III sections apply to persons who are merchants under

upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

The special provisions as to merchants appear only in this Article and they are of three kinds. Sections 2-201(2), 2-205, 2-207 and 2-209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on *normal business practices* which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . ." since the practices involved in the transaction are nonspecialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants." But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant.

On the other hand, in Section 2-314 on the warranty of merchantability, such warranty is implied only "if the seller is a merchant *with respect to goods of that kind*." Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods. The exception in Section 2-402(2) for retention of possession by a merchant-seller falls in the same class; as does Section 2-403(2) on entrusting of possession to a merchant "who deals in goods of that kind."

A third group of sections includes 2-103(1)(b), which provides that in the case of a merchant "good faith" includes observance of reasonable commercial standards of fair dealing in the trade; 2-327(1)(c), 2-603 and 2-605, dealing with responsibilities of merchant buyers to follow seller's instruction, etc.; 2-509 on risk of loss, and 2-609 on adequate assurance of performance. This group of sections applies to *persons who are merchants under either the "practices" or the "goods" aspect of the definition of merchant*.

Id. (emphasis added).

either the "practices" or the "goods" aspect of the definition of merchant. Sections 2-103(1)(b) (definition of good faith in the case of a merchant), 2-327(1)(c) (special rule for merchant buyer under a sale on approval), 2-509(3) (special rule for merchant's risk of loss), 2-603 (merchant buyer's duties as to goods rightfully rejected), 2-605(1)(b) (special rule between merchants for waiver of buyer's objections after rejecting goods) and 2-609(2) (assurances of performance between merchants) are in this group.

The author believes that a somewhat better classification could be achieved by transposing Sections 2-327(1)(c), 2-509(3) and 2-603 from Group III to Group II, by adding 2-312(3) (merchant seller's warranty against infringement) to Group II, and by suggesting that Group II includes persons who *represent that they have specialized knowledge in both goods and practices*.¹⁴⁵ Under this revised scheme, then, Group III would contain only Sections 2-103(1)(b), 2-605(1)(b) and 2-609(2). The individual sections will be discussed under this proposed structure.¹⁴⁶

Group I: Normal Business Practices

Section 2-201(2) (Statute of Frauds between merchants)¹⁴⁷ was primarily designed to handle the problem of one party to a transaction being bound while the other was free to play the market.¹⁴⁸ If Party A sent a signed written confirmation of an oral agreement to Party B, A was bound but B could rely on the common law Statute of Frauds to escape liability. Section 2-201(2) changes that result in a transaction between merchants.

Section 2-205¹⁴⁹ was designed to codify the common commercial

145. Consequently, if my restructuring is correct, those persons who are not dealers in goods of the kind but by their occupation hold themselves out as having knowledge peculiar to the goods involved in the transaction (*e.g.*, auto mechanics or truck drivers) would only be merchants within the *either* "goods" or "practices" sections listed in Group III.

146. It will be apparent to the reader that the classification of a particular section within a specific category can be disputed. My reasons for the proposed classifications will be suggested as the sections are discussed in the hope that anyone relying upon or disputing the classification will at least know the basis for it.

147. UCC § 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 ten days after it is received.

148. BENDER § 2.04[2], at 2-43.

149. UCC § 2-205 provides:

practice of treating a firm offer as binding.¹⁵⁰ The section is limited to a merchant because he is presumed to know the common commercial practice and is required to act accordingly.¹⁵¹

Section 2-207¹⁵² concerns the "battle of the forms" problem¹⁵³ and was designed to align the law with the normal commercial understanding of the parties.¹⁵⁴ Thus, where the parties think they have an agreement, the Code agrees. The apparent reason for distinguishing between merchants and others in subsection (2) was the belief that persons who do not transact business regularly should not be expected to make unnegotiated adjustments because of last minute changes by those with whom they deal.¹⁵⁵

Section 2-209¹⁵⁶ revised a standard rule of contract law that

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

150. Keyes, *supra* note 122.

151. Attempted reliance on this section was rejected in *Wilmington Trust Co. v. Coulter*, 41 Del. Ch. 548, 200 A.2d 441 (1964), in which a corporate trustee argued that the trust company was bound by a firm offer to sell stock on behalf of the trust. The court's dictum that the trustee was not a merchant is very questionable, though the case seems decided correctly on other grounds.

152. UCC § 2-207 provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

153. See the excellent discussion of the business background of "the battle of the forms" in L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* 530-32 (1972).

154. UCC § 2-207, Comment 2.

155. See Note, *The Uniform Commercial Code: Some Selected Problems*, 105 U. PA. L. REV. 837, 861 (1957).

156. UCC §§ 2-209(1) and (2) provide:

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

modifications or rescissions must be supported by consideration. The revision of the common law rule could result in constant allegations of oral modifications. To allow a party to protect himself in advance against such allegations, the section permits the parties to create their own Statute of Frauds by agreeing that a modification or rescission must be in writing.¹⁵⁷ Where such requirement appears on a merchant's form, the requirement must be signed separately by a nonmerchant. Between merchants there need be no separate signing on the apparent assumption that merchants are able to understand forms and should be more careful to read them.

The effect of the last three approaches¹⁵⁸ upon determining whether an individual qualifies as a merchant under the Group I (normal business practices) sections is presented below. Section 2-205 (firm offers) is used as an example of the methodology which would be applied by the three approaches to Group I sections.

Under Approach #2 any person who was or should have been aware of the common commercial practice (that firm offers are binding without consideration) would be bound by his action (making a firm offer) *regardless* of whether he fit the merchant definition.

Under Approach #3 one would examine the appropriate section (2-205) and see whether it requires general business knowledge—in this case, the section concerns business and legal problems of contract formation and has nothing to do with goods. Thus, it is a section requiring general business knowledge; any person who fits the merchant definition because he holds himself out as having such general business knowledge would be bound by a firm offer.

Under Approach #4 the person bound under Approach #3 might escape liability if he could show that in his line of business there was no common commercial practice that firm offers are binding without consideration, or perhaps even if there were, that he was unaware of it.¹⁵⁹

(2) A signed agreement which excludes modification except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

157. See Note, *Contract Draftsmanship Under Article Two of The Uniform Commercial Code*, 112 U. PA. L. REV. 564, 576-77 (1964).

158. Approach #1 does not rely on the nature or purposes of the section. Thus if a person fits the 2-104(1) definition, he is a merchant; otherwise, not.

159. The factors which will excuse a person from liability under Approach #4 depend greatly on the stress placed upon and the interpretation given to the "holds himself out"

Group II: Goods and Practices

Under this heading we start with the three sections classified as “goods” sections (*i.e.*, sections which require a professional status as to particular kinds of goods) by the drafters—*viz.*, 2-314(1) (warranty of merchantability), 2-402(2) (special rule for merchants who retain goods sold) and 2-403(2) (entrusting to a merchant of goods of the kind). The author has added Sections 2-312(3) (merchant seller’s warranty against infringement), 2-509(3) (special rule for merchant’s risk of loss), 2-603 (merchant buyer’s duties as to goods rightfully rejected) and 2-327(1)(c) (special rule for merchant buyer under a sale on approval) to the list of sections under Group II. The “and practices” language in the caption is included because in some sections¹⁶⁰ the merchant is a dealer who of necessity holds himself out as having knowledge of business practices, while in other sections¹⁶¹ the merchant should hold himself out as having knowledge of both goods and practices before he is held to a higher standard. The respective sections which comprise revised Group II are discussed briefly below.¹⁶²

Section 2-402(2)¹⁶³ adopts the doctrine of ostensible ownership, which has been described as follows:

The protection of the seller’s creditors against the buyer is principally predicated on the doctrine of ostensible ownership. Although the buyer may be said to own the goods, his leaving them in the seller’s possession has created the deceptive impression that the seller owns them. Thus, a second buyer of the sold goods, if in the ordinary course, would prevail over the first buyer; a purchaser in good faith might also prevail. The seller’s creditors should likewise be protected because they, too, can be misled by the seller’s retention of possession. In fact, the particular

language of 2-104(1); see notes 99-108 *supra* and accompanying text.

160. *Viz.*, Sections 2-314(1), 2-402(2), 2-403(2), 2-312(3) and 2-509(3).

161. *Viz.*, Sections 2-603 and 2-327(1)(c).

162. Sections 2-314(1) and 2-403(2) are discussed *supra* notes 71-98 and accompanying text.

163. UCC § 2-402(2) provides:

A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

creditor may not have been misled but this may be deemed unimportant.¹⁶⁴

However, an exception to the doctrine has been adopted which provides that retention in good faith and current course of trade by a merchant seller for a commercially reasonable time is not fraudulent. The apparent reason for this exception is the balancing of the drafters' desire for more unfettered negotiability of goods¹⁶⁵ with a feeling that creditors of a nonmerchant are more likely to be misled by his retention of the goods.¹⁶⁶

Section 2-509(3)¹⁶⁷ is a risk of loss section. According to Comment 3 to 2-509,

The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.

Section 2-603¹⁶⁸ is designed to place upon the merchant buyer the additional duties of following reasonable instructions from his seller after buyer's rejection; resale is also indicated in certain dis-

164. Gordon, *The Prepaying Buyer: Second Class Citizenship Under the Uniform Commercial Code Article 2*, 63 Nw. U. L. Rev. 565, 576-77 (1968).

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

166. For a discussion of 2-312(3), see notes 64-72 *supra* and accompanying text.

167. UCC § 2-509(3) provides: "In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery."

168. UCC § 2-603 provides:

(1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business as the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

tress situations. The merchant buyer is distinguished from the non-merchant in the hope of effecting a balance between inconvenience to the buyer and the possibility of disproportionate loss to the seller.¹⁶⁹ Section 2-327(1)(c)¹⁷⁰ also places an added burden on a merchant buyer when he elects to return goods sold to him on approval. He, too, must follow any reasonable instructions received from the seller. The reason for this rule would similarly seem to be that the merchant understands the instructions, has the ability to follow them and consequently will not be unduly burdened if he is required to follow them.

An example of the effect of the last three approaches upon determining whether a person is a merchant under Group II sections (goods *and* practices) is offered below. Section 2-603 (merchant buyer's duties upon rightful rejection) is the section chosen to present the methodology of the three approaches.

Under Approach #2 any person who purchased goods and rightfully rejected them would be held to the obligation of 2-603 if he understood the instructions and had sufficient knowledge of the goods and markets so as not to be unduly burdened by this task.

Under Approach #3 one would examine Section 2-603 and discover that it requires an understanding of *both* goods and practices. Any person who holds himself out as having knowledge of the goods involved and of general business practices would thus be obligated under 2-603.

Under Approach #4 the person obligated under Approach #3 might escape liability if he could show that someone in his particular business could not be expected to shoulder this burden or perhaps that he personally did not have adequate knowledge of the markets in the goods or did not understand the instructions.

Group III: Goods or Practices—Reasonable Action

Included in this group are Sections 2-103(1)(b) (good faith in the case of a merchant), 2-605(1)(b)(waiver of buyer's objection after rejecting goods) and 2-609(2) (assurance of performance between merchants). This is probably a most arbitrary and disputable

169. Note, *supra* note 155, at 867.

170. UCC § 2-327(1)(c) provides: "Under a sale on approval unless otherwise agreed . . . (c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions."

classification.¹⁷¹ However, three closely related reasons support a determination that the greatest number of persons should qualify as merchants within these sections:

(1) Each section seems to require only reasonable behavior and thus the determination of merchant status is less important because harsh results are avoided by adjustments in the standard of reasonable behavior, *e.g.*, a television repairman rejecting a television set might act reasonably if his response to a request for specification of defects (Section 2-605(1)(b)) was quite detailed as to the defects but was presented in a very informal communication a few weeks after the request; on the other hand, the response of a banker or purchasing agent rejecting the same set might be expected to be more prompt and formal but less detailed as to technical defects.

(2) The general good faith standard set out in Article 1 incorporates a subjective definition of good faith.¹⁷² As suggested below, performance can best be measured objectively.¹⁷³ Since the Article 1 definition does not seem to permit objective determinations, broad use of the Article 2 sections requiring objectively reasonable behavior is desirable.

(3) The reasons for confining the application of these sections to merchants are less apparent than is true for other sections.

Section 2-103(1)(b)¹⁷⁴ establishes a standard of good faith for merchants. It was apparently designed as a test of good faith performance and can be distinguished from good faith purchase¹⁷⁵ as follows:

In this sense "good faith" has nothing to do with a state of

171. For instance, Professor Kripke would apparently classify 2-605(1)(b) as a practices section. Professor Kripke's remarks in *Hearing, supra* note 4, at 183.

172. UCC § 1-201(19).

173. See notes 174-77 *infra* and accompanying text.

174. UCC § 2-103(1)(b) provides: "In this Article unless the context requires otherwise . . . (b) 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

For a discussion of the conceptual problems involved in dealing with the Code's good faith obligation, see Stankiewicz, *Good Faith Obligation in the Uniform Commercial Code: Some Problems in Determining Its Meaning and Evaluating Its Effect*, 7 VAL. U.L. REV. 389 (1973).

175. The merchant good faith test has, however, been used in the good faith purchase sense through the definition of a buyer in the ordinary course of business and the use of that term in 2-403(2); see, *e.g.*, *National Car Rental v. Fox*, 18 Ariz. App. 160, 500 P.2d 1148 (1972).

mind—with innocence, suspicion, or notice. Here the inquiry goes to decency, fairness or reasonableness in performance or enforcement.¹⁷⁶

In order to test good faith performance it is necessary that an objective test be developed; as the same writer points out:

Good faith performance properly requires some objective standard tied to commercial reasonableness

. . . Surely the test is not whether one party actually believed that he was acting decently, fairly or reasonably. Surely he must do more than form an honest judgment.¹⁷⁷

It has been noted that the merchant good faith test may be limited in scope because it may only apply where good faith is mentioned specifically in Article 2 and where there are commercially reasonable standards of fair dealing in the trade.¹⁷⁸ However, it seems clear that 2-103(1)(b) was not so intended and in fact would have been used as a basis for the general test of good faith in Article 1 had bankers not intervened.¹⁷⁹

Section 2-609¹⁸⁰ is a specific application of the merchant good faith principle established in 2-103(1)(b). A person judging (1) whether he has reasonable grounds for insecurity or (2) the adequacy of any assurance received should act reasonably.

Section 2-605¹⁸¹ requires the merchant buyer to state the defects

176. Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 668 (1963).

177. *Id.* at 671-72.

178. See Farnsworth, *supra* note 176; see also Summers, "Good Faith" In *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

179. See Farnsworth, *supra* note 176; see also Summers, "Good Faith" In *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

180. UCC § 2-609(2) provides: "Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards."

181. UCC § 2-605(1)(b) provides:

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

. . . .
(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

relied upon for rejection when the information is requested in writing by another merchant. Again it seems he is only asked to act reasonably.

An example of the effect of the last three approaches upon determining whether a person is a merchant under the sections in the "Goods or Practices—Reasonable Action" classification (Group III above) is offered below. Section 2-103(1)(b) (definition of good faith in case of a merchant) is the section chosen to present the methodology of the three applications.

Under Approach #2 any person could be expected to act according to the reasonable standards of his business; accordingly, the merchant good faith test of 2-103(1)(b) should be applied to him.

Under Approach #3 one would examine 2-103(1)(b) and discover that it does not really depend on a knowledge of either goods or practices; thus, he would determine that any person who met the merchant definition of 2-104(1) should be included. Thus, in this case the result would be the same as would be indicated by Approach #1.¹⁸²

Under Approach #4 the person obligated under Approaches #1 and #3 would still be bound on the assumption that all we are seeking is action in accordance with reasonable standards of business.

THE RESULT: UNCERTAINTY

The merchant sections are not the best drafted sections in the Code. Among the many problems are: the minor variations in wording from section to section, the words and phrases used in the definition which are not themselves defined, the comments which confuse and in some cases suggest interpretations not supported by the Code, the term "merchant," which has common sense, case law and historical meanings different from each other and from the Code definition, and the suggested reliance on the purposes of each merchant section to aid in answering a merchant question without any clear specification of those purposes.

It appears that the drafters of the Code asked too much of the merchant concept. They sought the certainty of a central definition and at the same time the fluidity of a merchant classification that

182. See note 140 *supra* and accompanying text.

could expand or contract according to the needs of a particular situation. In addition, they hoped in the merchant sections to codify commercial practices, to correct specific abuses, to reform areas of the law and to establish higher standards of conduct for professionals. However, certainty and fluidity do not blend well and the determination of a merchant question is complicated by the existence of so many different purposes underlying the merchant sections.

There have not been very many difficult "merchant" cases. Since most Code problems involve dealers in goods of the kind, that result should be expected. Nonetheless, courts facing difficult merchant questions are free to do whatever they wish. Good arguments for the most liberal or strict interpretation can be found in the Code and comments. The best approach to answering a merchant question involves case-by-case examination of the nature and purposes of the Code section involved and the facts of particular cases. It might have been easier to justify such an approach if each of the sections establishing a different rule had clearly described the types of persons subject to the rule instead of referring to a central term of uncertain meaning.