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## UCC SECTION 2-305(1)(c): OPEN PRICE TERMS AND THE INTENTION OF THE PARTIES IN SALES CONTRACTS

### INTRODUCTION

UCC section 2-305 concerns open price terms in contracts for the sale of goods. The open price term is utilized by businessmen who for valid reasons<sup>1</sup> wish to bind themselves to an agreement, but do not wish to be bound at the time of contract to a fixed price.<sup>2</sup> Rather than leaving the contract entirely silent with respect to price, the parties using an open price term often provide some method for later fixing the price. As listed by Professor Hawkland:

The five most common methods are: (1) price to be fixed by agreement of the parties at a particular, future, time; (2) price to be fixed by some agreed market or other independent standard; (3) price to be fixed by the seller; (4) price to be fixed by the buyer; (5) price to be fixed by a third person.<sup>3</sup>

This note, as a discussion of UCC section 2-305(1)(c), is limited to situations which utilize the second and fifth of the methods enumerated above (where the price is to be fixed by some agreed market or other independent standard, or by a third person).<sup>4</sup> This note considers specifically the problems which arise when the specified standard fails.

A typical example of the problems arising upon failure of the standard follows: *Corporation A* enters into a contract with *Corporation B* to run for a period of ten years wherein *Corporation A* agrees to buy all its requirements of widgets from *Corporation B*. Because both parties are reluctant to speculate regarding the future prices of widgets but do desire to bind themselves to deal with each other, they agree on a price standard—the price at any given time during the contract period is to be based upon the price of widgets as published by *Corporation C*, not a party to the contract, for example, ten per cent below *Corporation C's* published price. Thus the prevailing market conditions as represented in *Corpora-*

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1. "The price is to be left open . . . with a view toward retaining, rather than exchanging, the risks of a market fluctuation." HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 53 (1964). For a more detailed discussion, see notes 115-18 *infra* and accompanying text.

2. *Ibid.* See also Prosser, *Open Price in Contracts for the Sale of Goods*, 16 MINN. L. REV. 733 (1932).

3. HAWKLAND, *supra* note 1, at 54.

4. The price as fixed by a third person here contemplates a market price to be set by that person, and does not contemplate a valuation. A valuation is distinguished from a market price, notes 33-36 and 108-10 *infra* and accompanying text.

tion C's published price will continually be reflected in the contract between Corporation A and Corporation B. The parties function smoothly under this agreement for three years. Then Corporation C, for any of a variety of reasons,<sup>5</sup> discontinues the publication of widget prices. Meanwhile, Corporation A has found that it can buy widgets for less than C's published price, the prevailing market price, elsewhere. Corporation A subsequently ignores its contract with Corporation B which in turn sues A for breach of contract. Corporation A contends that the contract with Corporation B is not enforceable on the ground the price is no longer determinable. Corporation B seeks to uphold the contract.

Statutory "solutions" as well as approaches taken by courts for determining the validity of contracts in which "external" price standards fail comprise the subject matter of this note. Specifically, the note deals with UCC section 2-305, subsection (1)(c), and tests this subsection both in relation to the relevant sections of the Uniform Sales Act, and particularly in relation to decisional law, with the purpose of exploring the changes and resulting improvements supposedly made by the UCC within the area of open price contracts.

#### THE UNIFORM SALES ACT

Section 2-305 authorizes the use of an open price term in a contract for sale.<sup>6</sup> As such, it is the corollary of section 2-204(3) which prevents an open price contract from failing for indefiniteness, dependent upon the intention of the parties.<sup>7</sup> The subsection of immediate concern, section 2-305(1)(c), provides:

- (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if . . .
- (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

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5. See, e.g., *Louisville Soap Co. v. Taylor*, 279 Fed. 470 (6th Cir.), cert. denied, 259 U.S. 583 (1922) (no sales on which a market price could be based); *Interstate Plywood Sales Co. v. Interstate Container Corp.*, 331 F.2d 449 (9th Cir. 1964) (third company went out of business); *Turman Oil Co. v. Sapula Refining Co.*, 124 Okla. 150, 254 P. 84 (1926) (third company adopted a different method of pricing).

6. UNIFORM COMMERCIAL CODE [hereinafter cited as UCC] § 2-305(1): "The parties if they so intend can conclude a contract for sale even though the price is not settled."

7. UCC § 2-204(3): "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

The relation of this provision to prior statutory law has been considered with specificity by the legislative commissions of the various states in their evaluations of the Code prior to enactment.<sup>8</sup> The most common state-statutory predecessor to Article 2 of the Uniform Commercial Code was the Uniform Sales Act,<sup>9</sup> the pertinent provisions of which follow:

§9. Definition and ascertainment of price—(1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties. . . . (4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

§10. Sale at a valuation—(1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must

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8. The various states, in enacting the Code, have invariably provided their own state comments to the Code as supplements to the Official Code Comments. These state code comments on individual Code provisions usually indicate the position of the state law prior to the Code, and ordinarily also provide a comparison of the prior state law and the Code provisions. See, e.g., CAL. ANN. CODE vol. 23A, § 2305, at 205 (West 1964); N.Y. CONSOL. LAWS bk. 62½ pt. I, § 2-305, at 202 (McKinney 1964); ILL. STAT. ANN. ch. 26, § 2-305, at 181 (Smith-Hurd 1963); FLA. STAT. ANN. vol. 19A, § 672.2-305, at 180 (1966); IND. STAT. ANN. vol. 5, pt. 2, § 19-2-305, at 54 (Burns 1964).

See also various analytical studies of the Code made by state legislatures prior to enacting the Code, e.g., N.Y. LAW REVISION COMMISSION, HEARINGS ON THE UNIFORM COMMERCIAL CODE (1954); N.Y. LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE (1955); N.Y. LAW REVISION COMMISSION, REPORT AND APPENDICES RELATING TO THE UCC (1956); 3 WIS. LEGISLATIVE COUNCIL, REPORT ON THE UCC pt. II (1961); TEX. LEGISLATIVE COUNCIL (SNEED), ANALYSIS OF ARTICLE 2 OF UCC (1953).

9. The Uniform Sales Act was the statutory predecessor to the Uniform Commercial Code in 35 of the 48 states that have enacted the Code to date. The Uniform Sales Act as statutory law has been repealed by the Uniform Commercial Code in the following states: Alabama, 1967; Alaska, 1963; Arkansas, 1962; California, 1965; Colorado, 1966; Connecticut, 1961; Delaware, 1967; Dist. of Columbia, 1965; Hawaii, 1967; Illinois, 1962; Indiana, 1964; Iowa, 1966; Kentucky, 1960; Maine, 1964; Maryland, 1964; Massachusetts, 1958; Michigan, 1964; Minnesota, 1966; Nebraska, 1965; New Hampshire, 1961; New Jersey, 1963; Nevada, 1967; New York, 1964; North Dakota, 1965; Ohio, 1962; Oregon, 1963; Pennsylvania, 1954; Rhode Island, 1962; South Dakota, 1967; Tennessee, 1964; Utah, 1966; Vermont, 1967; Washington, 1967; Wisconsin, 1965; Wyoming, 1962. For a comprehensive listing of the 48 jurisdictions that have adopted the Code to date, see footnote 169 *infra*.

pay a reasonable price therefor.<sup>10</sup>

The Official Comments to UCC section 2-305 state that sections 9 and 10 of the Uniform Sales Act (USA) were "completely rewritten" by the Code provision.<sup>11</sup> It would appear at first glance that section 2-305(1)(c) in upholding a contract as enforceable despite failure of a third person or agency to fix the price has completely *reversed* the law as set forth in USA section 10(1), which avoided the sale or contract in that situation. The Illinois State Code Comment<sup>12</sup> to UCC section 2-305 indicates that subsection (1)(c) is a reversal of USA section 10, but also contends that the result is in "accord with Illinois decisional law."<sup>13</sup> Numerous state legislative commissions, notably California<sup>14</sup> and New York,<sup>15</sup> take the position, however, that UCC section 2-305(1)(c) accords with the prior law<sup>16</sup> in their states.<sup>17</sup>

The majority of commentators, who have considered the problem,<sup>18</sup> on the other hand, argue that UCC section 2-305(1)(c) differs to such a degree from sections 9 and 10 of the Uniform Sales Act as to be "directly contra"<sup>19</sup> (Arkansas), "a reversal,"<sup>20</sup> or at least a "change"<sup>21</sup> (New York), or "innovation"<sup>22</sup> (California) from the Uniform Sales

10. UNIFORM SALES ACT [hereinafter cited as USA] §§ 9 and 10.

11. Official Code Comment to UCC § 2-305.

12. See note 8 *supra* for an explanation of the state code comments.

13. ILL. STAT. ANN. ch. 26, § 2-305, at 181 (Smith-Hurd 1963); see FLA. STAT. ANN. vol. 19A, § 672.2-305, at 180 (1966).

14. CAL. ANN. CODE vol. 23A, § 2305, at 205 (West 1964). California adopted the Uniform Sales Act in 1931. It was repealed by the UCC in 1965.

15. N.Y. CONSOL. LAWS bk. 62½, pt. 1, at 202 (McKinney 1964). The Uniform Sales Act was enacted in New York in 1911, and was repealed in 1964 by the UCC.

See also 1 N.Y. LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 665 (1955). The Law Revision Commission, however, admits that the New York cases have not gone as far as to substitute a "reasonable" price in the situation covered by paragraph (c). *Ibid.*

16. The California State Code Comment indicates that § 2-305(1)(c) accords with both the statutory and the decisional law in that state. The New York Code Comment omits any mention of prior statutory law.

17. See notes 14 and 15 *supra*. See also TEX. LEGISLATIVE COUNCIL (SNEED), ANALYSIS OF ARTICLE 2 OF THE UCC 64 (1953).

18. Research has disclosed no writers who are of the opinion that the specific provisions in UCC § 2-305 accord with the Uniform Sales Act provisions. Professor Beutel stated, however, in a comment on an early draft of the Code, that: "Sixty percent of the sections in this article [2] seem to contain much the same legal concepts as, but a rewording of, the original Sales Act, with no important substantive changes . . ." Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification*, 16 LAW & CONTEMP. PROB. 141, 158 (1951).

19. Spies, *Institute on the UCC, Article 2*, 16 ARK. L. REV. 6, 14 n.31 (1961). ARK. STAT. ANN. § 68-1401 was § 10(1) of the Uniform Sales Act, repealed in 1962 by the UCC.

20. 1 HAWKLAND, GUIDE TO THE UNIFORM COMMERCIAL CODE 55 (1964).

21. Whitney, *Effects of UCC on New York Law—Contracts*, 26 ST. JOHN'S L. REV. 1, 13 (1951).

22. *Comparison of California Sales Law and Article 2 of the UCC*, 10 U.C.L.A.L.

Act provisions. Thus the question arises: What is really meant by the statement in the Official Code Comments that USA section 9 and 10 are completely rewritten in section 2-305? Is UCC 2-305 intended to be new law—a significant change in the law as stated by the Uniform Sales Act—or is it merely a recodification and rewording of the law as found in the Uniform Sales Act? Arguments can be made for either position.

It is arguable that USA section 9(1) has a direct counterpart in UCC section 2-305(1):

USA 9(1): The price may be fixed by the contract, or may be left to be fixed in such a manner as may be agreed, or it may be determined by the course of dealing between the parties.

UCC 2-305(1): The parties if they so intend can conclude a contract for sale even though the price is not settled.

An immediately noticeable change in language in the Code provision as compared to the Uniform Sales Act is the inclusion of the phrase “if they so intend.” This may be a significant change<sup>23</sup> affecting the entire manner of the Code’s approach to the problem of the failure of an independent standard price term. The solution under the Code originates with the intention of the parties, while the Uniform Sales Act provides no similar starting point. On the other hand, the difference may be illusory since the intention of the parties may be implied in the Uniform Sales Act provision. Thus, because the intention of the parties is the starting point and central consideration in the formation of any contract,<sup>24</sup> that same intention must always function as the touchstone for any contract interpretation.<sup>25</sup> From this point of view, the inclusion of the words “if they so intend” in the Code provision would be superfluous.

A further linguistic distinction between the provisions of USA section 9(1) and UCC section 2-305(1) is the Code’s use of the word “conclude.”<sup>26</sup> Apparently the word means in the context of section 2-305 that the parties may bind themselves at the time of contract. USA section 9(1) does not use the word “conclude,” but the provision is similarly applicable only in situations where the parties bind themselves at the time they enter into the contract.<sup>27</sup>

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REV. 1087, 1134, 1136 (1963). See Corman, *The Law of Sales Under the UCC*, 17 RUTGERS L. REV. 14, 28 (1962); Hall, *Article 2—Sales—“From Status to Contract”?* 1952 WIS. L. REV. 209.

23. The impact of “if they so intend” in the Uniform Commercial Code provision will be dealt with in depth in notes 104-13 *infra* and accompanying text.

24. *E.g.*, *Howland v. Stitzer*, 240 N.C. 689, 84 S.E.2d 167 (1954).

25. 3 CORBIN, CONTRACTS § 538, at 55 & n.40 (1963).

26. UCC § 2-305(1).

27. Section 9(4) of the USA gives weight to this argument. It is there stated

Finally, the provision in USA section 9 that the price "may be left to be fixed in such manner as may be agreed" impliedly encompasses the situations involving future agreement of the parties,<sup>28</sup> and the third person or agency price standard<sup>29</sup> expressly mentioned in UCC 2-305.

Similarly, the remedies contemplated by the Uniform Commercial Code and the Uniform Sales Act provisions appear to be identical. USA section 9(4) provides: "where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price."<sup>30</sup> This corresponds to language in UCC section 2-305(1):

In such a case the price is a reasonable price at the time for delivery if

- (a) nothing is said as to price; or
- (b) the price is left to be agreed by the parties and they fail to agree; or
- (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Thus the provisions of USA section 9 and UCC section 2-305(1)(c) should effectuate identical results.

Moreover, while UCC section 2-305(1)(c) appears to have completely reversed USA section 10(1) (and indeed has been declared a reversal by most observers),<sup>31</sup> close examination, however, reveals that while the approaches of the two provisions may differ, their results will be identical for a given situation.

Section 10(1) of the Uniform Sales Act provides:

Sale at a valuation—(1) Where there is a contract to sell or a sale of goods at a set price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided. . . .

The Uniform Commercial Code's determination that a reasonable price<sup>32</sup> (rather than an unenforceable contract) is the proper result in a situation where the third person fails to fix the price thus appears at first glance

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that the buyer *must* pay a reasonable price if the price is not determined under the foregoing provisions. This would not follow unless § 9 were operating under the assumption that the parties intended to make or "conclude" a binding agreement.

28. UCC § 2-305(1)(b).

29. UCC § 2-305(1)(c).

30. Section 9(4) is quoted in the text accompanying note 10 *supra*.

31. See notes 19-22 *supra*.

32. UCC § 2-305(1)(c).

to be a complete turn about from the Uniform Sales Act.

The question of whether or not a difference does exist between the two provisions turns, however, on the distinction between the "valuation"<sup>33</sup> of the Uniform Sales Act and the "agreed market or other standard" of the Uniform Commercial Code. "Market price" traditionally is defined as "that reasonable sum which the property would bring on a fair sale by a man willing but not obliged to sell, to a man willing but not obliged to buy."<sup>34</sup> In a "valuation," on the other hand, rather than promising to pay a specified price or a reasonable price, the buyer "promises to pay such price only as the valuers shall fix . . . it must be assumed that the parties laid weight on the particular individuality of the valuer."<sup>35</sup> Thus the valuation is an "inherent" condition precedent to the obligation to pay since the measure of the obligation cannot be determined in absence of the valuation. If the valuation should fail, therefore, it naturally follows that an obligation based on the precedent condition of valuation cannot be enforced.<sup>36</sup>

UCC section 2-305(1) (c) by its own terms contemplates the situation in which "the price is to be fixed in terms of some agreed *market* or other standard. . . ."<sup>37</sup> (Emphasis added.) The implication is that the contract by naming a particular valuer intends to designate nothing more than a reasonable commercial standard. It follows that it would be within the terms of the contract and the contractual intention to substitute an equally reasonable standard if the one specially designated should fail.

For example: *Corporation A* executes a contract with *Corporation B* which provides that *Corporation A* will buy its requirements of widgets from *Corporation B* at the price *Corporation C* (not a party to the contract) publishes for its widgets. *Corporation C* later discontinues the publication of its widget prices. If the contract properly comes under UCC section 2-305(1) (c), and if the implication of "market standard" in that section is what the parties intended, then the parties by designating *Corporation C* intended merely to select a commercially reasonable standard. If there exists a *Corporation D* which also sells widgets and trades on the same market as the other corporations, it follows that the

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33. A distinction must be maintained between a "valuation" and a "fair valuation." The latter is equivalent to "present market value," and thus is far removed from the meaning of the former. See BLACK, LAW DICTIONARY (4th ed. 1951).

34. Winslow, C. J., in *Allen v. Chicago & N.W. Ry.*, 145 Wis. 263, 129 N.W. 1094 (1911) as quoted in Prosser, *Open Price in Contracts for the Sale of Goods*, 16 MINN. L. REV. 733, 754 (1932).

35. 1 WILLISTON, SALES §§ 174, 175 (rev. ed. 1948). For a complete discussion of valuation under USA § 10 see *id.* at §§ 173-75.

36. *Id.* at 451.

37. UCC § 2-305(1) (c).



contract contemplates the substitution of *Corporation D's* published prices as an equally reasonable standard to replace *Corporation C's* prices as the standard specified in the contract.

A controversy arising under the above circumstances—in which the contract under UCC section 2-305(1)(c) would be enforceable at a reasonable price (the price as published by *Corporation D*)—does not seem to come within the restrictive terms of USA section 10(1) in which a *valuation* is specifically required. Rather, the controversy seems to fall under the provisions of USA section 9(1): “The price . . . may be left to be fixed in such manner as may be agreed. . . .” The remedy thus is outlined by USA section 9(4): “Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price.” The controversy thus, under the above interpretation, reaches the same result whether resolved under provisions of the Uniform Sales Act or under provisions of the Uniform Commercial Code.

The situation contemplated under USA section 10(1)—valuation—may be illustrated by the case in which “a known and trusted expert is to ‘value’ a particular painting for which there is no market standard.”<sup>38</sup> A case of this type comes under the provisions of UCC section 2-305(4):

Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract.

The Official Code Comment to section 2-305 explains:<sup>39</sup>

The section recognizes that there may be cases in which a particular person's judgment is not chosen merely as a barometer or index of a fair price but is an essential condition to the parties' intent to make any contract at all . . . [T]he difference would support a finding that . . . the parties did not intend to make a binding agreement if that expert were unavailable.<sup>40</sup>

The result under UCC section 2-305(4), when read in the light of the Official Code Comment, corresponds to the result under USA section 10(1) in which the contract is avoided.<sup>41</sup> Thus the valuation situation also is resolved similarly under either the Uniform Sales Act or the Uniform Commercial Code.

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38. Official Code Comment 4 to UCC § 2-305. See note 108 *infra*.

39. The purpose of the Official Code Comments is to promote uniformity of interpretation by explaining the purpose and intent of the various Code provisions. *UNIFORM COMMERCIAL CODE (U.L.A.)* at III, LXIII (1962 ed.).

40. Official Code Comment 4 to UCC § 2-305. See Whitney, *supra* note 21, at 14.

41. See text accompanying note 10 *supra*.

In short, it is suggested<sup>42</sup> that UCC section 2-305(1)(c) is not the reversal of previous statutory law that most writers consider it to be.<sup>43</sup> The UCC provision appears rather to be essentially an enlightened re-codification of prior statutory law.

#### DECISIONAL LAW

Although UCC section 2-305(1)(c) may not be a reversal of prior statutory law, the provision does effect a reversal of reported decisional law. An encyclopedic statement of the case law in point declares:

Where there is a contract to sell goods at a price or on terms to be fixed by a third person, this express condition qualifies the obligations of both buyer and seller; and where such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the seller is released from his obligations to sell and deliver, and the buyer is released from his promise to accept and pay.<sup>44</sup>

Generally, the case law involving failure of a third-party standard is, in effect, identical with the provisions of the Uniform Sales Act and the Uniform Commercial Code relating to a *valuation*.<sup>45</sup>

The problem of a third party's failure to set a contract price was presented in the case of *Louisville Soap Co. v. Taylor*.<sup>46</sup> There the third person who was to set the price was a *board of trade* of a named city. The board of trade was required by its by-laws to merely post price quotations on rosin reflecting true conditions of the market (the facts will be discussed in more detail below). It is unlikely that the board of trade was intended as a *valuer* for the parties. The board of trade was more probably meant to be a market *indicator*, for market indication was the board's normal function. Here the court failed to make the important distinction between a valuation (wherein under UCC section 2-305 the contract would be unenforceable if the valuation failed) and an index intended only to reflect the market (wherein UCC section 2-305(1)(c)

42. Research, however, has disclosed no specific support for this contention. See note 19 *supra*.

43. See notes 19-22 *supra*.

44. 46 AM. JUR. *Sales* § 245 (1943). See 77 C.J.S. *Sales* § 21, at 623 (1952).

45. But the case that is used in 46 AM. JUR. *Sales* § 245 (1943) to illustrate the encyclopedic statement regarding failure of the third person to fix the price or terms is *Louisville Soap Co. v. Taylor*, 279 Fed. 470 (6th Cir.), *cert. denied*, 259 U.S. 583 (1922), in which the parties clearly intended a market standard as their price term rather than a valuation (see notes 62-66 *infra* and accompanying text).

46. *Louisville Soap Co. v. Taylor*, 279 Fed. 470 (6th Cir.), *cert. denied*, 259 U.S. 583 (1922). The fact situation in this case is set out in text accompanying notes 51-54 *infra*.

would enforce the contract for the market price at delivery if the specified indicator failed).

In 1932, Professor William Prosser noted that courts would usually interpret *any* contract in which a third party was to determine the price as a sale at a valuation.<sup>47</sup> Thus the decisional law prior to the Uniform Commercial Code applied the valuation principle even to situations in which the contracting parties had agreed on a price to be set by a specified *market* indicator.<sup>48</sup>

The case-law assumption—that all contracts naming a third person or agency to fix the price term in the contracts are to be treated as a sale at a valuation<sup>49</sup>—is not justified upon an examination of the contracts as set forth in the cases, nor upon consideration of the circumstances under which the contracts were formed. Professor Prosser has succinctly analyzed the problem<sup>50</sup> in his discussion of *Louisville Soap Co. v. Taylor*.<sup>51</sup> In that case the contract provided for the buyer's requirements of rosin for one year at the stated price of fifty cents per 280 pounds over the official closing price posted daily by the Savannah Board of Trade.<sup>52</sup> The Board of Trade was required by its by-laws to post quotations reflecting true conditions of the market but was not authorized to post an official closing price when there was no reasonable basis for the quotation.<sup>53</sup> During the last two months of the contract period no sales occurred on which a closing price could be based, and consequently, none were posted. The Court of Appeals for the Sixth Circuit held that the contract price could not be determined; accordingly, both parties were relieved of their obligations under the contract.<sup>54</sup> The court—in line with the case-law presumption<sup>55</sup>—treated the contract as a valuation. Under the rationale of valuation, the law (*vis-à-vis* the parties' contractual intent) presumes that the promise to pay is conditioned on the valuation.<sup>56</sup> Since the condition relates to an essential term of the contract, if the valu-

47. Prosser, *Open Price in Contracts for the Sale of Goods*, 16 MINN. L. REV. 733, 781 (1932).

48. See text accompanying notes 44-46 *supra*; notes 51-55, 75-82, 133-35 *infra* and respective accompanying text. A contract stating the price merely as the "market price" would, on the other hand, be given effect. See note 88 *infra*.

49. See notes 47-48 *supra* and accompanying text.

50. Prosser, *supra* note 47, at 786. The article is an analytical treatment of all aspects of the open price term, with emphasis on the reasoning of the contract law, the problems which arise in its application, and the justice of the results. It is highly recommended as a thoughtful discussion of the open price term in all its ramifications.

51. *Louisville Soap Co. v. Taylor*, 279 Fed. 470 (6th Cir.), *cert. denied*, 259 U.S. 583 (1922).

52. *Id.* at 472, 475.

53. *Id.* at 477, 478.

54. *Id.* at 478, 479.

55. See notes 47-48 *supra* and accompanying text.

56. See note 35 *supra* and accompanying text.

ation fails, the contract also must fail.<sup>57</sup> This reasoning and result clearly honor the intention of the parties provided they had indeed intended a valuation rather than a market price.

Although the court failed specifically to determine the issue of valuation (*vis-à-vis* market price), it did state that:

[T]he presumption naturally and necessarily obtains that the contracting parties contemplated prices fixed in the usual and ordinary way, based upon actual transactions on the Savannah Market. Prices that would reflect the true condition of the *market generally*, and not the closing price of 22 January, which in this case happens to be largely in excess of the actual market price in Savannah, outside the transactions [in that commodity] on the Board of Trade.<sup>58</sup> (Emphasis added.)

The court then stated that “the provision in the contract as to price fails, because indefinite and uncertain, and *no longer possible of ascertainment* by the means or method provided in the contract *or in any other way*.”<sup>59</sup> (Emphasis added.) The court also stated the general rule applicable to valuation as found in section 10 of the Uniform Sales Act<sup>60</sup> as a further reason for its decision, even though the Uniform Sales Act was not in force in Kentucky.<sup>61</sup>

Professor Prosser observes that the Sixth Circuit in deciding the *Louisville Soap* case misinterpreted the contract.<sup>62</sup> Since the Board of Trade could scarcely be considered a valuer, and since the Board’s only significance to the parties would be as a market reporter, the only reasonable conclusion is that “the obvious intent was to close a deal at the market, and if there should be no market, then at a reasonable price.”<sup>63</sup> The court intimated that the result it reached was unavoidable since the

57. 1 WILLISTON, SALES, *supra* note 35, § 175. See text accompanying note 36 *supra*; Prosser, *supra* note 47, at 781.

58. *Louisville Soap*, *supra* note 51, at 477.

59. *Id.* at 478.

60. *Id.* at 479.

Where there is a contract to sell goods at a price, or on terms, to be fixed by a third person, this express condition qualifies the obligations of both buyer and seller; and where such third person, without fault of the seller or buyer, cannot or does not fix the price or terms the seller is released from his obligation to sell and deliver, and the buyer is released from his promise to accept and pay. This doctrine has been universally applied by the courts . . . and it has also been written into the Uniform Sales Act adopted by many states of the Union.

*Ibid.*

61. Kentucky did not adopt the Uniform Sales Act until 1928. In any event, the court was not obligated to apply the state law, since the era of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) was not heralded until 1939.

62. Prosser, *supra* note 47, at 786.

63. *Id.* at 786, 787.

price could not be ascertained "in any way."<sup>64</sup> But the court in its opinion disclosed that a market price *was* available in Savannah.<sup>65</sup>

The *Louisville Soap* court made an unequivocal finding that the parties intended to deal at a price "based upon actual transactions on the Savannah Market . . . prices that would reflect the true condition of the market generally. . . ."<sup>66</sup> The court's decision, however, failed to give effect to that intent, particularly since there was a market price available that would be suited to the terms of the contract.

Professor Prosser, commenting on the *Louisville Soap* case, notes that it is "unfortunate that the language of the Uniform Sales Act [section 10] is sufficiently broad to justify such a result."<sup>67</sup> It is suggested, as discussed above,<sup>68</sup> that section 9(1) of the Uniform Sales Act<sup>69</sup> is broad enough to cover the situation of a third-party price standard, and does afford a result opposite to that reached in the *Louisville Soap* case.<sup>70</sup> The outcome in *Louisville Soap* should have depended upon a determination of whether the parties intended a valuation or a market index as the price term.

The court in the *Louisville Soap* case would probably have saved the contract if the case had been decided under the Uniform Commercial Code.<sup>71</sup> UCC section 2-305(1) *requires*<sup>72</sup> a determination of market index vis-à-vis valuation by its provision "if they so intend," particularly when subsection (1)(c) is read in the light of Official Code Comment 4 to section 2-305.<sup>73</sup> Thus a result in accord with the parties' intentions is possible under either the Uniform Sales Act or the Uniform Commercial Code,<sup>74</sup> but appears more probable under UCC section 2-305(1)(c).

64. The pertinent section of the opinion is quoted in text accompanying note 59 *supra*.

65. The pertinent section of the opinion is quoted in text accompanying note 58 *supra*. See Prosser, *supra* note 47, at 787 n.225.

66. *Ibid*.

67. Prosser, *supra* note 47, at 787. USA § 10(1) is quoted in text accompanying note 10 *supra*.

68. The discussion is found in the text accompanying and following notes 23-30 and 37 *supra*.

69. USA § 9(1) is quoted in text accompanying note 10 *supra*.

70. If decided under USA § 9(1) ("The price . . . may be left to be fixed in such manner as may be agreed. . . .") the contract would be upheld in accordance with the agreement of the parties to deal at a reasonable market price. This is in contrast to USA § 10(1) which is restricted to a valuation situation, and which voids the contract if the valuation fails. A comprehensive discussion of this conclusion is found in the text accompanying and following notes 23-30 and 37 *supra*.

71. The Uniform Commercial Code, of course, was not controlling, since the Code had not yet come into existence at the time the case was decided.

72. See note 105 *supra*.

73. See text accompanying note 108 *infra*, notes 38-39 *supra* and accompanying text.

74. A comprehensive discussion of this conclusion is found in the text accompanying notes 37-41 *supra*.

A recent California case, *Interstate Plywood Sales Co. v. Interstate Container Corp.*,<sup>75</sup> uses a more refined rationale to justify a result similar to that in the *Louisville Soap* case. Plaintiff corporation contracted to loan money to defendant corporation and generally to assist defendant in establishing a plywood business. In return, defendant agreed to supply the plaintiff at plaintiff's option with up to ninety-five per cent of defendant's total output of plywood.<sup>76</sup> The contract stated that the price for the plywood was to be the "market price."<sup>77</sup> The parties further agreed that the market price was to be determined on the basis of prices published by five other plywood mills. Shortly after the contract was entered into, this five-mill pricing formula became unworkable because some of the named mills went out of business while others failed to publish prices. The parties nevertheless continued to do business under this output contract by meeting occasionally to determine the actual going market price. Subsequently, defendant repudiated the contract.<sup>78</sup>

The court recognized the issue as: "whether the five-mill pricing formula was designed to be the only binding means of setting price under the contract, or whether the contract called for sales of plywood at the general market price, with the five-mill formula being merely a guide thereto."<sup>79</sup> The court acknowledged plaintiff's contention that the parties had, by their dealings before the dispute, made a "practical construction" of the contract to the effect that it required sales at the general market price. But the court rejected this argument. It replied that these dealings at the market price did not "inescapably" indicate that the parties had a contract to do so.<sup>80</sup>

The court found that the parties intended to give a special definition to the term "market price" to mean *only* that price as established by the five-mill formula.<sup>81</sup> The court then held that the five-mill formula price was an essential contractual element that could not be judicially supplied; that the failure of the formula had left the parties without any means of determining a binding price; that a contract is not valid and enforceable if the price is missing; and that the parties would be obliged to deal at a price neither bargained for nor mutually acceptable.<sup>82</sup> The court further—in a footnote—distinguished the contract which is silent as to price

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75. *Interstate Plywood Sales Co. v. Interstate Container Corp.*, 331 F.2d 449 (9th Cir. 1964).

76. *Id.* at 450.

77. *Ibid.*

78. *Id.* at 451.

79. *Id.* at 452.

80. *Id.* at 453.

81. *Id.* at 452, 453.

82. *Id.* at 452.

where the implication arises that the parties intended to deal at a reasonable price, by reasoning that where the parties do attempt to set a price, it may not be implied that they intended to deal at a reasonable price.<sup>83</sup>

The court in effect held that the five-mill formula amounted to a sort of *continuing valuation* which did not allow the substitution of a reasonable standard. It could have reached the same result by application of section 10(1) of the Uniform Sales Act, which had been in effect in California since 1931.<sup>84</sup> Although the court used the phrase "California law" in various contexts, it never gave a statutory citation.<sup>85</sup> Perhaps the court recognized the "valuation" restriction of section 10(1), and was reluctant to hold in name what it held in effect, believing it could not reach the desired result under USA section 9.<sup>86</sup>

If UCC section 2-305(1)(c) had been controlling in *Interstate Plywood*, the contract would have been enforced at a reasonable price as determined by the court, a result diametrical to that reached under decisional law.

At this point in the discussion an anomaly in the decisional law appears. Assuming that a buyer and a seller wish to contract for sale at the market price upon delivery in order to avoid the risks of a fluctuating market:

A) If they remain completely silent as to price in the contract, the contract will uniformly be enforced at a reasonable or market price by the courts.<sup>87</sup>

B) If they fix the price as the market price, the courts will go to a great deal of trouble to enforce the contract, even though the market price is not readily ascertainable.<sup>88</sup>

C) If, however, they wish to add a degree of certainty to the contract, and so *specify* a market indicator (such as a competitor's price or a price as published in a trade journal), they have in effect introduced indefiniteness and unreliability into the contract. For if that index fails,

83. *Id.* at 452 n.6.

84. CAL. CIVIL CODE, art. V, § 1730 (1941 ed.). The effective date of the UCC in California was 1 January 1965.

85. In his discussion of USA § 10 in connection with the *Louisville Soap* case (*supra* note 67) Professor Prosser states that "notwithstanding the number of cases bearing on the question, for some unaccountable reason this statute [USA § 10] appears never to have been cited and relied upon by any court." Prosser, *supra* note 47, at 787.

86. The editor of the West Reporter Key Note apparently felt that the court's distinction between contracts silent as to price and contracts stating price regarding implication of intent to deal at a reasonable price was justified by § 9(4) of the Uniform Sales Act—CAL. CIV. CODE, art. V, § 1729 (1941 ed.)—as he cited the statute in the Key Note, where the court's opinion did not.

87. Prosser, *supra* note 47, at 738. See text accompanying note 83 *supra*.

88. Prosser, *supra* note 47, at 751, 754.

the court treats the contract as a valuation, and refuses to enforce the contract.<sup>89</sup> Why should the courts go to lengths to determine a market or reasonable price in the instances of A and B, but not in C?

The reasoning in the cases begins with the assumption that all contracts with prices to be fixed by a third party are to be treated as contracts for sale at a valuation.<sup>90</sup> Thus the price determination, or "valuation," as provided for in the contract was a condition precedent to the obligation of either party under the contract. If the price was not fixed as contemplated, neither of the parties was under an obligation to perform.<sup>91</sup> The courts apparently believed they could neither compel a valuation, nor substitute another reasonable standard for the one specifically designated—the one in which the parties presumably reposed confidence.<sup>92</sup>

The courts occasionally have reasoned—often while presuming the parties intended a valuation—that when the price is not determined as contemplated in the contract, the entire price term is lacking. Without that essential price term of the contract, there is no agreement that can be enforced.<sup>93</sup> It has been stated in conjunction with this no-agreement-to-be-enforced reasoning that when the price term fails, the contract fails for uncertainty or indefiniteness.<sup>94</sup>

Courts often beg the crucial question by stating that there is "no contract" when the price cannot be determined as provided in the contract,<sup>95</sup> indicating that to enforce the agreement absent the price term as contemplated by the parties would be to "make a contract" for the parties.<sup>96</sup> Contracts in which the price is to be fixed by a third person or agency have also been held mere "agreements to agree," and therefore unenforceable as a *nudum pactum* until the price is fixed as provided.<sup>97</sup>

89. See notes 44-48 *supra* and accompanying text.

90. *Ibid.*

91. *E.g.*, *Elberton v. Hawes*, 122 Ga. 858, 50 S.E. 964 (1905); *Interstate Plywood v. Interstate Container*, *supra* note 75; 46 AM. JUR. *Sales* § 245 (1943); *Stern v. Farah Bros.*, 17 N.M. 516, 133 P. 400 (1920).

92. *E.g.*, *Prosser*, *supra* note 47, at 782; *Raytheon Co. v. Rheem Mfg. Co.*, 322 F.2d 173 (9th Cir. 1963); *National Importing Co. v. Clark*, 270 Fed. 54 (2d Cir. 1920).

93. *E.g.*, *Louisville Soap v. Taylor*, *supra* note 51 (1922); *Turman Oil Co. v. Sapula Refining Co.*, 124 Okla. 150, 254 P. 84 (1926); *Canadian Ry. Co. v. Jones Co.*, 27 F.2d 240 (6th Cir. 1928); *Interstate Plywood v. Interstate Container*, *supra* note 75 (1964).

94. *E.g.*, *Louisville Soap v. Taylor*, *supra* note 51 (1922); *Canadian Ry. v. Jones*, *supra* note 93 (1928).

95. *E.g.*, *Stern v. Farah*, *supra* note 91 (1913); *Turman Oil v. Sapula Refining*, *supra* note 93 (1926).

96. *E.g.*, *Interstate Plywood v. Interstate Container*, *supra* note 75 (1964); *Stern v. Farah*, *supra* note 91 (1913); *Elberton v. Hawes*, *supra* note 91 (1905); *National Importing v. Clark*, *supra* note 92 (1920).

97. *E.g.*, *California Lettuce Growers, Inc. v. Union Sugar Co.*, 45 Cal. 2d 474, 289 P.2d 785 (1955); 77 C.J.S. *Sales* § 21, at 624 nn.14-17 (1952); *Spies, Institute on the UCC, Article 2*, 16 ARK. L. REV. 6, 14 n.31 (1961). It should be mentioned that the case



The provisions in UCC section 2-305, then, while perhaps not a reversal of sections 9 and 10 of the Uniform Sales Act,<sup>88</sup> do represent a radical reversal of the reported decisional law on the question of failure of external price standards. The Official Code Comments to UCC section 2-305 specifically reject the formula that "an agreement to agree is unenforceable."<sup>89</sup> In addition, the comments reject an analysis invalidating an agreement on the ground of "indefiniteness" where the parties intend to make a binding agreement even though the price term is left open.<sup>100</sup>

Furthermore, it is not only the proviso in UCC section 2-305(1)(c) that effectuated this reversal, for there are ancillary (for purposes of this discussion) provisions of the Code which make the final result in section 2-305(1)(c) possible by meeting the arguments and reasoning of the prior decisional law. Among these are: section 2-204(3), which does not permit a contract to fail for indefiniteness even though one or more terms are left open,<sup>101</sup> section 2-305(1)(b), which holds that an agree-

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law has on a few occasions not been so derelict in its duty of interpreting the contract according to the intention of the parties when the price provision failed. But these instances have always been only where the intention of the parties to deal at a market price notwithstanding the failure of their designated indicator has been clearly ascertainable, and a suitable market price to replace the unworkable contract term has been readily available. See *Webb & Co. v. Miller Co.*, 176 F.2d 678 (3d Cir. 1949); *Ferguson v. Associated Oil Co.*, 173 Wash. 672, 24 P.2d 82 (1933); *American Car & Foundry v. East Jordan Furnace Co.*, 275 Fed. 786 (7th Cir. 1921); *Barnsdale Refineries v. Birnamwood Oil*, 81 F.2d 569 (7th Cir. 1936).

98. Discussion is found in notes 13-46 *infra* and accompanying text. Under the interpretation of USA §§ 9, 10 as espoused on those pages of this paper, it would seem that the statement that UCC § 2-305 is a reversal of the case law would be a non sequitur, and in fact the USA was the reversal of the case law, with the UCC merely following in the theory of the USA. This is not so merely because, in fact, the USA has not been used as proposed herein, and indeed has been cited only infrequently in the cases deciding the question under discussion. The UCC is a reversal because it *effects* the change from the case law.

Of the cases cited under the discussion of the case law holdings, (notes 91-97 *supra*) the following were decided in jurisdictions in which the Uniform Sales Act *was* in force, but was not applied: *Interstate Plywood v. Interstate Container*, *supra* note 75 (1964); *Raytheon v. Rheem*, *supra* note 92 (1963); *California Lettuce*, *supra* note 97 (1955). The USA was in force in these jurisdictions, and should have been applied in the cases, but yet no mention was made of the statute.

The USA was in force also in the jurisdictions in which the controversies of *National Importing v. Clark*, *supra* note 92 (1920) and *Canadian Ry. v. Jones*, *supra* note 93 (1928) arose, but before the time when the federal courts were compelled to apply the substantive state law by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

Professor Prosser said in 1932: "It is astonishing, after twenty-five years of the Sales Act, with innumerable open price contracts before the courts, to find no satisfactory construction of this section [USA § 9]." Prosser, *supra* note 47, at 748. See note 85 *supra* for a similar comment by Professor Prosser in relation to USA § 10.

99. Official Code Comment 1 to UCC § 2-305. See Mooney, *Old Contract Principles and Karl's New Code: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 239 (1966).

100. *Ibid.*

101. This section is quoted in note 7 *supra*. See also note 99 *supra*.

ment to agree is now enforceable;<sup>102</sup> and indeed the whole of section 2-305, which allows the court to "make a contract" for the parties with a clear conscience.<sup>103</sup> In the decisions discussed thus far, the results would have been reversed and the contracts enforced according to their original tenor if the Uniform Commercial Code had been the controlling law applied by the courts.

#### INTENT

The next inquiry must be into the nature of the change thus effectuated by section 2-305(1)(c). Specifically, what is *the* crucial, elemental, innovation of section 2-305(1)(c) which affords a result in harmony with the general principles of related sales and contract law, while at the same time accomplishing a reversal of prior law? The answer is that section 2-305(1)(c) has established not only a new point of departure but also a new objective to be reached in these situations by providing that the contract be interpreted according to the *intention of the parties to conclude a contract*:

(1) The parties *if they so intend can conclude a contract* for sale even though the price is not settled. *In such a case* the price is a reasonable price at the time for delivery if . . .

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.<sup>104</sup>  
(Emphasis supplied.)

Thus UCC section 2-305(1) requires<sup>105</sup> that the court determine whether the parties intended to have a contract.<sup>106</sup> If the court determines the parties did intend to "conclude" a binding agreement, the court is directed to uphold the contract and impose a "reasonable price."<sup>107</sup> In a controversy coming within subsection 2-305(1)(c), a finding on whether the parties intended a valuation or a market price is material to the determination of whether the parties intended to have, or "conclude,"

102. This section is quoted in the text following note 33 *supra*. See note 99 *supra*.

103. See text accompanying note 158 *infra*.

104. UCC § 2-305(1)(c).

105. "Even if [the parties'] intention [to contract] is not clearly expressed on the issue of liability, UCC 2-204(3) and underlying policies of Article 2 *require* the court to determine their probable intention from the commercial context in which the deal was made." (Emphasis added.) Address by Professor Speidel, Annual Convention of the Association of American Law Schools, December 28, 1966.

106. "This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement." Official Code Comment 1 to UCC § 2-305. See text accompanying notes 113 and 131 *infra*.

107. UCC § 2-305(1).

a contract.<sup>108</sup> In the language of the Official Code Comment to section 2-305, the situation of a valuation "would support a finding . . . that the parties did not intend to make a binding agreement if [the third person] were unavailable."<sup>109</sup> And the situation of a market standard would support a finding that the parties "did . . . intend" a binding agreement even if the named third person did not set the price.<sup>110</sup>

Thus the Uniform Commercial Code in section 2-305(1)(c) does not search for some supposed intent on the part of the parties as to what should happen if their external price standard should fail. Rather it seeks to uphold the parties' original intent to *contract*.<sup>111</sup>

Professor R. Speidel has observed that the "intention to contract is . . . substituted for the bargain paradigm [where every term must be fully agreed before any relief can be granted<sup>112</sup>] as the test for liability. . . . [I]f seller and buyer agree to the future sale of described goods in a stated quantity and clearly state that they 'intend to contract,' the bargain is enforceable even though no other terms have been agreed."<sup>113</sup>

The intent that will be given effect, of course, is the intent of the parties as ascertainable at the time of contract, and not their intent as they stand in controversy before the court.<sup>114</sup>

The contractual intent of the parties may to some extent be determ-

108. Official Code Comment 4 to UCC § 2-305. The Comment contrasts the situation in which an expert is to value a "priceless" painting with the situation in which a named expert is to determine the grade of cotton. The first situation, it is explained, would support a finding that the parties did not intend to make a binding agreement if the expert did not set a price. But the second situation indicates that the parties did intend a binding agreement even if the named expert were unavailable. The latter situation would then be resolved under UCC § 2-305(1)(c).

109. *Ibid.*

110. *Ibid.*

111. HART & WILLIER, FORMS AND PROCEDURES UNDER THE UCC (1966) § 23.03(4), states that "if the external standard fails then a reasonable price is substituted automatically if the parties so intend." That wording seems to indicate that the intention with which UCC § 2-305(1)(c) is concerned is the parties' intention as to what should happen if the external standard should fail.

That interpretation is negated by the wording of the provision itself: "The parties if they so intend can *conclude* a contract for sale even though the price is not settled. *In such a case* the price is a reasonable price. . . ." UCC § 2-305(1).

The Code provision indicates that it concerns itself with the parties' intent to *conclude* a contract rather than gleaning the parties' intent regarding procedure to be followed in the event of a failure of the price standard.

112. Address by Professor Speidel, Annual Convention of the Association of American Law Schools, December 28, 1966.

113. *Ibid.*

114. It should be noted that cases in which an independent standard for fixing the price has failed will never reach the courtroom as long as the parties still wish to deal pursuant to their original contract terms and intent. The parties then merely agree on a new price index or a method for determining the price, and continue their dealings. In such situations no judicially imposed solutions are required. Controversies arise and cases come to trial when one of the parties concludes that he has made an unprofitable bargain, or for some other reason wishes to avoid the contract.

inable by economic considerations. The chief function of the fixed price term in a contract is to shift the risks of a fluctuating market between the parties. Before contracting, the seller bears the risk of the price declining before he can sell, while the buyer has the risk that the price will increase before he can buy.<sup>115</sup> Once the contract is concluded these risks are exchanged.<sup>116</sup> Now the seller holds the risk that the price will go up and thus might lose an expected profit, while the buyer assumes the risk that the price will fall and that he will be delegated to perform a comparatively unprofitable bargain. The traditional contract may be viewed as a simple wager that the price will change in favor of one of the bargaining parties.

But this traditional barter for risks often is not suited to the needs of a businessman, who while he must be assured of a binding contract for a period of time, is either not willing or not able to take or exchange the risks of contracting in a rapidly fluctuating market.<sup>117</sup> It is in such situations that the contract with an *independent* or externally determinable price term becomes necessary. By utilizing such a contract, the parties may conclude a binding contract between them and yet avoid the necessity of exchanging the risks of an unsteady market.<sup>118</sup> The independent standard price index effectuates a reasonable allocation of risks between the parties by using a continuing external market indicator. The parties thus retain and share the risks of a market fluctuation rather than exchange them. No longer is it foreordained that one must win and the other lose on the transaction as was true in the wager context of the traditional contract, where the nature of the transaction itself precluded the satisfaction of both parties unless the market remained static.

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115. Prosser, *Open Price in Contracts for the Sale of Goods*, 16 MINN. L. REV. 733 (1932). See HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 52 (1964).

116. *Ibid.*

117. There are many business situations in which the parties may not wish to exchange these risks. One of the most common of these is a requirements contract, where the parties are not necessarily concerned with whether they make a profitable or non-profitable contract, but are chiefly interested in assuring themselves, respectively, of a market and a supply: "[R]elatively long-term arrangements . . . the object of the agreement is not so much protection against rising or falling prices, as an avoidance of the disruption and economic waste involved in shifting from one source or outlet to another." FULLER & BRAUCHER, BASIC CONTRACT LAW 78 (2d ed. 1964) (Flexible Pricing and Its Economic Effect). See, e.g., notes 1-2 *supra* and accompanying text; Turman Oil v. Sapula Refining, note 137 *infra* and accompanying text; Shell Petroleum Corp. v. Victor Gasoline Co., 84 F.2d 676 (10th Cir. 1936); Barnsdale Refineries v. Birnamwood Oil, note 97 *supra*; Canadian Ry. v. Jones, note 93 *supra*.

Another instance in which parties may desire a contract without price risks is typified in notes 123-24 *infra* and accompanying text, where one party is contracting for a term only as part of a bargain involving consideration of a different type from the other party.

118. See authorities cited note 115 *supra*.

The only thing predetermined in such a contract is that the parties will continue doing business with each other at the market price or at a price determined from the market price. The one is assured of a supply and the other of a market for the duration of the contract.

The contractual intent of the parties seem obvious when they both wish to avoid the risks of a fluctuating market. The parties clearly intend to be bound by their dealings,<sup>119</sup> and at the market price.

A contract that provided only for "market price" and did not *specify* a market indicator would undoubtedly be enforced without hesitation by the courts as long as a market price was available.<sup>120</sup> If the parties went further, however, by including in their contract what they considered a reasonable market indicator, they invited calamity if that specified indicator should fail. For although the intent of the parties did not change<sup>121</sup> (but now a determination must be made that a valuation was not in fact intended) if the standard failed the courts did not give cognizance to the intent to contract at market price.<sup>122</sup>

The situation is perhaps typified by *Interstate Plywood Sales v. Interstate Container Corp.*<sup>123</sup> In this case the defendant contracted in consideration for loans and machinery given to it by plaintiff to set the defendant up in the plywood business. The ostensible purpose of the contract was to bind the defendant as a supplier of plywood to the plaintiff, and not to speculate in market risks. The parties presumably were content to avoid all such risks, and to deal at the market price for the contract period. This intent of the parties was manifested not only in the contract itself<sup>124</sup> but also by the fact that the parties continued doing business at the market price for some time after the five-mill formula failed. Professor Prosser commented on small manufacturers which enter into contracts similar to that of *Interstate Plywood* in a field dominated by larger concerns, where the larger concerns fail to set a price as anticipated in the contract. He stated: "It is probable that they [the parties] mean to sell at the market price, but with the expectation that

119. Professor Prosser's remarks in reference to open price terms are as applicable here: "The agreement is made by businessmen; it is meant to accomplish something. It is not to be supposed that they have gone through all the motions of making a contract with the intention that it shall be of no effect." Prosser, *supra* note 115, at 737. See also note 137 *infra*.

120. See notes 87 and 88 *supra* and accompanying text.

121. "The parties may intend to buy and sell at the market, and to select a particular source of information as to what the market may be. . . ." Prosser, *supra* note 115, at 785.

122. See notes 44-48 *supra* and accompanying text.

123. *Interstate Plywood Sales Co. v. Interstate Container Corp.*, 331 F.2d 449 (9th Cir. 1964). The case is discussed also in text accompanying notes 75-86 *supra*.

124. The contract provided in the price term that the sales should be at the "market price." *Id.* at 450.

the dominant competitor[s] will control the market and fix the price.”<sup>125</sup>

In *International Plywood*, the defendant saw the failure of the price formula as its way out of an unprofitable bargain.<sup>126</sup> The court allowed the defendant to escape the contract by holding that the “formula was intended to be the sole and objective binding means of fixing price under the agreement.”<sup>127</sup> This may have been the intent testified to in the courtroom situation when looking with hindsight from present exigencies, but a reasonable doubt arises as to whether this was the intent the parties held at the time of contract.

UCC section 2-305(1)(c), in contrast to the court’s treatment of the *International Plywood* case, requires<sup>128</sup> that the court give effect to the parties’ intention to conclude a binding agreement. This intent would generally be determined by a finding as to whether the parties intended a valuation or a market standard. Herein lies the reversal that UCC section 2-305(1)(c) has effected in recognizing and requiring the distinction between a valuation and a market standard as an indication of the parties’ original contractual intent and the foundation for the contract’s subsequent interpretation.

If the enforceability of an undesirable contract would turn on his statement, it is understandable that a party as witness could easily convince himself of his contractual intent or perjure his original intention (if he had one). But in no other situation is a party entitled to relief merely because the bargain he has made is burdensome or unprofitable.<sup>129</sup> And yet since these cases do not reach the courts unless one party is attempting to avoid his contract, the failure of a price term appears to function as a means to effectuate such avoidance.

It is more “consistent with what the parties said,” to enforce a contract that the parties intended to be a binding contract.<sup>130</sup> This is precisely the effect of UCC section 2-305(1)(c) for it establishes the intention of the parties as the touchstone of interpretation for contracts involving the failure of an independent price standard. Section 2-305(1)(c) hinges the validity of the contract upon the intent of the parties to conclude a binding agreement,<sup>131</sup> rather than mechanically applying the

125. Prosser, *supra* note 115, at 788.

126. The defendant corporation had been making more profitable “outside sales” in violation of plaintiff’s option even before the repudiation. *Interstate Plywood v. Interstate Container*, *supra* note 123, at 451.

127. *Id.* at 452.

128. See note 105 *supra*.

129. See, e.g., *Allen v. Bissinger & Co.*, 62 Utah 226, 219 P. 539 (1923).

130. 1 CORBIN, CONTRACTS § 97, at 426 (1963).

131. *Comparison of California Sales Law and Article 2 of the UCC*, 10 U.C.L.A.L. REV. 1087, 1134 (1963).

rules for valuation in the context of an independent standard price term. Courts on occasion have overlooked the reality that a determination of valuation also necessarily turns on the question of intention.<sup>132</sup> *Turman Oil Co. v. Sapula Refining Co.*<sup>133</sup> involved an agreement to buy the seller's output of oil. The contract price was to be the price posted by a third company for its oil, plus thirty-five cents per barrel. The third company stopped posting a single price, and rather posted seven prices based on the gravity of the oil. The court disregarding the argument that one of the seven grades was comparable to the contract oil, held that the contract ended when the third company stopped publishing a single price since the price could not be determined from the contract.<sup>134</sup> The court stated:

In the interpretation of contracts it is the duty of the court to ascertain the intention of the parties at the time the contract was entered into, and that intention must be determined by the language of the contract itself, if possible. . . . It is contended by the plaintiff that the parties to the contract, being experienced in the oil business, and with knowledge that the [third company] had in the past posted prices for oil based upon the gravity in the oil, they must have had in mind it might again, during the life of the contract, adopt that method of price fixing, and therefore it must be held that it was the intention of the parties, at the time the contract was made, that, if such changed method of price fixing arose, the refinery company would pay the price quoted by the [third company] for oil of like gravity . . . and an additional premium of 35 cents per barrel. The defendant contends that, since the [third company] had posted a single price for oil for more than eleven years, it would have been written in the contract if the parties had in contemplation a change to price fixing on a gravity basis, and intended, in such contingency, that the refining company should pay the quoted price for oil of like gravity and a 35-cent premium. We think the latter contention must be sustained. . . .<sup>135</sup>

Thus the court claimed to honor the intent of the parties. But the court actually restricted the question of intent by considering only the parties' intention (or lack of it) regarding procedure to be followed in the event of failure of the price standard. The Uniform Commercial Code under the mandate of section 2-305(1) looks at the broader ques-

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132. 1 WILLISTON, SALES § 174 (rev. ed. 1948).

133. *Turman Oil Co. v. Sapula Refining Co.*, 124 Okla. 150, 254 P. 84 (1926).

134. *Id.* at 88.

135. *Id.* at 86.

tion of whether the parties intended to have a binding contract, and grants relief on that basis.<sup>136</sup>

In *Turman Oil*, the original intention of the parties to deal with each other and be bound by their contract was obvious.<sup>137</sup> A reasonable market price was readily available to replace the fallen price standard set in the contract.<sup>138</sup> There can be little doubt that a court granting relief under the direction of UCC section 2-305(1)(c) would have upheld the contract in the *Turman Oil* case.

Professor Corbin voices the spirit of the Uniform Commercial Code<sup>139</sup> when he states that:

The court should be slow to come to this conclusion [too indefinite and uncertain for enforcement] if it is convinced that the parties themselves meant to make a "contract" and to bind themselves to render a future performance. Many a gap in terms can be filled, and should be, with a result that is consistent with what the parties said and that is more just to both than would be a refusal of enforcement.<sup>140</sup>

The practice of interpreting and enforcing disputed contracts according to the original intention of the contracting parties is the principle that lies at the foundation of UCC section 2-305(1)(c). The change effected by section 2-305(1)(c) goes beyond merely validating contracts heretofore held unenforceable for failure of the price term. The change in section 2-305(1)(c) reflects a change in legal theory—and actually harmonizes the codified law of sales with the general body of contract interpretation principles—with the objective of "giving effect to the agreement of the parties."<sup>141</sup>

The theory underlying the operation of UCC section 2-305 is to "recognize the dominant intention of the parties."<sup>142</sup> If the parties in-

136. See notes 104-13 *supra* and accompanying text.

137. See notes 117 and 119 *supra* and accompanying text. The only value of the contract to the respective parties would be to assure them of dealings with each other, to provide the one with a source of oil for his refinery, and the other a market for the oil he produced. This could not be considered an exchange of risks situation (see notes 115-18 *supra* and accompanying text) since the parties had set the price to be merely the market price plus the premium for a year.

138. The contract oil was still comparable in gravity with one of the oils on which the third company posted prices. *Turman Oil v. Sapula Refining*, *supra* note 133, at 87.

139. UCC § 2-305.

140. 1 CORBIN, CONTRACTS § 97 (1963).

141. Official Code Comment 6 to UCC § 2-305. Professor Hawkland says of § 2-305 that it is "based on the sensible assumption that the expectations of the parties are best satisfied by enforcing their open price agreement even if it becomes necessary for the court to 'make a contract for the parties' . . ." HAWKLAND, SALES AND BULK SALES 18 (1958).

142. Official Code Comment 1 to UCC § 2-305.



tend their agreement to be binding, then effect should be given to their agreed method for determining the price. If that method fails, there is no reason to avoid the agreement (indeed, this would be contrary to the contractual intent of the parties). Rather, a reasonable price should be supplied by the court. A market price usually is ascertainable at the time for delivery. This price ordinarily meets the requirement of reasonableness<sup>143</sup> in addition to giving effect to the intent of the parties.<sup>144</sup> In any event, the court is permitted, as indicated by the Official Code Comments, to uphold a contract by imposing as a price term for future performance that which would otherwise constitute a remedy for breach of the contract.<sup>145</sup>

But the Uniform Commercial Code is not to be considered a panacea. The phrase that is so decisive "if they so intend,"<sup>146</sup> leaves the correspondingly difficult problem of ascertaining *what* "they so intend."<sup>147</sup> The Code delegates this problem to the trier of fact who has the duty to determine whether the parties intended to conclude a contract.<sup>148</sup> Professor Speidel has noted that "intend to contract" is an unfortunate choice of words since, in view of the Code's definition of "contract,"<sup>149</sup> the phrase suggests that the parties must intend their agreement to have legal consequences. Professor Speidel thinks it "extremely doubtful" that the parties ever intend "legal consequences."<sup>150</sup>

Thus the problem of ascertaining original contractual intent is difficult. A court may even find itself in a situation of having to impose an intent on the parties when in fact there was no original well-defined or articulated intention, or none that would coincide to the parties' actual intention as it existed at the time of contracting.

In spite of the difficulty, the prospect of determining a controversy on the basis of the intention of the parties represents a more desirable

143. UCC § 2-305 requires a "reasonable price at the time for delivery. . . ." (Emphasis added.)

144. *California Sales Law and Article 2*, *supra* note 131, at 1134.

145. "As to future performance, since this Article recognizes remedies . . . which go beyond any mere arithmetic as between contract price and market price, there is usually a 'reasonably certain basis for granting an appropriate remedy for breach' [UCC § 2-204(3)] so that the contract need not fail for indefiniteness." Official Code Comment 1 to UCC § 2-305.

146. UCC § 2-305(1). See also Official Code Comment 2 to UCC § 2-305.

147. See FULLER & BRAUCHER, *BASIC CONTRACT LAW* 67 (2d ed. 1964) (Intention as a Test of Legal Consequences).

148. Official Code Comment 2 to UCC § 2-305.

149. UCC § 1-201(11): "'Contract' means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law."

150. Address by Professor Speidel, Annual Convention of the Association of American Law Schools, December 28, 1966. See FULLER & BRAUCHER, *BASIC CONTRACT LAW* 67 (2d ed. 1964) (Intention as a Test of Legal Consequences).

result than was affordable under prior law where the only standard was whether the price term was sufficiently definite and certain.<sup>151</sup>

The difficulty of ascertaining the parties' intent, however, need not remain a constant problem. Relief for either party under the Code provisions is contingent upon a factual determination of intent. It is within this finding of fact that a margin of error appears, since it is never a certainty that such a finding corresponds with reality. But, with UCC section 2-305 applicable, this factual determination of intent with its margin of error should gradually pass from the list of issues confronting the jury. Rather, the intent of the parties should be the determinative contribution of the contract itself. Now that UCC section 2-305 has given its implied warning, only poorly drafted contracts should require the trier of fact to ascertain the intent of the parties. The draftsman who is cognizant of the Code's relevant provisions will include in a contract a clear and simple statement of the intention of the parties as to when and how long the contract is to be binding.<sup>152</sup> Including such a statement, in addition to giving a court a foundation for interpretation, would force the parties to consider and come to an agreement regarding the duration of the contract, even if an external price standard fails within the period. A statement of intention incorporated into the contract could produce the further benefit of resolving any uncertainty regarding a market indicator vis-à-vis a valuation. The price standard might not have been intended to determine a reasonable price or to reflect the market price, but to represent only the price that a valuer should fix as, for example, an heirloom or Rembrandt.<sup>153</sup> In the case of a valuation, the imposition of a "reasonable" price under section 2-305(1)(c) abrogates the parties' original intention. Such a result may be avoided by a statement of intention.

#### AN IMPROVEMENT OVER EXISTENT LAW?

A final consideration concerns the impact of the change effectuated by UCC section 2-305(1)(c) on the economic as well as the legal community. As stated by Professor Speidel, "the critical assumption . . . is that the 'intention' test of liability better serves the interests of seller and buyer and the transaction in context than does the [bargain] paradigm

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151. Cases cited note 94 *supra*.

152. "The counseling point is clear. If the parties intend to be bound even though the price is not settled, they should state so in clear, concise language; if the parties do not intend to be bound until the price is fixed, they should so state in clear, concise language." HAWKLAND, SALES AND BULK SALES 19 (1958). See also, HAWKLAND, TRANSACTIONAL GUIDE TO THE UCC 57 (1964).

153. See notes 35, 38, 40 and 109 *supra* and accompanying text.

of agreement.”<sup>154</sup> This is an issue that admits of no easy answer. Perhaps the most persistent criticism of the Code provision is that courts are permitted and even directed to “make a contract” for the parties.<sup>155</sup> If specific performance of executory contracts is the remedy requested,<sup>156</sup> a court is empowered even to compel estranged parties to deal with each other.<sup>157</sup>

Professor Hawkland gives expression to the opposing view, stating:

Section 2-305 is based on the sensible assumption that the expectations of the parties are best satisfied by enforcing their open price agreement even if it becomes necessary for the court “to make a contract for the parties” by supplying a reasonable price as the price term. Surely it would seem that a fairer and more just result is reached by this action on the part of the court than would be reached by a ruling that the contract was completely unenforceable.<sup>158</sup>

Thus the consideration of whether to let one<sup>159</sup> of the parties escape the contract when the price method fails is weighed against the consideration of permitting a court to make a contract for the parties. The Uniform Commercial Code provision in section 2-305(1)(c) indicates that it has judged the balance in favor of the latter solution. Objection to a court’s action in revitalizing the contract comes only from a party who wants to repudiate the original agreement. The law of contracts has not considered a desire to repudiate sufficient grounds for escaping contractual liability.<sup>160</sup>

In essence, courts when operating under section 2-305 may order specific performance of the contract, or at least uphold the contract as a

154. Address by Professor Speidel, Annual Convention of the Association of American Law Schools, December 28, 1966.

155. 1 N.Y. LAW REVISION COMMISSION, HEARINGS ON THE UNIFORM COMMERCIAL CODE 98 (1954); *but cf.* rebuttal by Professor Llewellyn, *id.* at 121. See also Hall, *Article 2—Sales—“From Status to Contract”?*, 1952 WIS. L. REV. 209, 215; *but cf.* HAWKLAND, SALES AND BULK SALES 18 (1958), as quoted note 141 *supra*.

156. Official Code Comment 1 to UCC § 2-305 (quoted in note 145 *supra*) indicates that the section is intended to apply also to executory transactions. See Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 578 (1950). The party seeking to uphold the contract is most probably, however, contemplating a recovery in damages on basis of the contract rather than specific performance of the contract.

157. *Ibid.*

158. HAWKLAND, SALES AND BULK SALES 18 (1958).

159. If both parties wished to escape the contract, they obviously would have no difficulty abandoning the contract, or reaching a novation.

160. Cases cited note 129 *supra*.

basis for a remedy in damages.<sup>161</sup> But this is contract enforcement with a new twist. Rather than merely compelling the parties to honor their agreement, the court is also setting the terms of the agreement. The Uniform Commercial Code, moreover, assumes that courts are as qualified to set a reasonable price for the parties as they are to provide a remedy for breach.<sup>162</sup> This is an assumption upon which the realities of the commercial world might cast a doubting shadow.<sup>163</sup>

The Uniform Commercial Code has been seriously criticized in some quarters apparently because it is a change in existing law.<sup>164</sup> Those opinions, however, express the minority view, and the favorable and even enthusiastic comments on the changes wrought by the Code are multiplying in number.<sup>165</sup>

As previously noted,<sup>166</sup> the most significant and arguably beneficial change made by UCC section 2-305(1) (c) is that the original intent of the parties to contract is to be the sole criterion for interpreting and enforcing an external standard-price-term provision.

### *Uniformity*

Further advantages forthcoming under section 2-305 do not belong exclusively to it, but are characteristic of the entire Code.<sup>167</sup> The most widely acclaimed advantage made possible by the Code is its uniformity

161. Damages as a remedy under UCC § 2-305(1) (c) could not be measured by the difference between the market price and the contract price, since in these situations there would be no difference. The damages for breach would rather have to be measured by a party's reliance on the contract and the expense and delay involved, such as in finding another supplier (or outlet) or losses caused by the interruption of supply.

162. Official Code Comment 1 to UCC § 2-305 (quoted in note 145 *supra*).

163. See note 155 *supra*.

164. Especially Professor Williston in Williston, *The Law of Sales in the Proposed UCC*, 63 HARV. L. REV. 561, 562 (1950), where he recommends the Code not be enacted into law, and emphasizes the dangers in intentionally making "drastic changes in substance and in terminology from existing law," with particular emphasis on an absence of judicial construction to fix the meaning of the new law, and conflicts of laws between the states arising as the growing pains of the Code.

See also Hall, *supra* note 155, at 229: "One cannot but wonder whether it would not have been better to have amended the Uniform Sales Act without being quite so extreme." See also Beutel, *Proposed UCC as a Problem in Codification*, 16 LAW & CONTEMP. PROB. 141, 158 (1951); Waite, *The Proposed New Uniform Sales Act*, 48 MICH. L. REV. 603 (1950).

165. "[Speaking regarding UCC § 2-305] . . . open price terms are provided for and specific results spelled out, and while there is some change of the law involved, it is all to the good." Lattin, *Law of Sales in the UCC*, 15 OHIO ST. L.J. 12, 21 (1954). See, e.g., Corbin, *The UCC—Sales: Should it be Enacted?*, 59 YALE L.J. 821 (1950); Latty, *Sales and Title in the Proposed Code*, 16 LAW & CONTEMP. PROB. 3 (1951); Llewellyn, *Statement to the Law Revision Commission*, 1 N.Y. LAW REVISION COMMISSION, *supra* note 155, at 23 (1954).

166. See notes 104-13, 130-31, 141-45 *supra* and accompanying text.

167. For articles discussing the advantages of the Code in general see note 165 *supra*.

of application within the economic and legal communities. The Code itself indicates that uniformity is one of its principal objectives,<sup>168</sup> the purpose being to abolish differences among territorial laws regulating commercial transactions.<sup>169</sup> Similarly, many have expressed the hope that the Code's specific provisions will be interpreted uniformly by the various state courts.<sup>170</sup>

The Code's uniformity of application as well as the hoped for uniformity of interpretation should enhance the "certainty" of commercial law. By reason of UCC section 2-305(1)(c), contracting parties may be more assured that their agreement regarding an external standard price term will be upheld according to their original intention;<sup>171</sup> attorneys can give more competent counsel regarding the possible legal consequences of open and external standard-price-term provisions; and judi-

168. Comment to Title, Uniform Commercial Code, (U.L.A.) at LXIII (1962). Also: "The Code project was undertaken . . . to achieve UNIFORMITY in State laws regulating commercial transactions. It was not undertaken as a project merely to improve the law; the Act was promulgated not as a *model* act, but as a *uniform* act." William A. Schnader, member of the Editorial Board for 1952 edition of Uniform Commercial Code, in Foreword to the *Uniform Commercial Code* (U.L.A.) (1962).

169. The Uniform Commercial Code has at least superficially realized this purpose. A total of 49 jurisdictions have adopted the Code to date. The jurisdictions which have adopted the Code, as listed in EZER, UNIFORM COMMERCIAL CODE BIBLIOGRAPHY—1966 (1966) (a complete bibliography of all materials written to date on the Uniform Commercial Code) and their respective effective dates are as follows: Alabama, 1967; Alaska, 1963; Arkansas, 1962; California, 1965; Colorado, 1966; Connecticut, 1961; Delaware, 1967; Dist. of Columbia, 1965; Florida, 1967; Georgia, 1964; Hawaii, 1967; Illinois, 1962; Indiana, 1964; Iowa, 1966; Kansas, 1966; Kentucky, 1960; Maine, 1964; Maryland, 1964; Massachusetts, 1958; Michigan, 1964; Minnesota, 1966; Mississippi, 1968; Missouri, 1965; Montana, 1965; Nebraska, 1965; New Hampshire, 1961; New Jersey, 1963; New Mexico, 1967; Nevada, 1967; New York, 1964; North Carolina, 1967; North Dakota, 1965; Ohio, 1962; Oklahoma, 1963; Oregon, 1963; Pennsylvania, 1954; Rhode Island, 1962; South Carolina, 1968; South Dakota, 1967; Tennessee, 1964; Texas, 1966; Utah, 1966; Vermont, 1967; Virginia, 1966; Virgin Islands, 1965; Washington, 1967; West Virginia, 1964; Wisconsin, 1965; Wyoming, 1962.

170. Regarding the future of the Uniform Commercial Code as a foundation for a body of precedent law, see Hart, *Interpreting the Uniform Commercial Code*, 12 PRAC. LAW. 39 (1966).

But there are also those who feel that the Code presents a threat to uniformity: "This considerable achievement toward uniformity [by the Uniform State Laws], which has taken many years to accomplish, is threatened by the proposed Code." Wiliston, *supra* note 164, at 561.

Also: "The Code is made up of the Uniform Sales Act, case law, business practice and invention. It contains, in too many sections, such weasel words as 'reasonable,' 'unreasonable,' 'commercially reasonable,' and 'unconscionable.' We may lose much of uniformity under the application of such words to similar fact situations." Hall, *supra* note 155, at 229. Note that the criticisms written by both these authors pertain to the 1949 draft of the Code. There was, however, no change between the provision under discussion (UCC § 2-305) in the 1949 draft and that contained in the 1962 edition.

171. "Business concerns which should have been making open price contracts for years and which have shied away from them in fear that they might be held unenforceable are freed by this section [UCC § 2-305] to do business on businessmen's terms and in conformity with the economics of the situation." HAWKLAND, SALES AND BULK SALES 19 (1958).

cial administration should benefit from the comparatively clear-cut rules outlined in the section.

#### CONCLUSION

UCC section 2-305(1)(c) represents an unqualified improvement over prior law in that it clearly states the law and the result desired. By making the intention of the parties at the time of contracting the principal consideration, the section recognizes distinguishable situations regarding the use of standard-price-term provisions. Specifically, the Code draws a line between market valuations and market indications as determined by a third party or other independent standard. In so doing, the Code accepts the prophetic wisdom of Professor Prosser as revealed in his 1932 analysis of open-price terms.