Duquesne Law Review

Volume 35 | Number 2 Article 3

1997

The Emerging Article 2: The Latest Iteration

John E. Murray Jr.

Duquesne Law Review

Volume 35, Winter 1997, Number 2

The Emerging Article 2: The Latest Iteration

TABLE OF CONTENTS

The Emerging Article 2: The Latest Iteration

*John E. Murray, Jr.**

"[What] we are attempting to say, whether we got it said or not . . . ."[1]

I. INTRODUCTION

The sacrosanct product of the great Karl Llewellyn has joined its relatives in undergoing major surgery.[2] At the time of this writing, the most recent draft of a revised Article 2 of the Uniform Commercial Code was presented for discussion at the July 1996 meeting of the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). While this draft, like earlier drafts, was emphatically promulgated *for discussion only*, it is the latest iteration from the Drafting Committee and suggests a number of important changes in Article 2 that are likely to remain in the final product.[3]

Formal discussions considering the revision of Article 2 began eight years ago.[4] Many had assumed the new version would have been well on its way toward final review and approval by the summer of 1996.[5] The surgery, however, proved to be more difficult than some had imagined, particularly with respect to knotty issues[6] and policy questions.[7] In addition, there was a

---

* President and Professor of Law, Duquesne University.

1. KARL LLEWELLYN, 1954 NEW YORK LAW REVISION HEARINGS, 117 (181) (emphasis added). *See* John E. Murray, *The Chaos of the "Battle of the Forms:" Solutions,* 39 VAND. L. REV. 1307, 1323 (1986).

2. Notwithstanding substantial revision and reorganization of its sections, apparently the final version of a new Article 2 will retain the underlying philosophy of its creator, the unique Karl Llewellyn.

3. U.C.C. § 2 (Proposed Draft 1996).

4. These discussions began with the Article 2 Study Project, which was asked to consider whether Article 2 should be revised. Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305 (1994). Professor Richard Speidel of the Northwestern School of Law chaired this committee, and now serves as a member of the Article 2 Drafting Committee.

5. *Id.* Professor Speidel wrote, "[t]he Committee should complete the revision project by August, 1996." *Id.* Professor Speidel further explained that "the revision must work its way through the American Law Institute ("ALI"), which had reviewed the Study Group Report in 1990 and a proposed draft of Article 2 in 1993. *Id.*

6. *Id.* at 1314. *See, e.g,* the notorious "battle of the forms," U.C.C. § 2-207 (1995), and the products liability question, U.C.C. § 2-318 (1995), in relation to tort theory.

7. Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods,* 16 J. INT'L. L. & BUS. 165, 168 (1995). For example, what effect should the United Nations Convention on Contracts for the International Sale of Goods (CISG) (ratified by the United States and

very ambitious draft that would have reengineered Article 2 into separate chapters, opening with underlying principles and followed by chapters on sales law and licensing of intellectual property. This "hub and spoke" approach[8] could have eventually included another "spoke" on leases of goods by transplanting Article 2A into a fourth chapter of a new Article 2 paradigm.

The controversial "hub and spoke" design was rejected. The newest paradigm confronts the burgeoning issues surrounding the licensing of intellectual property through new Article 2B.[9] A return to the drawing board produced the latest draft of an Article 2 relegated to sales of goods. This draft features refined sections from earlier drafts, as well as resolutions of contested changes. Notwithstanding the necessary caveat that substantial changes may still occur, and that the latest draft expressly leaves some matters unsettled, the final design of Article 2 is beginning to emerge. Awareness of the new design and analysis of some of its more important changes, therefore, is no longer premature.

---

more than forty countries and, where applicable, displacing Article 2 of the Uniform Commercial Code) have on the new Article 2? Professor Speidel notes that:

> From the beginning, the Drafting Committee questioned the extent to which Article 2 should be revised to harmonize with CISG. Although state law cannot vary CISG, state law can be revised to clarify the relationship . . . with CISG . . . . [T]he Drafting Committee has not embraced CISG as a model for revision. This stance partially reflects NCCUSL's historical ambivalence toward international commercial unification. Ironically, the desire for horizontal uniformity in sales law among the states of the United States and among nations has not been translated into strong pressure for vertical uniformity between domestic (state) and international sales law (federal). At best, the process of harmonization to date has been ad hoc and reflects highly selective borrowing.

Id. at 168-69.

Professor Speidel suggests seven reasons why the Drafting Committee chose not to use CISG as a model for the revision of Article 2: "(1) the absence of compatible background law; (2) Article 2 is part of an integrated commercial code; (3) the nature of the code; (4) limitations in scope; (5) differences in the drafting process; (6) differences in substance; and (7) technological and transactional obsolescence." *Id.* at 171. He suggests that the most notable CISG influence in the draft revision of Article 2 is found in the repeal of the Statute of Frauds, U.C.C. § 2-201 (1995), U.C.C. § 2-201 (Proposed Draft 1996); clarifications of the confusion over "no oral modification" clauses, U.C.C. § 2-209 (1995), U.C.C. § 2-210 (Proposed Draft 1996); the addition of a "general mitigation of damages policy," U.C.C. § 2-703(b) (Proposed Draft 1996); the deletion of "complex delivery terms" in part 3 of the UCC, U.C.C. § 2-309 (Proposed Draft 1996); and the expansion of the seller's right to cure, U.C.C. § 2-508 (1995), U.C.C. § 2-610 (Proposed Draft 1996). *Id.* at 168 n.18.

8. For analyses and criticism of the "hub and spoke" approach, *see* Marion W. Benfield & Peter A. Alces, *Reinventing the Wheel*, 35 WM. & MARY L. REV. 1405 (1994); and Raymond T. Nimmer, *Intangible Contracts: Thoughts of Hubs, Spokes and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337 (1994).

9. U.C.C. § 2 (Proposed Draft 1996). This article will deal only with the draft of Article 2—Sales.

II. DEFINITIONS

A curious change in the "short title" of Article 2[10] is followed by the "definitions" section[11] rather than the "scope" section, which is moved to section 2-103. The original[12] definitional section presents only four definitions[13] followed by references to twenty-five definitions in other sections of Article 2,[14] six definitions in other Articles of the Code[15] and the incorporation of Article 1 definitions.[16] Instead of referring to other sections, the draft[17] contains forty definitions as well as the residual reference to Article 1 definitions.[18] The new list repeats many of the current definitions without change, modifies others and also includes a number of new definitions. Alternate definitions of "good faith" begin with the current Article 1 definition of "honesty in fact,"[19] the current Article 2 definition adding the requirement that merchants observe reasonable commercial standards[20] or the use of a similar standard from Article 3.[21]

Among the familiar definitions that have been changed, the meaning of "conspicuous" has been enlarged.[22] The current definition appears only in Article 1.[23] The draft definition begins with the familiar test that a term or clause is conspicuous when "a reasonable person against whom it is to operate would likely have noticed it."[24] The definition is then enlarged to deal with

---

10. The new section 2-101, "Short Title," merely states that the article "may be cited as Uniform Commercial Code—Sales," U.C.C. § 2-101 (Proposed Draft 1996), as contrasted with the original version, which provides that the article "shall be known and may be cited as Uniform Commercial Code—Sales." U.C.C. § 2-101 (1995). The change is curious in that there is no longer an official identity of Article 2 though it "may" be cited as the section suggests.

11. U.C.C. § 2-102 (Proposed Draft 1996).

12. "Original" refers to the present version of Article 2 as enacted throughout the United States. "Draft" refers to the revised version.

13. U.C.C. § 2-103(1) (1995).

14. *Id.* § 2-103(2).

15. *Id.* § 2-103(3).

16. *Id.* § 2-103(4).

17. "Draft" refers to the "Discussion Draft" of Article 2 at the July meeting of the National Conference on Uniform State Laws discussed throughout this article.

18. U.C.C. § 2-102 (Proposed Draft 1996). The residual provision in subsection (b) of the draft incorporates Article 1 "principles of construction," but unlike its U.C.C. § 2-104(4) (1995) predecessor, says nothing about principles of "interpretation." *See* U.C.C. § 2-102(b) (Proposed Draft 1996).

19. U.C.C. § 1-201(19) (1995). This is "alternative A" in draft section 2-102(24).

20. U.C.C. § 2-102(1)(b) (1995). This is "alternative B" to draft section 2-102(24).

21. Good faith arises from "honesty in fact and the observance of reasonable commercial standards of fair dealing in the conduct or transaction concerned." Alternative C of U.C.C. § 2-102(24) (Proposed Draft 1996) (based on U.C.C. § 3-103(a)(4) (1995)).

22. U.C.C. § 2-102(9) (Proposed Draft 1996).

23. U.C.C. § 1-201(10) (1995).

24. U.C.C. § 2-102(9) (Proposed Draft 1996) (as contrasted with "ought to have noticed it" in the current U.C.C. § 1-201(10) (1995)).

electronic messages, including those that will not be reviewed by an individual but only by a computer.[25] There is no reference to a "writing" since electronic message systems now require the more generic term, "record," which includes any tangible or electronic medium.[26]

How does one "sign" an electronic record? The definition of "sign" begins with the familiar test, "any symbol executed or adopted by a party with present intention to authenticate the record."[27] The definition then adds the method of authentication for an "electronic record:" identifying the originator of the record and indicating the originator's approval of the information in the record, *if* the parties had agreed upon that method or the method was "reliable" under the circumstances.[28]

Other necessary "electronic" definitions had to be added, thus, "electronic agent,"[29] "electronic message,"[30] "electronic transaction"[31] and "electronic intermediary"[32] are newly included among the forty definitions in section 2-102(a). Other new entries are

---

25. *Id.* § 2-102(9) (Proposed Draft 1996). This section provides: "[I]n the case of an electronic message intended to evoke a response without the need for review by an individual," "conspicuous" means that the message must be "in a form that would enable the recipient or the recipient's computer to take it into account or react to it without review of the message by an individual." *Id. See also* section 2-102(19) (Proposed Draft 1996), which adds a definition of "electronic agent," a computer program designed to initiate or respond to electronic messages or performances without review by an individual. Such an "agent" operates "within the scope of its agency if its performance is consistent with the functions intended by the party who utilizes the electronic agent." *Id.* § 2-102(19). It is inevitable that such changes will produce references by courts to "reasonable electronic agents" or even "reasonable computers."

26. U.C.C. § 1-202(33) (Proposed Draft 1996). "'Record,' when used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." *Id.* Generations of new lawyers will undoubtedly refer to "perceivable retrievables."

27. *Id.* § 2-102(36). In original section 1-201(39), the definition of "signed" is the same with the exception of "a writing" for "the record." *See* U.C.C. § 1-201(39) (1995).

28. U.C.C. § 1-201(36) (Proposed Draft 1996).

29. *Id.* § 2-102(19). *See supra* note 22 and accompanying text.

30. *Id.* § 1-201(20). This term is defined as: "[A] record generated or communicated by electronic, optical, or other analogous means for transmission from one information system to another. The term includes electronic data interchange and electronic mail." *Id.*

31. *Id.* § 1-201(21). An "electronic transaction" occurs when the parties "contemplate that an agreement may be formed through the use of electronic messages or responses, whether or not either party anticipates that the information or records exchanged will be reviewed by an individual." *Id.*

32. *Id.* § 2-102(26). An "electronic intermediary" is "a person or entity that, on behalf of another, receives, transmits, stores or provides other services with respect to a record of information." *Id.* "Intermediary with respect to an electronic message" would not include a common carrier used in that capacity. *Id.*

"standard form," "standard terms"[33] and "substantial performance,"[34] which, standing alone, could lead to the assumption that the "perfect tender" rule in rejecting goods[35] is eschewed in the draft. As will be seen, however, such an assumption is unwarranted.

III. SCOPE

The original "scope" section simply applies Article 2 to generic "transactions in goods," distinguishing security interests to which Article 9 would apply while preserving consumer and farmer protection.[36] The draft "scope" section, however, deals with consumer protection and preempting law in a separate section.[37] Instead of the somewhat amorphous "transactions in goods," the draft describes Article 2 as applying to any "transaction, regardless of form, that creates a contract for the sale of goods," but adds the important distinction, "including a contract in which a sale of goods predominates."[38] Even where the sale of goods does not predominate, Article 2 would apply to the goods portion of the contract where the goods "fail to conform to the terms of the contract."[39]

These elaborations, however, are only necessary clarifications as contrasted with the enlargement of Article 2 where the seller is contractually obligated "to install, service, repair, or replace the goods sold at or after the time of delivery."[40] This explicit extension of Article 2 to service contracts is limited to service by the "seller" rather than a third party. Standards of performance for such sellers are found in new draft sections 2-501 through 2-

---

33. U.C.C. § 2-102(37), (38) (1995). These definitions will be discussed in a later analysis of the "battle of the forms" and related matters. *See* section VIII, *infra* at note 201 *et. seq.* and accompanying text.

34. U.C.C. § 2-102(39) (1995). "Substantial performance" is "performance of a contractual obligation in a manner that does not constitute a material breach of contract." *Id.*

35. With certain exceptions, the right to reject is provided for *any* nonconformity in the goods or their tender. U.C.C. § 2-601 (1995). The exceptions, however, are substantial and include contrary agreement by the parties, installment contracts, the implied limitation of good faith, the limitation of a reasonable time to reject and the seller's overriding right to cure under original section 2-508. *Id.*

36. U.C.C. § 2-102 (1995).

37. U.C.C. § 2-104 (Proposed Draft 1996). The notes to this draft section are particularly emphatic about the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which, as "federal law," preempts the UCC when applicable, as it would be, for example, in a contract between a Canadian seller suing a United States buyer in the Southern District of New York. *Id.* at note 4.

38. *Id.* § 2-103(a)(1). This important clarification of the test to be used in mixed sale of goods/services contracts is very desirable.

39. *Id.* § 2-103(a)(2).

40. *Id.* § 2-103(a)(3).

504, which deal with such subjects as material versus "nonmaterial" breaches,[41] a "quality of performance" standard to supplement other warranty standards, the scope of a seller's support or instruction to the buyer, and the maintenance and repair of goods. This elaboration of the application of Article 2 might be viewed as an effort to frame its precise boundaries, but a note to this section expressly invites courts to continue the extension of Article 2 by analogy.[42] The remainder of the "scope" section attempts to distinguish the application of new Article 2B, i.e., transactions where goods and information licensed under Article 2B are involved. The notes reveal a lack of confidence if not anxiety as to these efforts.[43]

IV. UNCONSCIONABILITY

It is sensible to move the unconscionability section from part 3 of Article 2[44] to part 1 because it is an underlying and pervasive standard[45] like the standard of "good faith." There is precious little difference between the current language and the draft.[46] The unconscionability section in Article 2A (leases) replicates the language of the current law, but adds provisions on consumer leases involving unconscionable conduct in the collection of claims arising from a lease contract as well as claims for reasonable attorney's fees.[47] The draft rejects this expanded treatment

---

41. *Id.* § 2-501-2-504. Draft section 2-602 expressly provides for a material breach analysis to be used as the test for "substantial impairment of the value" as courts and writers have been suggesting for a number of years. *Id.* § 2-602.

42. U.C.C. § 2-103 note 4 (Proposed Draft 1996) (citing with approval Barco Auto Leasing Corp. v. PSI Cosmetics, Inc., 478 N.Y.S.2d 505 (N.Y. Civ. Ct. 1984)).

43. *See id.* § 2-103 note 5 (providing: "To each his own on this one."); *Id.* § 2-103(c) note 6 (setting forth: "More work should be done here.").

44. U.C.C. § 2-302 (1995).

45. U.C.C. § 2-105 (Proposed Draft 1996). Symmetry may suggest that just as there is a requirement of "good faith" in all contracts, there should be a requirement of "conscionability" in all contracts. Presumably, there is, since unconscionability is banned. This change would then augur a definition of "conscionable" along with the definition of "good faith." There is neither a definition of "bad faith" nor a section devoted to its effects. Precluding unconscionability is undoubtedly desirable, though neither the current section 2-302 nor the draft section 2-105 makes the slightest attempt to define unconscionability. The same difficulty would attend any effort to define "conscionability."

46. *Compare* U.C.C. § 2-302(1) (1995) [in brackets] *with* U.C.C. § 1-205(a) (Proposed Draft 1996) [italicized]:

> If the court *finds* as a matter of law [finds] *that a* [the] contract or any clause *thereof* [of the contract] *was* [to have been] unconscionable at the time it was made *or was induced by unconscionable conduct*, the court may refuse to enforce the contract, [or it may] enforce the remainder of the contract without the unconscionable clause, or [it may] so limit the application of any unconscionable clause as to avoid any unconscionable result.

47. U.C.C. § 2A-108 (1995). The phrase "induced by unconscionable conduct" in draft section 2-105(a) is taken from the current section 2A-108(2), which addresses consumer leases. *See* U.C.C. §2-105(a) (Proposed Draft 1996); U.C.C. § 2A-108(2) (1995).

because it is a particularized application of unconscionability found elsewhere in the draft.[48] The Drafting Committee continues the limitation of unconscionability to the time the contract was made[49] and the remedy to avoidance or limitation of the contract or clause rather than damages. Like its predecessor, the determination of unconscionability in the draft is a "matter of law" and a party will have "a reasonable opportunity to present evidence as to the setting, purpose, and effect of the contract or clause thereof or of the conduct."[50]

The decision to leave the language of the unconscionability section in vague terms of principle may be problematic. Like the original section, the draft unconscionability section is conclusory: if a court discovers unconscionability, it should be excised, i.e., there is no attempt to provide standards or tests to guide courts in determining whether a contract or clause is unconscionable. A note attempts final resolution of whether a disclaimer of warranty meeting the formal or threshold requirements of the disclaimer section may still be unconscionable.[51] Not surprisingly, it resolves the question in accordance with the prevailing case law and commentary; i.e., such a clause may still be unconscionable on other grounds.[52] Again, however, there is no attempt to establish even a basic test in the section language.

Absent such guidance in the original section, courts and commentators scurried to the "official" comments for assistance as evidenced by the oft-cited language of "one-sided" contracts, as well as the evils of "oppression and unfair surprise," the "basic test" found in an "official" comment.[53] Induced by the desire to

---

Section 2A-108(4) allows reasonable attorney's fees to the consumer lessee when the court finds unconscionability. U.C.C. § 2A-108(4) (1994). If the consumer lessee knowingly makes a groundless claim of unconscionability, however, the court may award reasonable attorney's fees to the party against whom such a knowingly groundless claim was made. *Id.*

48. U.C.C. § 2-206 (Proposed Draft 1996). For example, draft section 2-206 deals with "standard form records" and subsection (b) therein provides a special rule for consumers. *See id.* § 2-206, 2-206(b). Similarly, draft section 2-316(e) applies a special rule for the exclusion or modification of implied warranties for consumers. *See id.* § 2-316(e).

49. *See id.* § 2-105. The Drafting Committee, however, added that a contract "induced by unconscionable conduct" is also within the scope of the section. *See id.* The lines between unconscionability and other abuses of the bargaining process such as duress, undue influence, misrepresentation and bad faith are sometimes ignored. This additional language in the draft unconscionability section may suggest a form of quasi or incipient duress.

50. *Id.* § 1-205(b). This subsection also allows the court to consider such evidence on its own motion. *Id.*

51. *Id.* § 2-316.

52. *Id.* § 1-205 note 2. *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS §96(e) & nn. 63 & 64 (3rd ed. 1990) for a discussion of the case law and commentary.

53. U.C.C. § 2-302 cmt. 1 (1995).

unravel the mysteries of this "emotionally satisfying incantation,"[54] courts parsed and extrapolated this comment language. Myriad tests and analyses have been suggested by courts and commentators over the last four decades.[55]

Presumably, extensive comments to the draft version of unconscionability will address numerous questions such as: is there merit in the "substantive"/"procedural" dichotomy suggested by some courts and writers? What about "apparent" versus "genuine" assent, or "unexpected" versus "no choice" forms of unconscionability? What about a "contract of adhesion?"[56] Should the principles of famous cases such as *Henningsen v. Bloomfield Motors, Inc.*[57] or *Williams v. Walker-Thomas Furniture Co.*[58] be codified as reliable guides? What about the application of unconscionability in cases involving merchants, which courts have studiously rejected except for those "merchants" who demonstrate the contractual understanding of consumers?[59] What about the use of unconscionability in cases where the buyer claims a gross disproportion between price and value with an allegation of overreaching?[60] Extensive comments explicating myriad applications of the unconscionability standard are not only desirable but necessary. Yet, a general statement of the basic elements of unconscionability in the section, aided by such comments, may be even more desirable, notwithstanding the formidable challenge such an effort would present.

At first blush, a new draft section on the allocation or division of risks immediately following the unconscionability section allows complete freedom to reallocate risks and shift burdens otherwise imposed under Article 2.[61] This addition, however,

---

54. This is the well-known characterization by the late Professor Arthur Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 558-59 (1967), who added, "[i]t is easy to say nothing with words." While I disagreed with Professor Leff's analysis of the unconscionability concept, *see* John E. Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969), his characterization of the language of the section remains accurate and, like all of his work, elegant in expression.

55. *See* MURRAY, *supra* note 52 at § 96(b)-(d).

56. *See id.* at § 96(b)-(c) for an elaboration of each of these concepts and others.

57. 161 A. 2d 69 (N.J. 1960).

58. 350 F.2d 445 (D.C. Cir. 1965).

59. *See* MURRAY, *supra* note 52 at § 96 nn. 55-60.

60. *See id.* at § 96 nn. 51-53.

61. U.C.C. § 2-106 (Proposed Draft 1996). Draft section 2-106 states: "Whenever this article allocates a risk or imposes a burden as between the parties, the agreement may shift the allocation and apportion the risk or burden." *Id.* This is somewhat reminiscent of a statement in the original comment to section 2-302, which insisted that "[t]he principle is one of the prevention of oppression and unfair surprise. . .*and not of disturbance of the allocation of risks because of superior bargaining power*." U.C.C. § 2-302 cmt. 1 (1995) (emphasis added). One explanation was that the mere existence or appearance of superior bargaining power does not allow a court to declare a contract or clause to be

must be read in conjunction with draft section 2-109. While continuing the general principle that parties are free to vary sections of Article 2 by their agreement, section 2-109 codifies clear exceptions to the general principle of freedom of contract, including relief from unconscionable contracts or clauses.[62]

V. "GOODS"

The definitions of "goods" and "future goods" in original section 2-105(1) are found among the many definitions in draft section 2-102.[63] Original 2-105 also distinguishes existing and identified goods from future goods and clarifies contracts to sell future goods as well as sales of part interests in goods and undivided shares in an identified bulk of fungible goods.[64] These pieces of 2-105 now occupy a separate section in the draft.[65] The remaining parts of original 2-105 defining "lot" and "commercial unit"[66] have been moved to the enlarged list of definitions.[67]

There is something to be said for the original section. Unfolding distinctions among "goods," "existing goods," "identified goods," "future goods" and "undivided shares in a bulk of fungible goods" as well as distinguishing "lot" and "commercial unit" in one Code section may be less confusing than requiring these definitions to be reassembled and compared from scattered sections.[68]

---

unconscionable. Rather, it is the oppressive use of such power that activates judicial power to declare unconscionability.

62. U.C.C. § 2-109 (Proposed Draft 1996). While generally reaffirming the right of parties to vary provisions of Article 2 by their agreement (whether or not a phrase such as, "or otherwise agreed," appears in such a provision), draft section 2-109(b) lists those sections that may not be limited or varied by the agreement of the parties: (1) the obligation of good faith under 1-203 and new section 2-102(a)(24); (2) the effect on use of parol or extrinsic evidence under new section 2-202(b); (3) the right to relief from an unconscionable contract or clause under new section 2-105; (4) the effect of new section 2-316 concerning the negation or limitation of express warranties; and (5) the effect of new section 2-318 concerning the extension of warranties. *Id.* § 2-109(b)(1)-(6). Even this list is incomplete in the draft, which contains a blank section 2-109(b)(6) suggesting future additional exclusions. A note to draft section 2-109 lists the sections that cannot be limited or varied by agreement:

> Other sections that cannot be limited or varied by agreement include the scope of the parties' power to liquidate damages, Section 2-710(a), the right to assign contract rights, Section 2-403, reduction of the statute of limitations to less than one year, section 2-714, and the rights of persons not parties to the contract.

Id. § 2-109 note 1.

63. *Id.* § 2-102(23), (25).

64. U.C.C. § 2-105(2)-(4) (1995).

65. U.C.C. § 2-107 (Proposed Draft 1996).

66. U.C.C. § 2-105(3), (4) (1995).

67. U.C.C. § 1-201(2), (7) (Proposed Draft 1996).

68. U.C.C. § 2-106 (1995). This and similar criticisms of the new draft, however, may sometimes be mitigated by recognizing that those very familiar with the original sections and so used to finding certain concepts in one place cannot be totally objective as

VI. Statute of Frauds

The Drafting Committee approved the repeal of the Statute of Frauds on March 6, 1993. An effort to restore it was easily defeated at the 1995 annual meeting of NCCUSL. Draft section 2-201 not only repeals the Statute of Frauds as it applies to contracts for the sale of goods, but also (1) repeals the application of the Statute to modifications,[69] (2) repeals the application of the one-year provision of the Statute to contracts for the sale of goods,[70] and (3) integrates a separate section of the original Article 2 making seals inoperative.[71] All of these efforts are grouped under the caption "No Formal Requirements" in the new section 2-201. Notwithstanding Karl Llewellyn's championship of the Statute of Frauds, the negation of "formal requirements" is in keeping with his philosophy of repudiating "technical" requirements that interfere with the identification of the factual bargain of the parties.[72]

The stated rationale for the rejection of the Statute is the common view that under modern fact-finding processes, original 2-201 "is frequently used to avoid liability in cases where there was credible evidence of an agreement and no evidence of perjury."[73]

---

to the worth of the reorganization of such concepts in different sections with new numbers.

69. U.C.C. § 2-201(a) (Proposed Draft 1996). This section reads, "[a] contract or modification thereof is enforceable, whether or not a record signed by a party against whom enforcement is sought . . . . " *Id.* This change, alone, alleviates the confusion of original section 2-209, which applied the original 2-201 Statute of Frauds to modifications. *See* U.C.C. §§ 2-201, 2-209 (1995). Among other confusing problems, questions arose as to whether modifications of sale-of-goods contracts that would not require a writing if they had been original contracts were, nonetheless, subject to original section 2-209(3). *See* John E. Murray, *The Modification Mystery: Section 2-209 of the Uniform Commercial Code,* 32 Vill. L. Rev. 1 (1987).

70. U.C.C. § 2-201(a) (Proposed Draft 1996). Draft section 2-201(a) applies "even if the contract or modification is not capable of performance within one year after its making." *Id.* Having repealed the Statute of Frauds as it applies to contracts for the sale of goods, the proposed draft would frustrate the rationale for the repeal if such a contract could be recaptured by the "one-year" provision of the statute.

71. *Id.* § 2-201(b). The negation of the seal as applied to contracts or offers is formerly found in U.C.C. § 2-203 (1995).

72. *See* John Murray, *The Article 2 Prism: The Underlying Philosophy of the Uniform Commercial Code*, 21 Washburn L. J. 1, 6 & n.30 (1981). Notwithstanding his aversion to "technical" requirements of classical contract law that interfered with the discovery of the factual bargain of the parties, Karl Llewellyn remained one of the few champions of the Statute of Frauds. *See* Llewellyn, *What Price Contract—An Essay in Perspective*, 40 Yale L. J. 704, 747 (1931) (suggesting that the habit of reducing agreements to some permanent record in this age of literacy (compared to the illiteracy of 1676) is supported by the Statute of Frauds).

73. U.C.C. § 2-201 note 3 (Proposed Draft 1996). Note 2 to this section indicates the consistency of the draft with the law of England. With the exception of contracts for the sale of land and contracts to answer for the debt of another, the Statute was repealed in England by the Law Reform Act of 1954. Note 2, however, reminds us that the Statute

Supplemental comfort is suggested by the assertion that "there is no persuasive evidence that the valuable habit of reducing agreements to a signed record will be adversely affected by the repeal."[74] It is difficult to discover the empirical basis for this assertion since we have never been without a Statute of Frauds. Other support for the repeal, however, is found in the extremely modest requirements of the current Statute.[75] The Drafting Committee could have discovered further support for its position in the judicial erosion of the Statute through the creation of a reliance basis for satisfying the statute well beyond that which can be carried by the statutory language.[76]

On balance, few should suffer from the passing of the Statute of Frauds. As the great Arthur Linton Corbin suggested, if the entire Statute of Frauds was repealed, he would suffer only to the extent that one volume of his magnificent treatise would no longer be sold.[77]

VII. Parol Evidence Rule

The original version of the Article 2 parol evidence rule[78] is a significant improvement over earlier shibboleths that often left the practicing bar, courts and law students in some confusion.[79]

---

lives with respect to leases of goods in section 2A-201, and the draft section 2B-201 on intellectual property provides options for its application.

74. *Id.* § 2-201 note 3.

75. Any number of terms can be omitted from the writing. There need only be evidence of the identity of the parties, what they intended to buy and sell and the quantity term. U.C.C. 2-201, cmt. 1. Price, time of delivery and other terms may be omitted. *Id.* More recently, even the requirement of the quantity term has been questioned. *See* Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670 (3rd Cir. 1991).

76. U.C.C. § 2-201 (1995). Notwithstanding the opening phrase of section 2-201, "[e]xcept as otherwise provided in this section . . . ," courts have discovered a new exception in the reliance of a promisee. *See, e.g.*, Potter v. Hatter Farms, Inc., 641 P. 2 628 (Or. 1982). The single reliance exception in the statute is found in original section 2-201(3)(a), which allows reliance as a substitute for a writing only in the very narrow situation of specially manufactured goods. *See* U.C.C. § 2-201(3)(a) (1995). The use of a judicially created general reliance satisfaction device for the Statute of Frauds further erodes the application of the statute.

77. 2 Arthur Linton Corbin, Corbin on Contracts § 275 (1963).

78. U.C.C. § 2-202 (1995).

79. The parol evidence rule was often viewed as a legal concept whose mysteries were "familiar to many but fathomed by few." Astor v. Boulos Co., 451 A.2d 903, 905 (Me. 1982) (quoting J. Murray, Murray on Contracts § 94 (2d ed.1965)). There is an oft-quoted statement of James Bradley Thayer concerning the parol evidence rule, "[f]ew things are darker than this or fuller of subtle difficulties." James Bradley Thayer, Preliminary Treatise on Evidence at the Common Law 390 (1898).

Shibboleths merely state the conclusion that evidence may not be admissible to vary, contradict or alter the terms of a writing. The application of this "rule," however, required courts to adopt one or more tests to apply the rule. *See* Murray, *supra* note 52 at § 84. The case law included the silly "appearance" or "four corners" test, the "Wigmore" test, and the "natural inclusion" or "natural omission" test, which was, by far, the domi-

In particular, the original version supports the critical distinction between interpretation and the parol evidence rule and clarifies the admission of trade usage, prior course of dealing and course of performance evidence. Unfortunately, the section language does not contain a workable test for the judicial application of the rule, though the comments feature an extremely valuable test emphasizing a narrower application. The original Article 2 test is found in a comment: "If the additional terms are such that, if agreed upon, they *would certainly* have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact."[80]

The "would certainly" test narrows the application of the rule.[81] The Drafting Committee intends the same test to be applied[82] but, like its predecessor, fails to include it in the section language. Instead, it seeks to guide courts by suggesting a change in the language of the original section in a curious way. It begins with the original distinction between a writing or record that may be merely final (partially integrated) or final and complete (fully integrated).[83] If a writing is deemed only partially integrated, both the original and draft versions state that the written terms "may not be *contradicted* by any prior ('previous' in the draft) agreement or a contemporaneous oral agreement." While both versions provide that trade usage, prior course of dealing or course of performance evidence is always admissible regardless of the finality or completeness (full integration) of the writing, the original version allows a partially integrated writing

---

nant test: Would parties situated as were the parties to this contract, naturally and normally include the alleged extrinsic matter in the writing? *Id.* § 84(c)(1), (3), (6). This is essentially the test ascribed to Professor Williston, the Reporter of the First Restatement of Contracts. *See* RESTATEMENT OF CONTRACTS § 240(1)(b) (1932); RESTATEMENT (SECOND) OF CONTRACTS § 216(2)(b) (1971). *See* MURRAY, *supra* note 52 at § 84 for an analysis of these and other tests, including the Uniform Commercial Code test.

80. U.C.C. § 2-202 cmt. 3 (1995) (emphasis added).

81. This is a modified Williston test as found in the following analysis:

> Under the Williston test ('natural inclusion' or 'natural omission'), if parties, situated as were the parties to the contract, would have naturally (normally or ordinarily) included the alleged extrinsic matter in the kind of writing they executed, the evidence is excluded. Under the UCC test, only if such parties *would certainly* have included such extrinsic terms in their writing is the evidence excluded. Thus, less evidence of extrinsic agreements is excludable (or more evidence is admissible) under the UCC test than the Williston test.

MURRAY, *supra* note 52 at § 84. *See also* the precocious statement of the great Justice Roger Traynor in Masterson v. Sine, 436 P. 2d 561, 564 (1968): "The draftsmen of the Uniform Commercial Code would exclude evidence in still fewer instances . . . ." *Id.*

82. U.C.C. § 2-202 note 1 (Proposed Draft 1996).

83. The draft version uses "record" in 2-202(a) and "writing or record" in 2-202(b). Hereinafter, for the purposes of this discussion, "writing" and "record" are used interchangeably, recognizing that the original version deals only with writings while the draft deals with either in the same fashion.

to be "explained or supplemented . . . by evidence of *consistent additional terms.*"[84] The new version allows a partially integrated record to "be explained or supplemented by evidence of *noncontradictory additional terms.*"[85] An explanatory note states: "[T]his latter ground for admissibility changes original Section 2-202, which excluded evidence of 'inconsistent additional terms,' and arguably narrows the effect of partial integration." The same note adds that the change follows the test from original comment 3, quoted above, but then emphatically discloses that the parol evidence section of the draft of Article 2B[86] retains the "consistent additional terms" language found in the original 2-202.[87]

The obvious question is whether there is any real difference between "consistent additional terms" and "noncontradictory additional terms." Both versions of the parol evidence section preclude the admission of "contradictory" terms even where the writing is only partially integrated. If an additional term is "consistent" or "noncontradictory," both versions would allow a partially integrated writing to be explained or supplemented by such a term.[88] The implication is clear that the original version precludes the admission of an "inconsistent" term. But if "inconsistent" means "contradictory,"[89] it does not differ from the draft version since the draft would allow only "noncontradictory" terms to be admitted to explain or supplement a partially integrated record.[90] Yet, the draft insists that by allowing noncontradictory evidence to be admitted where the record is partially integrated, the draft "changes original Section 2-202" because the original section "excluded evidence of 'inconsistent additional

---

84. *Id.* § 2-202(b) (emphasis added). The inclusion of "course of performance" along with trade usage and prior course of dealing evidence as admissible notwithstanding the parol evidence rule is somewhat superfluous. Course of performance necessarily must occur after the contract is formed and constitutes the strongest evidence of the meaning of the agreement since it is the parties themselves who are engaged in such course of performance, and their manifestations of performance may be viewed as the best evidence of what they meant by their written (or recorded) agreement. Moreover, course of performance evidence may be sufficient to constitute a waiver of the recorded terms of the agreement. U.C.C. § 2-208 (1995). Thus, even if course of performance was not mentioned in the U.C.C. parol evidence section, evidence of such performance would be admissible since the parol evidence rule has no application to subsequent as contrasted with prior or contemporaneous agreements.

85. U.C.C. § 2-202(a)(2) (Proposed Draft 1996) (emphasis added).

86. *Id.* § 2B-301(a)(2).

87. *Id.* § 2-202 note 1.

88. If the writing is fully integrated (i.e., final *and* complete), even consistent or noncontradictory terms will not be admitted. U.C.C. § 2-202 (Proposed Draft 1996).

89. One of the ordinary dictionary definitions of "contradiction" is "inconsistent." *See, e. g.*, WEBSTER'S UNABRIDGED DICTIONARY 397 (1983).

90. U.C.C. §2-202 (Proposed Draft 1996).

terms.'"[91] This confusion is a prime candidate for clarification in any final draft.

Even assuming that this distinction can somehow be clarified, the draft could be more user-friendly to a trial judge who must make parol evidence rulings in the trenches and to appellate courts confronted with final decisions. Since the purpose of both versions is to preserve the integrity of a record where reasonable parties *would certainly* have included alleged extrinsic matters in the record, why not state that test in the section language? There is a splendid location for the insertion of such language, as the draft adds a new subsection directing courts to consider all relevant evidence of intention to "integrate the document."[92] It is difficult to understand why this new subsection is added without the critical test; the very test desired by the Drafting Committee. In the draft's present form, it restates the obvious without the critical assistance that a statutory test would provide.

Other important questions not considered in the original 2-202 continue to be left to future comments. An earlier (May 1994) draft followed certain case law holding that a merger clause does not create a conclusive presumption of a total (full) integration. This statement was removed at a meeting of the Drafting Committee in March, 1995. A note in the latest version (July 1996) states that "a merger clause creates a presumption that both parties intended a total [full] integration and puts a difficult burden on one party to establish the contrary."[93] Does this mean that a merger clause *almost* creates a conclusive presumption—a "quasi conclusive presumption"—or just a regular presumption? The same note adds that an alternative draft to a section of Article 2B distinguishes merger clauses in standard forms from negotiated merger clauses.[94] The new Article 2 should certainly emphasize this distinction since merger clauses in standard, printed forms are so often ignored. To do so, however, raises other complications because the draft includes a new section without parallel in the original version dealing with the binding

---

91. *Id.* §2-202 note 1. The original version does so by *allowing* the admission of evidence of "consistent additional terms" to explain or supplement a partially integrated writing. U.C.C. §2-202(b) (1995).

92. U.C.C. § 202(b) (Proposed Draft 1996). Since there is no statutory definition of "document," which presumably refers to a "writing," the drafters apparently meant to say "record."

93. *Id.* § 2-202 note 2.

94. *See id.* § 2B-301(b) (Alternative 2) (stating that a merger clause *not* in a standard form is "presumed to state the intent of the parties on this issue"). Thus, a standard form merger clause would not create a presumption.

effect of terms in a standard form.[95] It is tempting to suggest a tidy solution: if a party assents to a standard merger clause in a standard form in accordance with the new section on standard forms, there is a *rebuttable* presumption that the parties intended their document to be final and complete, i.e., totally or fully integrated. If, however, the parties manifest assent to a negotiated merger clause, the presumption is conclusive.[96]

Two final matters deserve attention. An earlier (May 1994) draft contained a subsection[97] invoking the incredible old notion that a court must find a record ambiguous before extrinsic evidence is admissible to interpret it. Fortunately, this retrogression was deleted at the March 1995 meeting, which the current draft happily reports.[98] Yet, the fact that this antediluvian view reached draft status at any time may be sufficient evidence of the need to place a final stake in its heart by clearly rejecting it in the statutory language.[99] Notwithstanding the fundamental nature of the distinction between interpretation and the parol evidence rule, a short but clear expression of that distinction, including the rejection of any requirement of finding ambiguity, may be a worthwhile replacement for the properly deleted subsection of the earlier draft.[100] Such a clause could also finally and irrevocably condemn the "dreaded 'plain meaning rule.'"[101]

---

95. *Id.* § 2-206. *See infra* note 178 and accompanying text for a discussion of draft section 2-206.

96. There were earlier discussions concerning the effect of standard merger clauses in consumer contracts that included recommendations that such clauses be deemed inoperative or be enforced only if the consumer understood and expressly agreed to such a clause. These recommendations were rejected. The present draft allows courts "to sort out cases where there is unfair surprise or no real assent" to such printed merger clauses. *Id.* § 2-202 note 5.

97. The subsection was denoted as subsection (c).

98. U.C.C. § 2-202 note 4 (Proposed Draft 1996).

99. At the very least, a strongly worded comment is essential.

100. A blurring of this fundamental distinction continues to occur with some regularity.

101. The last paragraph of U.C.C. § 2-202 note 4 (Proposed Draft 1996) explains that there was some concern that the phrase "terms may be explained" in the section could give rise to the "dreaded 'plain meaning rule.'" Not surprisingly, the best statement of the absurdity of the "plain meaning" rule emanated from the great Arthur Linton Corbin:

> It is sometimes said, in a case in which the written words seem plain and clear and unambiguous, that the words are not subject to interpretation or construction. One who makes this statement has of necessity already given the words an interpretation—the one that is to him plain and clear; and in making the statement he is asserting that any different interpretation is 'perverted' and untrue.

MURRAY, *supra* note 52 at § 81 (quoting Arthur Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. Q. 161, 171-72 (1965)).

VIII. Formation, Standard Terms, Forms and the "Battle"

There was never any doubt that a new Article 2 would include a substantial revision of section 2-207 dealing with the infamous "battle of the forms." The clear consensus that this "byzantine"[102] section simply had to be changed established it as the prime candidate for revision.[103] It was, however, more than predictable that the Drafting Committee would encounter considerable difficulty in meeting this challenge.[104]

The changes are complex and require a lengthy analysis. Before that analysis can be understood, the complexities of the original 2-207 and its curious interpretation must be understood. With apologies bordering on the abject to those who fully understand the "chaos" of the "battle,"[105] it is necessary to sketch the background for others.

A. Background—The Challenge

The original 2-207 attempts to revolutionize the agreement process by directing courts to unearth the true or factual bargain of the parties from layers of boilerplate in printed forms that almost everybody used but almost no one read and fewer understood.[106] The buyer's printed purchase order expressly or

---

102. This was the characterization of the court in *Phillips Petroleum Co. v. Bucyrus-Erie Co.*, 388 N.W.2d 584, 590 (Wis. 1986). Other characterizations include "a murky bit of prose," Southwest Eng'g Co. v. Martin Tractor Co., 483 P.2d 18, 25 (Kan. 1970), and "[a]n enigmatic section of the Code," Ebasco Servs. Inc. v. Pa. Power & Light Co., 460 F.Supp. 163, 205 (E.D. Pa. 1978).

103. As suggested in Murray, *The Revision of Article 2: Romancing the Prism*, 35 Wm. & Mary L. Rev. 1447 (1994), the awkward analysis of section 2-207 was the product of the courts because Karl Llewellyn placed too much faith in the ability of judges to elaborate his concept through the language of section 2-207. Such a radical change required a much more carefully articulated section if it was to have the effect Llewellyn sought. As in other matters, Llewellyn made the mistake of assuming that everyone, or at least the courts in their common law tradition, were quite capable of sharing his ingenious vision.

104. Having written several articles analyzing 2-207 and its judicial progeny, my students urged me to provide a draft of a new Article 2. The response is found in John Murray, *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J. L. & Com. 337 (1986). At page 355 of that piece, the following statement appears: "Discussing the design of the new Section 2-207 is considerably easier than drafting it." *Id.* at 355. I include a "working draft" as nothing more than an effort to begin the process of revision. The actual revision process has confirmed the difficulty of restating the principles of section 2-207 without the confusion and manufactured difficulties in the current interpretation of that section. For example, at the 1995 NCCUSL meeting in Kansas City, Missouri, the draft revision was followed by a note calling it "the latest draft in the constantly evolving Section 2-207." U.C.C. note to 2-207 (Proposed Draft 1995).

105. John Murray, *The Chaos of the Battle of the Forms: Solutions*, 39 Vand. L. Rev. 1307 (1986).

106. *See* Murray, *supra* note 52 at §§ 48-50 for a complete analysis of the "battle of the forms" and related matters.

impliedly contained all of the normal warranty and remedial protection afforded by the law, while the seller's prefabricated acknowledgment sought to strip away much of that protection and, perhaps, add an arbitration clause to deny the buyer the normal judicial process in the event of a dispute. Yet, as to the consciously considered ("dickered") terms of the deal—identity of the goods, price and quantity—that the parties had written, typed or word processed in the blanks of the printed forms, the forms were identical. The seller's typical response to the buyer's offer was necessarily a counter offer, simply because it contained different or additional boilerplate terms. The conclusion was inescapable that the buyer's acceptance of the goods after receiving the "counter offer" constituted an acceptance of the seller's terms. The seller, therefore, won the "battle of the forms" because the seller fired the "last shot" in the battle.[107]

Karl Llewellyn, however, believed that such parties intended to form a contract to buy and sell certain goods at the price found in both forms even though the unconscious, undickered terms in the boilerplate did not match, i.e., the *intended* offer and the *intended* acceptance *did* match. To discover a contract under these circumstances, the "matching acceptance" rule, requiring the acceptance to be the "mirror image" of the offer, had to be modified.[108] This was accomplished by treating a "definite and seasonable expression of acceptance" as an operative acceptance even though such an "acceptance" contained different or additional terms.[109] While an early judicial reaction simply could not assimilate this radical change,[110] courts finally perceived the

---

107. *See* Step Saver Data Sys. v. Wyse Technology, 939 F.2d 91, 98-99 (3d Cir. 1991) for an analysis of the "last shot" principle and the change effected in that principle by original section 2-207.

108. There is a tendency to suggest that the "matching acceptance" rule was discarded. In fact, the rule remains with respect to any "dickered" term such as the price, quantity and identity terms. Thus, an offer to sell goods for $10,000 is not accepted by a response to buy the goods for $8,000 since such a response is clearly not a "definite and seasonable expression of acceptance." Beyond this obvious distinction, it is plausible to suggest that original section 2-207 was designed to effectuate the "true" matching acceptance rule, i.e., to treat an expression of acceptance that matched the dickered terms as a real, substantive and intended acceptance even though the printed form used to accomplish such an acceptance contained nonmatching boilerplate terms.

109. Original section 2-207(1) provides:

> 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.

U.C.C. § 2-207(1) (1995).

110. *See* Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962), where the court could not bring itself to understand how an otherwise definite expression of acceptance could operate as an acceptance since the "acceptance" contained a disclaimer of warranty materially altering the terms of the offer. Yet, original section 2-207(2)(b)

change in the "matching acceptance" rule, which they proudly asserted as their sophisticated understanding of section 2-207.[111] Unfortunately, there was precious little judicial understanding of the Llewellyn design beyond this point.

Under original 2-207, a seller could no longer convince a court that because its response to an offer contained different or additional terms in the fine print, such a response was a counter offer when the dickered terms matched. Rather, it was deemed an acceptance and the seller's materially altering terms were excised.[112] Sellers were not pleased with this result, and resorted to the use of ambiguous language to regain control of the "battle" by making a counter offer. They accomplished this feat by a clause providing that "acceptance" was "expressly made conditional on assent to the additional or different terms," which tracked the statutory language.[113] Though courts insisted that such language in a seller's printed form must sufficiently track the proviso in the statute,[114] if the clause was virtually identical to the statutory language, they were forced to characterize the seller's response as a counter offer. The result was no contract, though it is more than likely that the agents for both buyer and seller assumed they had a contract and were without a clue as to the legal effect of the "expressly conditional" formula language in the seller's form. After all, the typical formula phrase, "this *acceptance* is expressly conditioned on buyer's assent to any different or additional terms found on the front or reverse side of this form," called itself an "acceptance." The normal operation of counter offers would lead to the pre-Code, "last shot" result, i.e., after receiving such a formula counter offer, the buyer's acceptance of the goods would manifest acceptance of the seller's counter-offer terms that stripped away the normal protection otherwise afforded by the U.C.C. While nothing in the Code suggested any modification of such algebraic counter offer effects, courts insisted that the mere acceptance of the goods rather than

---

expressly recognizes that such material alterations in otherwise definite expressions of acceptance simply do not become part of the contract. U.C.C. § 2-207(2)(b) (1995).

111. *See, e. g.,* Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440 (9th Cir. 1986); C. Itoh & Co. (American) Inc. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977); Hohenberg Bros. Co. v. Killebrew, 505 F.2d 643 (5th Cir. 1974); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972); Steiner v. Mobil Oil Corp., 569 P. 2d 751 (Cal. 1977); Uniroyal Inc. v. Chambers Gasket & Mfg. Co., 380 N.E.2d 571 (Ind. App. 1981).

112. Between merchants, such terms became part of the contract unless they materially altered the terms of the offer. U.C.C. § 2-207(2)(b) (1995).

113. *Id.* § 2-207(1).

114. Courts became very sticky about different language that was arguably no different in substance from the statutory language, often holding that different language did not create a counter offer. *See Dorton,* 453 F.2d at 1168.

some manifestation of express assent to the seller's terms would be insufficient. They arrived at this conclusion expressly because the formula counter offer was "ambiguous,"[115] i.e., the buyer would not have understood the response as a counter offer. This analysis ignored the fundamental principle of contract law that an ambiguous response to an offer need not be treated as a counter offer.[116]

The flawed judicial analysis found an offer, rejected by a counter offer,[117] that was not accepted by the conduct of the buyer in accepting the goods. Since the goods had been shipped and accepted by the purchaser, however, a contract had to be recognized—a contract by conduct that activated the notorious subsection (3) of 2-207.[118] The terms of the contract were those that matched on the forms that previously failed to create a contract, while the nonmatching terms on such forms were excised. Resulting gaps were filled with Article 2 terms. The net effect was an offer that expressly or impliedly contained all U.C.C. buyer protection (warranties, remedies, etc.), a counter offer that unsuccessfully sought to remove much of that protection, a shipment of the goods, the acceptance of the shipment, and a resulting contract by conduct with all of the dickered (matching) terms supplemented by U.C.C. buyer protection terms. The buyer won the battle of the forms.

---

115. One court provided: "Since the seller injected ambiguity into the transaction by inserting the 'expressly conditional' clause in his form, he, and not the buyer, should bear the consequence of that ambiguity under subsection (3)." *C. Itoh*, 552 F.2d at 1238.

116. Such a response should *not* be effective as a counter offer. An offeror (buyer) in such a case may be justified in treating the response as an equivocal acceptance from which the offeror may infer assent. *See* RESTATEMENT (SECOND) OF CONTRACTS § 57, cmt. b (1971).

117. At this point in the transaction, i.e., before any shipment of goods, millions of buyers and sellers assumed they had formed a contract, but actually had not. As one court noted, either party could "walk away from the transaction without incurring any liability . . . ." *C. Itoh,* 552 F. 2d at 1238.

118. Original section 2-207(3) provides:

> 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.

Id.

In a well known letter from the late Professor Grant Gilmore to Professor Robert Summers, Gilmore suggested that the original (1952) version of 2-207, which contained only subsections (1) and (2), "was bad enough. . .but the addition of subsection (3), without the slightest explanation of how it was supposed to mesh with (1) and (2), turned the section into a complete disaster." Letter from Professor Grant Gilmore to Professor Robert Summers, *reprinted in* RICHARD E. SPEIDEL ET AL., COMMERCIAL AND CONSUMER LAW 54-55 (3d ed. 1981). Gilmore also suggested that Llewellyn had nothing to do with the addition of subsection (3). *Id.*

Since sellers could no longer prevail by making even the most precise formula counter offer, this almost comical exercise continued. Some sellers became convinced that victory in the battle lay in their becoming offerors instead of offerees. By ascertaining that a quote would be construed as an offer, the seller invited the usual purchase order response by the unknowing buyer. The quote/offer would disclaim warranties, exclude consequential damages and perhaps add other clauses. Rather than its usual characterization as an offer, the purchase order response would be viewed as an "acceptance" containing different or additional terms that materially altered the terms of the offer and were, therefore, excised. This little trick allowed the seller/offeror to prevail in the battle *because it fired the "first shot."* Thus, the new but notorious "first shot" principle simply replaced the notorious "last shot" principle, which was one of the fundamental evils original 2-207 was designed to overcome.[119]

Beyond these chaotic pieces, there are other confusing, if not mysterious, elements to section 2-207 such as why 2-207(1) refers to acceptances containing "different or additional" terms while 2-207(2) refers only to "additional" terms. Explanations range from a printer's error to a conscious decision to apply subsection (2) only to additional terms. The ramifications include different ways of dealing with "different" terms depending on whether they are intended to be governed by subsection (2).[120] Another fundamental rationale for the creation of 2-207 was the necessity to confront the pervasive use of confirmations containing different or additional terms. The analysis of this effort, where the statute pretends the confirmation is an acceptance, was anything but clear. Less formidable challenges ask whether variations in an acceptance are material or immaterial.

Karl Llewellyn attacked the fundamental unfairness caused by the application of monistic principles of classical contract law to the "battle of the forms." He was concerned about "unfair surprise" and "oppression"—concepts associated with unconscionability. Section 2-207 was an effort to nip unconscionability in the bud because it manifests threshold or "incipient unconscionability."[121] This singular section was designed to deal with a host of

---

119. *See* Phillips Petroleum Co. v. Bucyrus-Erie Co., 373 N.W.2d 65 (Wis. Ct. App. 1985), *rev'd on other grounds,* 388 N.W.2d 584, 590 (Wis. 1986) (finding that the original contract had been modified orally to include a warranty and describing entire section 2-207 process as "byzantine").

120. For a complete analysis, *see* Murray, *The Chaos of the Battle of the Forms: Solutions*, *supra* note 105 at 1354-65 n.103.

121. John Murray, *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597 (1978).

questions, including resolutions of the agreement process where the forms did not match or a confirmation did not match the earlier agreement, and the fundamental question of whether one is bound by the unread boilerplate. It also pursued an incomplete effort to deal with complex issues surrounding the effect of standardized terms and forms in myriad circumstances. Llewellyn depended much too heavily on the creativity of his favored common law tradition to deal with these and related questions pursuant to one section of the U.C.C. The Drafting Committee decided that more than one section was necessary to meet these challenges, but still experienced considerable difficulty in its efforts to cure the chaos of the battle of the forms.

B. The New 2-207

The new 2-207 in the draft is only one of several operative draft sections that surround the "battle of the forms" and related problems. The analysis begins with the new version of the section dealing with "formation in general."[122] While this section continues the original concept that a contract may be made in any reasonable manner including conduct, and, if the parties so intend, a contract will be found notwithstanding considerable indefiniteness, "the issue of contract formation has been detached from the original section 2-207 and is treated in sections 2-203(b) [the formation section] and 2-205(a)(1) [the modified section on offer and acceptance in the formation of contract]."[123] Thus, the new section 2-207 "assumes a contract for sale has been formed under sections 2-203 and 2-205. [New] Section 2-207 does not deal with contract formation."[124]

The first critical portion of the new analysis begins in 2-203(b):

> If the parties so intend, an agreement sufficient to make a contract may be found even if the time when the agreement was made cannot be determined, one or more terms are left open or to be agreed upon, *or standard terms in the records of the parties do not otherwise establish a contract.*[125]

A note to this section confirms the origins of the italicized addition: "The test is taken from the first sentence of original section 2-207(3). Thus, if there is *conduct* by both parties which recognizes the existence of a contract but standard terms in their records do not agree, a contract is still made under 2-203(b)."[126]

---

122. U.C.C. § 2-203 (Proposed Draft 1996) (replacing U.C.C. § 2-204 (1995)).
123. *Id.* § 2-203 note 1.
124. *Id.* § 2-207 note 3.
125. *Id.* § 2-203(b) (emphasis added).
126. *Id.* § 2-203 note 1 (emphasis added).

Having dealt with the contract by conduct scenario from original 2-207(3), we are eager to discover the new analysis of the remaining formation problems from original 2-207(1). After a slightly changed section on "firm offers,"[127] the section dealing with "Offer and Acceptance in Formation of Contract"[128] is virtually identical to its predecessor except for an addition borrowed from original 2-207:

> (a) Unless otherwise unambiguously indicated by the language or circumstances the following rules apply:
>
> (1) An offer to make a contract must be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances, *including a definite expression of acceptance containing standard terms that vary the terms of the offer*.[129]

The italicized language is the new version of original 2-207(1). The remainder of 2-205 is a replication of original 2-206.[130]

To determine what the Drafting Committee intends by "*a definite expression of acceptance containing standard terms that vary the terms of the offer*,"[131] it is important to begin with the Article 1 definition of "term," which is unchanged: "'Term' means that portion of an agreement which relates to a particular matter."[132]

---

127. U.C.C. § 2-204 (Proposed Draft 1996). The original section 2-205 required a term of assurance that an offer would be held open in a form supplied by an offeree to be "separately signed" by the offeror who may have otherwise unwittingly made a firm offer. U.C.C. § 2-205 (1995). The new version states that such "[a] term of assurance in a record supplied by the offeree is ineffective unless it is conspicuous." U.C.C. § 2-204 (Proposed Draft 1996). There was also discussion concerning the continuation of the three month limit on a firm offer that, without any stated time limit, is open for a reasonable time. *Id.* § 2-204 note 1. The three month limit continues in the draft of 2-204, but the notes indicate the issue remains open. *Id.* § 2-204.

128. U.C.C. § 2-205 (Proposed Draft 1996).

129. *Id.* § 2-205(a)(1) (emphasis added).

130. Unfortunately, draft section 2-205(b) replicates original section 2-206(2), which caused confusion with respect to a notice requirement where the acceptance occurs through the "beginning of performance." Such notice is not part of the acceptance, but may be treated as such through the implication of the language in both the original and draft versions allowing the offer to be treated as having lapsed absent such notice. U.C.C. § 2-206 cmt. 3 (1995). The original version confirmed that notice is part of the acceptance in the comments. Notice is a condition to the duty of the former offeror created by the contract that was formed via the beginning of performance. Moreover, this condition is essential only where the former offeror would not promptly become aware of the beginning of performance. There is the additional problem of distinguishing such notice from the notice required by a seller who ships the goods under original section 2-504, which is unchanged under draft section 2-507. The shipping seller's notice requirement is expressly different from the notice requirement when the acceptance occurs through the beginning of performance. Moreover, under original section 2-504 (last paragraph), the 2-507(b) notice requirement is not a ground for rejection of the goods unless it causes material delay or loss. *See* John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM.& MARY L. REV. 1447, 1456-63 (1994).

131. U.C.C. § 2-205(a)(1) (Proposed Draft 1996) (emphasis added).

132. U.C.C. § 1-201(42) (1995). This is one of the "key definitions" referred to in U.C.C. § 2-207 note 3, para. 5 (Proposed Draft 1996).

"Standard terms," however, is one of the new definitions following the definition of "standard form."[133] "'Standard terms' means terms prepared in advance for general and repeated use by one party and *used without negotiation with the other party*."[134]

"Standard terms," therefore, are "undickered" terms, the kind found in boilerplate and not consciously considered by the parties. Under the new version, suppose an offeree includes the formula counter offer language or similar language in the "standard terms" of a "standard form." Will that create a counter offer? New 2-203 (the general formation section) requires such conditioning language to be "clear and conspicuous."[135] The new offer and acceptance section does not contain similar language, but a note to that section states that:

> [While] an offeree can avoid a contract by stating to the offeror that no contract exists unless the offeror agrees to the offeree's standard terms . . . [l]anguage in an offer or purported acceptance which attempts to condition contract formation upon agreement by the other to the terms proposed should be clear and, when contained in a standard form record, be conspicuous.[136]

While a future comment making this point is certainly desirable, in light of the havoc caused by this question in the past, there should be no reticence in emphasizing this requirement in the section language. Even the examples in the draft could be made abundantly clear.

Example 1 suggests a purchase order for 1000 units of described goods at $500 per unit and an acknowledgment that matches all dickered terms.[137] The reverse side of the purchase order contains standard terms including an arbitration clause, and the acknowledgment contains a standard term on the reverse side excluding consequential damages.[138] After mailing the acknowledgment, the market price rises and the seller faxes a rejection to the buyer.[139] There is a contract pursuant to 2-

---

133. *See* U.C.C. § 2-102(37) (Proposed Draft 1996). "Standard form" under draft section 2-102(37) means:

> [A] record prepared by one party in advance for general and repeated use that substantially contains standard terms and was used in the transaction without negotiation of, or change in, the substantial majority of standard terms. Negotiation of price, quantity, time of delivery or method of payment does not preclude a record from being a standard form.

Id.

134. *Id.* § 2-102(38) (emphasis added).

135. *Id.* § 2-203(d).

136. *Id.* § 2-205 note 2.

137. *Id.* § 2-205 Example 1.

138. U.C.C. § 2-205 Example 1 (Proposed Draft 1996).

139. *Id.*

205(a)(1) (an acceptance is effective even though it contains standard terms that vary the offer), and the seller's record did not unambiguously indicate that there would be no contract absent the buyer's agreement with all proposed terms as required by 2-203(d).[140] The example expressly states that if the seller had "clearly and conspicuously indicated that it did not intend to conclude a contract unless [the buyer] agreed to all of [the seller's] terms, both negotiated and standard," there would be no contract.

This desirable example could be enhanced by focusing upon the question, "clear and conspicuous" to whom? The example should indicate that such an express statement must be clear and conspicuous to a reasonable party under the circumstances, and no ambiguous formula language such as that previously found in original 2-207 should be effective to create a counter offer that negates the formation of a contract. But is this what the Drafting Committee intended?

The manifested intention of the Committee is found in its commendation of Judge Wisdom's rationale in *Step-Saver Data Sys. v. Wyse Tech.*, where this opinion clearly requires a "reasonable offeror" to understand that the offeree intends to proceed with a contract only on the terms of the offeree.[141] Then, why didn't the Committee say this, not only in the comment and example, but in the section itself? Repeating the "clear" standard in 2-205 after it has been stated in 2-203 may seem redundant, but it emphasizes the critical importance of ascertaining that an offeror is not unfairly surprised or oppressed.

Example 2 makes one change in the fact situation: seller's acknowledgment states the price at $600 per unit and also contains a standard term that the "seller reserves the right to litigate any dispute."[142] Seller ships the goods to the buyer with the acknowledgment and buyer accepts the goods without objection.[143] The example states, "[t]here is a contract under 2-203(b)."[144] This is curious since 2-203(b) is the subsection that allows a contract to be formed when terms are left open "or the standard terms of the parties do not otherwise establish a con-

---

140. *Id.* § 2-203(d). "Language in a standard form or a standard term which conditions intention of that party to be bound upon further agreement by the other party must be clear and conspicuous." *Id.* It should be noted that this example appears to mistakenly interchange buyer (B) for seller (S). *Id.* § 2-205 example 1.

141. 939 F.2d 91, 102-03 (3d Cir. 1991). This "well-reasoned opinion" is cited for this concept in Note 3 following 2-207 (the "fifth" rationale for 2-207). *See* U.C.C. § 2-207 note 3, para. 6 (Proposed Draft 1996).

142. U.C.C. § 2-205 example 2 (Proposed Draft 1996).

143. *Id.*

144. *Id.*

tract," i.e., it wars against indefiniteness. There is nothing indefinite about an attempt to "accept" a $500 offer at $600 per unit. Example 2 correctly treats the $600 price in seller's form as a negotiated term creating a counter offer that buyer accepted by using the goods. Thus, the contract was not formed under 2-203(b) as suggested in the example, but under 2-203(a), which recognizes a contract by conduct. As to the variation in the standard terms, 2-203(b) allows a contract to be formed if the parties so intend notwithstanding such variation. Whether the seller's standard term varying the buyer's standard term (arbitration) becomes part of the contract is not dealt with in either 2-203 or 2-205. A contract has been formed under those sections, but the question of which standard terms will be included in such a contract is determined by the new 2-207. Again, the new version of 2-207 has nothing to do with contract formation. From this example, it is clear that 2-207 will deal only "with the narrow question [of] whether the standard terms of one or both parties are part of that agreement."[145] This "narrow question" had been formerly covered by original 2-207(2) to which the new 2-207 will be relegated.

Example 3 to 2-205 has the buyer accepting the offer at the offered price ($500) and the seller shipping the goods, which the buyer accepts.[146] Subsequently, a dispute arises and the buyer insists on arbitration pursuant to the standard clause in the purchase order while the seller points to the standard clause in the acknowledgment "reserving the right to litigate."[147] Again, there is no question as to whether a contract is formed.[148] It has been formed "under either Section 2-205(a)(1) [which recognizes 'a definite expression of acceptance containing standard terms that vary the terms of the offer'], or 2-203 [which recognizes an intended contract though the standard terms in the records do not otherwise establish a contract under 2-203(b)]."[149] Example 3 concludes with the interesting statement, "[u]nless the Buyer's arbitration clause becomes part of the agreement under section 2-207, the 'default' rule is that the seller may litigate."[150] The seller's clause reserving the right to litigate would generally be superfluous since an aggrieved party[151] would normally have the

145. *Id.* § 2-207 note 3, para. 4.

146. *Id.* § 2-205 Example 3.

147. U.C.C. § 2-205 Example 3 (Proposed Draft 1996).

148. *Id.*

149. *Id.* § 2-205 Example 3.

150. *Id.*

151. Original section 1-201 defines an "aggrieved party" as a party entitled to resort to a remedy. U.C.C. § 1-201(2) (1995).

right to litigate and pursue any of the buyer or seller remedies in Article 2. If, however, the buyer's arbitration clause is included as a term in the contract, the seller would lose the right to litigate. To discover how the new 2-207 would deal with this case, consider a case to which the new 2-207 expressly applies.

Seller sends an offer in a record containing a "standard term arbitration clause."[152] Buyer accepts via a record containing no standard terms, i.e., the case involves standard terms in the record of only one party, the seller.[153] The seller ships and buyer accepts the goods.[154] Whether the arbitration clause is part of the contract is determined by 2-207:

> (a) In a contract to which 2-206 does not apply,[155] standard terms in a record prepared by one party that materially vary the contract are not part of the contract unless the party claiming inclusion establishes that the other party:
>
> (1) expressly agreed to them; or
>
> (2) had reason to know of them from course of performance, course of dealing or usage of trade and that they were intended for inclusion in the contract.[156]
>
> (b) In cases governed by subsection (a), the terms of the contract are:
>
> (1) standard terms included under subsection (a);
>
> (2) other terms to which the parties have agreed, whether or not contained in a record; and
>
> (3) supplementary terms incorporated under any other provision of this [article].[157]

Assuming that trade usage, prior course of dealing or course of performance would not include arbitration in the contract absent any express agreement to arbitrate between the parties, the seller's standard term arbitration clause materially varies the contract and is, therefore, not part of the contract, even though the buyer accepted the goods. Buyer's conduct in accepting the goods may be seen as "apparent assent," but apparent assent is not sufficient if the requirements of 2-207(a) are not met.[158] The

---

152. U.C.C. § 2-207 illus. C, para. 1 (Proposed Draft 1996).

153. *Id.*

154. *Id.*

155. The new 2-206 adds a section on "standard form records" where there is only one such record to determine whether the party who did not prepare it is bound by all of the standard terms contained therein. *See infra* note 178 and accompanying text.

156. The phrase, "and that they were intended for inclusion in the contract," was apparently added to emphasize that a "simple awareness" of such terms is not sufficient. *See* U.C.C. § 2-207(a)(2) (Proposed Draft 1996). There must also be a reasonable understanding by the other party "that the party seeking inclusion intended the standard terms to be part of the contract." *See id.* § 2-207 note 3, para. 6.

157. U.C.C. § 2-207 (Proposed Draft 1996).

158. *Id.* § 2-207 illus. C, para. 3. The next caption is also designated "C" instead of "D".

arbitration clause is a "varying term"[159] that is excluded from the contract.

Another illustration again considers standard terms in only one of the records. This time, the buyer sends an offer with no standard terms and seller sends a definite acceptance in a record containing standard terms that exclude liability for consequential damages. Seller ships and buyer accepts the goods, thereby apparently assenting to the seller's standard terms. A contract has been formed under 2-205(a)(1). When the seller suffers consequential damages, the question as to the inclusion of the seller's exclusionary clause will be determined by an application of 2-207(a). Again, the exclusionary clause appears to be a "varying term" that will not become part of the contract absent express agreement, agreement via trade usage, prior course of dealing or course of performance, of which the buyer had reason to know and understand were intended for inclusion.

The most important 2-207 cases involve an exchange of the records of both parties, each containing standard terms. There is an express recognition that the parties actually handling these records for their respective parties (e.g., purchasing agents and sales managers) "rarely take the opportunity to review the forms and this reality is well understood by all."[160] Through their lawyers, both parties strive to include advantageous terms in the "boilerplate," knowing that they will not be read, and each proceeds to manifest "blanket assent" to such terms.[161] How shall courts deal with such "standard terms" in conflicting "standard forms?" Illustrative cases are provided.

Case (1) deals with the obvious situation in which a buyer orders 1000 units of goods at a certain price in a typical form with standard terms, and seller "accepts" in a typical form with standard terms except that the seller agrees to ship 900 units.[162] This is a counter offer because the "mirror image" or "matching acceptance" rule continues to apply to "negotiated" terms.[163]

Case (2) involves a buyer making an offer to buy 1000 units at $50 per unit in a record containing a standard term arbitration clause.[164] Seller responds with a definite acceptance in a record

---

159. While a "varying term" is not defined in the draft, it is said to include "standard terms which materially add to or are different from the agreement of the parties." *Id.* § 2-207 note 3.

160. *Id.* § 2-207 illus. [the second] C.

161. *Id.*

162. U.C.C. § 2-207 illus. [second] C, case 1 (Proposed Draft 1996).

163. *Id.*

164. *Id.* § 2-207 illus. [second] C, case 2.

containing a standard term warranty disclaimer.[165] Seller ships and buyer accepts the goods.[166] Neither objects to the other's standard terms. Buyer later discovers the goods to be unmerchantable and initiates arbitration.[167] Seller claims it is not bound by the arbitration term and insists upon its disclaimer.[168] There is a contract, and whether either or both standard clauses will be part of the contract is determined by 2-207(a).[169] The illustration does not complete the analysis, presumably because the drafters concluded that the application of the section is clear.

To include either or both standard terms under 2-207(a) the party claiming inclusion would have to establish that the other party expressly agreed to the standard term or had reason to know of such a term from course of performance, course of dealing or trade usage, and that the term was intended for inclusion in the contract.[170] These are, of course, fact-laden questions.

Case (3) (*sic*)[171] assumes standard term arbitration clauses in both records that are materially different.[172] Here, neither clause is included in the contract unless 2-207(a), again, is satisfied, but there is no automatic "knockout" of these conflicting clauses[173] since one of the parties may have agreed to an arbitration clause.[174]

C. *Critique*

The analysis of the "battle of the forms" presented in this latest iteration clearly demonstrates that the Drafting Committee toiled long and hard in its quest, and that this quest may continue. The current result is conclusive evidence of the challenge. At the moment, at least, this analysis is the leading candidate for enactment throughout the country. It may be the most enactable draft in the spirit of compromise among myriad possibilities and desires. Then again, it may be improved.

---

165. *Id.*

166. *Id.*

167. U.C.C. § 2-207 illus [second] C, case 2 (Proposed Draft 1996).

168. *Id.*

169. *Id.*

170. *Id.* § 2-207(a).

171. *Id.* § 2-207 illus. D, case 3 (illus. D is really listed as a second "C," and case 3 is numbered as "4").

172. U.C.C. § 2-207 illus D, case 3 (Proposed Draft 1996).

173. Professor James White urged the "knockout" view where standard terms conflict. His co-author, Professor Summers, disagreed. More courts favored the White view. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 33-35 (3d. ed. 1988).

174. U.C.C. § 2-207 illus. D, case 3 (Proposed Draft 1996).

By the simple use of the term "vary," the draft quickly dispatches the confusion attending the "different versus additional" controversy that plagued courts and commentators under the original version. The draft properly clarifies the underlying purpose of 2-207, i.e., "to minimize unfair surprise and 'first' or 'last' shot advantage where one party seeks to include a standard term which varies terms in the agreement."[175] This express recognition that 2-207 is a species of unconscionability—incipient or threshold unconscionability—is important. The elaboration of this critical underlying philosophy, however, may be unnecessarily complex and confusing.

It is important to focus upon the detachment of the issue of contract formation from original 2-207. Placing formation questions in the general formation section (2-203(b)) and the offer and acceptance complement (2-205(a)) appears to be a logical separation and could allow a Drafting Committee to conclude that genuine progress has been made; but that would be an illusion. The separation of these concepts provides no relief from the underlying questions that plagued courts attempting to apply the original section. Courts must still decide whether a response to an offer constitutes "a definite expression of acceptance," albeit one that contains standard terms that materially vary the terms of "the contract." Whether a variation is "material" must still be decided.[176] Though these questions must be resolved before confronting the new 2-207, they must still be resolved. The fact that these questions will be resolved under a different section provides little solace.

The complexity of the draft is exacerbated by the definition of "standard terms," which are defined very simply as "terms prepared in advance for general and repeated use by one party and used without negotiation with the other party."[177] "Standard terms," therefore, can be *any* terms that a party inserts in a printed form or other record that will probably not be read or understood by the other party. At this point, however, another problem that is ignored in the original Article 2 must be addressed.

D. Excursus—Standard Form Records

Assuming no "battle," i.e., where only one record evidences the contract and that record is a standard form, would the party who did not prepare that form, but assents thereto, be bound by what

175. *Id.* § 2-207 note 3, para. 5.
176. "Material breach" is discussed in part VI of this article.
177. U.C.C. § 2-102(38) (Proposed Draft 1996).

he signs? The draft, quite properly, attempts to address this issue in new section 2-206, "Standard Form Records," dealing with a standard form—the kind of form that typically confronts the consumer buyer of any significant product,[178] though it also confronts merchants who accept it as the record of the contract.

The new section on standard forms presents the ancient question: am I bound by what I sign whether or not I have read or understood the standard terms on that printed document?[179] The draft provides the general answer: *if I manifest assent to the standard form by a signature or other conduct*, I am bound by the standard terms in the standard form unless they are unconscionable.[180] This appears to adopt the old but simple "bound by what one signs" rule. But it is not quite that simple. The section requires a party to "manifest assent" to the standard form and this phrase is defined as follows: "A party 'manifests assent' to a record if, after having an *opportunity to review* the terms of the record, the party engages in conduct that under the circumstances constitutes acceptance of the terms of the record and the party had an opportunity to decline to engage in the conduct."[181] The italicized phrase is itself defined as noted below:

> A party has an 'opportunity to review' a record if the record is made available in a manner designed to call the terms to the attention of the party before assent to the record or is provided in such a manner that the terms will be conspicuous in the normal course of initial use or preparation to use the goods.[182]

A party may have an *opportunity* to review a record without taking advantage of that opportunity. He may, therefore, manifest assent without any knowledge or understanding of the standard terms of the standard form because he has not bothered to read it. In such a situation, he will be bound by the standard terms that he has ignored after being provided with a reasonable opportunity to review such terms.

These new sections manifest another attempt to avoid incipient or threshold unconscionability—the "unfair surprise" vari-

---

178. There is never a "battle of the forms" in a consumer transaction where the seller presents the only form—a standard form—for the consumer to sign. "Standard form" is defined in the new draft as "a record prepared by one party in advance for general and repeated use that substantially contains standard terms and was used in the transaction without negotiation of, or change in, the substantial majority of the standard terms." U.C.C. § 2-102(37) (Proposed Draft 1996). "Negotiation of price, quantity, time of delivery or method of payment does not preclude a record from being a standard form." *Id.*

179. The issue is often described as the "duty to read" issue.

180. U.C.C. § 2-206(a) (Proposed Draft 1996).

181. *Id.* § 2-102(28) (emphasis added).

182. *Id.* § 2-102(30).

ety. The problems associated with determining whether a merchant had an "opportunity to review" a record before "manifesting assent" to unread terms cannot be gainsaid. The best prediction is that a merchant who has the opportunity to review a record for some period prior to manifesting acceptance by words or conduct will be bound to all except unconscionable terms. There is no indication that the party presenting such a record would be required to alert the merchant to any unexpected term. While unconscionability is still a theoretical salvation for a merchant, merchants will continue to have immense difficulty in establishing it. The section establishes a quite different and more favorable standard for consumers by treating as inoperative standard terms that the consumer "could not reasonably have expected . . . unless the consumer expressly (consciously?) agrees to them."[183] To genuinely confront unfair surprise in the case of a merchant, the same standard might be applied to merchants who apparently assent to a standard form presented by the other party.

Like 2-207, complexities abound when attempting to draft any statute that relieves a signer from the standard terms of a record. The overriding reluctance to excuse a party from the terms of a record he has signed continues as a brooding omnipresence. The new Restatement attempt to deal with standardized agreements was anything but an overwhelming success.[184] Again, the desire to preclude unfair surprise in standard forms or standard terms is clear. The solution in the draft presents considerable difficulty for courts in application. Is there a better solution—not only for the single standard form agreement—but for the "battle" as well?

E. A New Structure

To consider this possibility, return to the language of the draft 2-207:

---

183. *Id.* § 2-206(b).

184. *See* RESTATEMENT (SECOND) CONTRACTS § 211 (1981). For an analysis, *see* Murray, *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982). That article suggests, however, that the seeds of a highly effective analysis are discoverable in the Restatement analysis. In particular, a statement in Comment *f* to Section 211 is of considerable significance: a party should not be bound "to unknown terms which are beyond the range of reasonable expectation." RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f. The similarity between that statement and the test for consumers who signed standard forms in the current draft is striking. In the 1994 draft of the new Article 2, however, three alternatives were suggested. Alternative C followed Section 211 of the Restatement and was not followed in the latest draft.

> [S]tandard terms in a record prepared by one party that materially vary *the contract* are not part of the contract unless the party claiming inclusion establishes that the other party expressly agreed to them, or had reason to know of them . . . and that they were intended for inclusion in the contract.[185]

What terms of *the contract* may be materially varied by standard terms? If there are no standard terms, what are the terms of the contract?

There must be some manifested intention to create a contract including a minimum number of dickered or negotiated terms, e.g., subject matter and quantity.[186] A contract, of course, does not need to have "standard terms" as defined in the draft. Absent such terms and assuming sufficient dickered terms, what are the other terms of the contract? Trade usage and prior course of dealing may supply terms, but such terms are part of the contract *ab initio*. Course of performance provides the strongest evidence of what the parties intended by the original terms and can also operate as a modification of such terms, but it is not present at the inception of the contract. What are the "other" terms of the contract that are not supplied by trade usage or prior course of dealing at its inception? As in the original 2-207, the other terms are those "supplementary terms incorporated under any other provision of this [article]."[187] In the absence of any number of terms, the "supplementary terms" of Article 2 will supply terms such as place of delivery,[188] time of performance,[189] options and cooperation respecting performance,[190] shipment terms,[191] implied warranties[192] and the remedies of the buyer and seller in the event of a breach.[193] In the absence of such terms, these Article 2 terms become the terms of the contract—*by default*. Yet, these "default" terms *are* the normative terms established by Article 2 that remain essentially unchanged in the draft. They are the terms of *the contract*

---

185. U.C.C. § 2-207(a) (Proposed Draft 1996) (emphasis added).

186. Quantity, of course, can be indefinite in a requirements or output contract. U.C.C. § 2-306 (1995); U.C.C. § 2-304 (Proposed Draft 1996).

187. *See* U.C.C. § 2-207(3) (Proposed Draft 1996); U.C.C. § 2-207(3) (1995).

188. U.C.C. § 2-305 (Proposed Draft 1996); U.C.C. § 2-308 (1995).

189. U.C.C. § 2-306 (Proposed Draft 1995); U.C.C. § 2-309 (1995).

190. U.C.C. § 2-307 (Proposed Draft 1996); U.C.C. § 2-311 (1995).

191. U.C.C. § 2-309 (Proposed Draft 1996); U.C.C. §§ 2-319, 2-320 (1995).

192. U.C.C. §§ 2-312, 2-314, 2-315 (Proposed Draft 1996); U.C.C. §§ 2-312, 2-314, 2-315 (1995). The warranty of title is not labeled "implied" because it contains its own disclaiming requirements that are more stringent than the disclaiming requirements of the implied warranties of merchantability or fitness for a particular purpose. *Id.* Such warranties, however, are implied. U.C.C. § 2-312(a) (Proposed Draft 1996); U.C.C. § 2-312(1) (1995).

193. U.C.C. art. 2, pt. 7 (Proposed Draft 1996); U.C.C. art. 2, pt. 7 (1995).

together with any negotiated or implied terms, as stated in the draft version of 2-207, in the absence of any displacing terms.[194] If they are the norms that will be automatically supplied unless the parties expressly agree to the contrary, these Article 2 "default" terms, themselves, are the "standard" terms of the contract in one sense.[195] The familiar use of "standard" or "standardized" to refer to unread printed clauses (boilerplate), however, convinced the Drafting Committee to continue that usage in the new draft rather than refer to Article 2 terms as "standard."

Nonetheless, it is critically important to call Article 2 terms what they are. Thus, instead of "supplementary" or "default" terms, it would be helpful to refer to them as the "normal" terms of a contract since they are the established norms under the original version and have not been significantly changed in the draft. The essential goal continues to be the best approximation of the terms of the contract in accordance with the parties' presumable

---

194. U.C.C. § 2-207 (Proposed Draft 1996).

195. In my expressly fledgling attempt to redraft the original 2-207 as nothing more than an attempt to pursue the "discussion," I used the term "standard." *See* Murray, *A Proposed Revision of Section 2-207 of the Uniform Commercial Code, supra* note 104 at 355-56. Subsection (1) of my model captioned, "Factual Bargains Made Operative," attempted to do all that 2-207 attempts without its flaws. *Id.* at 355. My model subsection (1) reads:

> (1) If a court finds exchanged written manifestations of an intention to be bound to an agreement or one or more written confirmations of a prior oral agreement, they will be operative notwithstanding variations in the terms of the writing(s) if there is a reasonable basis for giving a remedy. [If separation is desirable, this portion could be moved to the general formation and offer and acceptance sections as in the NCCUSL draft. U.C.C. §§ 2-203, 2-305 (Proposed Draft 1996). "Record(s)" could be substituted for "writing(s)." The subsection continues:]
>
> The terms of the resulting contract will be the terms the parties have consciously considered [the "dickered" terms] and the standard terms of this Act [which would include trade usage, prior course of dealing and trade usage as well as all other implied terms]. Terms deviating from the standard terms of this Act will be operative only in accordance with subsections (2) and (3).

Id.

Essentially, subsection (2) includes immaterial variations in the resulting contract if their immateriality is established by the party seeking to include them and if the other party's "record" does not preclude them. *Id.* Subsection (3) allows material deviations in the resulting contract if the party seeking to include them establishes that the other party understood or should have reasonably understood such deviations, and that they would become part of any resulting contract to which that party expressed assent through language or conduct. *Id.* at 355-56. I see many similarities in the draft sections.

Finally, subsection (4) is my version of original section 2-207(3), the contract by conduct, where exchanged "records" do not form the contract. *Id.* at 356. The terms of this contract are the terms upon which the writings agree and the "standard" ("default" or "supplementary") terms of Article 2. *Id.*

See id. at 355-56 for the exact terms of subsections (2), (3) and (4) of the draft and its rationale. While I continue to believe that this initial attempt could be improved, and while the formation aspects could be moved to other sections as in the NCCUSL draft, revisiting this effort was rather pleasant insofar as, in general, I became convinced of its superiority to the NCCUSL draft. This may say more about the deficiencies in the NCCUSL structure than it says about the desirability of my fledgling draft.

intention. The initial question will always be whether the parties intended a contract. The counter offer problem should be solved by insisting that a reasonable party must understand that no contract was intended except on the terms included in such a counter offer. Again, however, assuming the parties' manifested their intention to be bound to a contract with a sufficient supply of matching dickered terms, what are the other terms of the contract?

The erection of a clear hierarchy would remove the complexity and confusion that attends the current draft. *The hierarchy should place normal Article 2 terms ahead of any standard terms.* Absent other evidence of displacing terms, this analysis would produce the necessary terms of *the contract*. These terms would be displaced only by varying terms that were negotiated (express terms) or by trade usage, prior course of dealing or course of performance terms that the parties presumably intended to displace the norms of Article 2. *This entire analysis would precede any consideration of standard terms in a standard form.* If the record(s) involved standard terms, the final analysis would determine if any of the standard terms displaced the terms of *the contract*. If the standard terms varied nothing in the contract as previously determined, there is no issue. If the record of the contract consisted of only one standard form, the determination of whether varying standard terms of that form displaced the terms of the contract would proceed in accordance with the suggested modification of new 2-206.[196] If there was an exchange of records involving standard terms in one or both records that varied the terms of the contract, the only question would be whether the parties had expressly agreed, by words or conduct, to any standard terms. Only then would standard terms displace "normal" Article 2 terms, because only then would they be elevated to the higher status of "negotiated terms."

Under this analysis, *the contract* would be evidenced by the parties' dickered and negotiated terms, terms supplied by trade usage, prior course of dealing and course of performance, and the normal terms of Article 2. *Again, this analysis would precede any engagement with standard terms since these determinations have nothing to do with standard terms or standard forms.* The structure of the new draft suggests that courts must decide whether negotiated terms ("expressly agreed" terms), trade usage, course of dealing, course of performance terms and so called "supplementary terms" provided by Article 2 displace

196. U.C.C. § 2-206 (Proposed Draft 1996). *See* text following *supra* note 181. U.C.C. § 2-207 (Proposed Draft 1996) would not apply.

standard terms. *But the question is the other way around.* The essential question is: do standard terms replace any of the already determined terms of the contract? All of these terms rank above standard terms in the hierarchy of determining the parties' intention. Unread and unconsciously considered standard terms should have the lowest ranking. A streamlined 2-207 could be very brief and very direct. It could incorporate the new section on "standard form records" into a section captioned, "The Effect of Standard Forms and Standard Terms." This single section could clearly state the effect of terms in a standard form and how a court should decide whether standard terms displace any of the already determined *terms of the contract.* The separate formation concepts could be retained in sections 2-203 and 2-205 with a directive that the effect of standard terms is to be determined under 2-207. This structural change would provide a highly effective and workable solution.

Curiously, this is apparently what the Drafting Committee is attempting to say. In the current draft, however, Karl Llewellyn might wonder, in his stylized way, "whether [they] got it said or not."[197] Any analysis of this nexus of problems requiring the lengthy analysis of the draft is more than suspect. The draft's obsession with the issues surrounding the effect of standard terms creates a structure that is unnecessarily complex and one that augurs considerable judicial confusion.

Finally, there is no mention in the draft of one of the "two typical situations" at which the original 2-207 was aimed, i.e., the oral agreement followed by one or more written confirmations that contain additional or different terms.[198] A note states that the draft "solves the problem without specifically identifying it"[199] by following the basic analysis of the original section, which treats a confirmation as if it is an acceptance and determines whether any additional or different terms become part of the contract under original section 2-207(2).[200] The situation was complicated where the earlier oral agreement was unenforceable under the Statute of Frauds and the writing with additional or different terms satisfied the Statute.[201] It was further complicated when the confirmation expressly conditioned the contract upon agreement to any additional or different terms in the confirmation.[202] The illustration suggests that the confirmation problem need not

197. *See* Llewellyn, *supra* note 1 at 117.
198. U.C.C. § 2-207 cmt. 1 (1995).
199. U.C.C. § 2-207 illus. D (Proposed Draft 1996).
200. *Id.*
201. *Id.*
202. *Id.*

be addressed in the statutory language because all of these problems are automatically solved in the new draft. Thus, whether a confirmation with different terms satisfies the Statute of Frauds is resolved by the repeal of the Statute.[203] Whether an oral contract was formed will be decided under the general formation (2-203) and offer and acceptance (2-205) sections, and whether standard terms in a confirmation become part of the agreement will now be determined by the new 2-207.[204] As to expressly conditioning language in a confirmation, if such language is included as a term of the contract under 2-207(a), it would be viewed as a proposal to modify the underlying oral contract and subjected to the section on the enforceability of modifications, which is new section 2-210.[205]

Notwithstanding the logic of this analysis, formation through an oral agreement that is later confirmed is arguably the most common form of commercial contracting. It was the premier situation addressed by Karl Llewellyn in the creation of original section 2-207. To relegate this common practice to guidance through implication may be imprudent.

IX. Electronic Transactions

Three sections of the draft focusing on other aspects of electronic transactions complete part 2 of Article 2 although none have been reviewed by the Drafting Committee.[206] In a section dealing with the formation of such contracts, the dispatch or "mailbox" rule is rejected.[207] An electronic response to an offer is effective only when the party initiating the electronic transaction receives a message manifesting acceptance.[208] This change may be justified since an "electronic" offeree will typically know whether the acceptance has been received, unlike the offeree who mails an acceptance by depositing it in the mailbox.

Draft section 2-212 is concerned with "attribution" in electronic messages, i.e., when will a party be bound by an electronic

---

203. *Id.*

204. U.C.C. § 2-207 illus. D (Proposed Draft 1996).

205. *See infra* section IX of this article.

206. *See* U.C.C. §§ 2-208, 2-212, 2-213 and accompanying notes (Proposed Draft 1996).

207. *Id.* § 2-208.

208. *Id.* § 2-208(a). Draft section 2-208(b) recognizes a contract under 2-208(a) even if no individual was aware of or reviewed the initial message or response. *Id.* § 2-208(b). Draft section 2-208(c)(1) states that "receipt" of electronic messages occurs when the messages enter a designated information system, while 2-208(c)(2) allows "receipt" to occur when the record enters any information system of the intended recipient where there is no designated system. *Id.* § 2-208(c)(1), (2).

message?[209] Attribution to a particular party is proper where that party sent the message, or where the message was sent on behalf of that party,[210] where previously agreed upon procedures allow the recipient of the message to conclude that the message is attributable to the initiating party,[211] or where another party whose relationship with the initiating party enabled such a person to gain access to and use the method employed by the alleged initiating party.[212]

Section 2-213 of the draft deals with errors or omissions by an intermediary in an electronic message that transmits, logs or processes data.[213] "[T]he party who sends [the] message is bound by the terms of the message as received[,] notwithstanding errors in transmission," unless the recipient should have discovered such errors by the exercise of reasonable care or failed to use a verification or authentication system pursuant to the parties' prior agreement.[214] The general rule is that the party who engages the intermediary is liable for any damage arising directly from the errors or omissions of the intermediary.[215]

X. MODIFICATIONS

Original section 2-209 dealing with modifications is now draft section 2-210, though the final version may allow this memorable section to retain its original number.[216] While the demand for improvement of original 2-209 pales in comparison to the demand for a revision of 2-207, there is enough mystery and confusion in 2-209 to justify change.[217]

There was never any real difficulty with the original 2-209(1), which modifies the pre-existing duty rule by allowing modifica-

---

209. *Id.* § 2-212.

210. *Id.* § 2-212(1).

211. U.C.C. § 2-212(2) (Proposed Draft 1996).

212. *Id.* § 2-212(3).

213. *Id.* § 2-213. The source of this section is the United Nations Commission on International Trade (UNCITRAL) Model Law on Electronic Data Interchange (EDI). *Id.*

214. *Id.* § 2-213(b).

215. *Id.* § 2-213(a).

216. U.C.C. § 2-210 (Proposed Draft 1996); U.C.C. § 2-209 (1995). Draft section 2-209 is devoted to a definition of "course of performance"—unchanged from the original in section 2-208. U.C.C. § 2-208(1) (1995); U.C.C. § 2-209(a) (Proposed Draft 1996). A note indicates that the ABA UCC Article Review Task Force has redrafted original section 1-205 to incorporate this course of performance definition and adds that should such revision be approved, there will be no need for the draft section 2-209 (which the draft note incorrectly identifies as "2-208") in the final draft of the new Article 2. U.C.C. § 2-209 note (Proposed Draft 1996). Since course of performance must be differentiated from trade usage and prior course of dealing as defined in the original section 1-205, the new 1-205 should certainly include the definition of course of performance, which is entirely misplaced in part 2 of Article 2. *See* U.C.C. § 1-205 (1995).

217. *See* MURRAY, *supra* note 52, § 64 E.

tions without consideration.[218] The sole language flaw in the section is the failure to explicitly require modifications to be made in good faith, though good faith was always implied and a comment explained this section's limitation to good faith modifications.[219] Unsurprisingly, the draft requires "[a] good faith agreement."[220]

It is the remainder of original 2-209 that has caused consternation. The original section 2-209(3) requires the application of the Statute of Frauds (original section 2-201) to modifications. Among the unsatisfied 2-209(3) questions is whether a modification in a price or delivery term required a writing even though such terms require no writing in an unmodified contract under original 2-201.[221] Such questions have been eliminated in the draft because the Statute of Frauds has been repealed.[222]

While the "public" Statute of Frauds has been repealed for original or modified contracts, the so-called "private" Statute of Frauds arising from no oral modification ("NOM") clauses in the original contract continues, albeit in substantially altered form.[223] The draft proposes the same general rule of its predecessor that "a term prohibiting modification or rescission except by a signed record may not be otherwise modified or rescinded," but carves out two exceptions.[224]

First, it excepts consumer contracts.[225] The original section required any NOM clause on a form supplied by a merchant to be separately signed by the other, non-merchant party as another safeguard against "unfair surprise."[226] Since consumer contracts are no longer subject to NOM clauses, this safeguard has been deleted.[227] Second, the draft precludes one party from asserting the NOM clause where it is inconsistent with language or conduct inducing the other party to change its position reasonably

---

218. U.C.C. § 2-209(1) (1995).

219. *Id.* § 2-209 cmt. 2.

220. U.C.C. § 2-210(a) (Proposed Draft 1996).

221. U.C.C. § 2-209(3), 2-201, 2-201 cmt. 1 (1995).

222. U.C.C. § 2-201 note 1 (Proposed Draft 1996).

223. U.C.C. § 2-209(2) (1995); U.C.C. § 2-210(b) (Proposed Draft 1996).

224. U.C.C. § 2-210(b) (Proposed Draft 1996).

225. *Id.* In definitional sections 2-102(a)(10), (11), and (12), a "consumer" is an "individual who buys or contracts to buy consumer goods," a "consumer contract" is "a contract for the sale of consumer goods between a seller regularly engaged in the business of selling and a [consumer] buyer," and "consumer goods" means goods that, *when delivered* to the consumer, are intended primarily for "personal, family or household use." *Id.* § 2-102(a)(10)-(12). The definition of consumer goods conforms to the Article 9 definition, found in 9-109(1), and the phrase "when delivered" is included in the draft to distinguish between goods in the hands of a commercial seller, when they are "inventory" under 9-109(4), and the same goods delivered to a consumer when they become consumer goods. U.C.C. § 2-102(a)(12) (Proposed Draft 1996); U.C.C. § 9-109(4) (1995).

226. U.C.C. § 2-209(2) (1995).

227. U.C.C. § 2-210 note 2 (Proposed Draft 1996).

and in good faith.[228] Illustrations suggest grossly unfair situations that can only be cured by such a waiver.[229] Thus, where a seller orally requests an extension of time after missing a delivery date, and the buyer agrees, but later seeks to invoke the NOM clause, the clause is "waived" by inconsistent language that induced reasonable, good faith reliance.[230]

After dealing with the waiver of NOM clauses in 2-210(c), the final subsection, 2-210(d), is designed to deal with traditional types of waiver "where NOM clauses are not involved."[231] Yet, subsection (d) curiously begins with, "[s]ubject to subsection (c). . .," where NOM clauses *are* involved.[232] Subsection (d) is clearly intended to overcome confusion in the original section concerning waiver by ascertaining a statutory recognition that "[l]anguage or a course of performance between the parties is relevant to show a waiver of any term inconsistent with that language or course of performance."[233] This subsection is followed by the familiar concept that waiver of an executory portion of a contract may be retracted upon notification that strict performance will be required unless the other party demonstrates reasonable and good faith reliance.[234]

A note explains that this subsection is intended to deal with three types of waiver.[235] Initially, the note explains that "election" waiver, which requires no reliance, occurs where a party for whose benefit a condition is included elects "not to insist upon the condition after the time for its occurrence has passed."[236] If the drafters are suggesting that an election not to insist upon a condition that formed a material part of the agreed exchange is enforceable absent consideration or reliance, they are breaking new ground. It is doubtful that this was their intention since another type of waiver, which they fail to label, excuses conditions "where the condition was not a material part of the agreed exchange."[237] At this point, however, the note becomes obscure by suggesting that this "waiver" requires a court to find that the nonoccurrence of the condition would cause "disproportionate forfeiture" excusing the condition.[238] The note cites section 229 of

228. *Id.* § 2-210(c).
229. *Id.* § 2-210(c).
230. *Id.*
231. *Id.* § 2-210 note 4.
232. U.C.C. § 2-210(d) (Proposed Draft 1996).
233. *Id.*; U.C.C. § 2-210(d) (1995).
234. U.C.C. § 2-210(d) (Proposed Draft 1996).
235. *Id.* § 2-210 note 4.
236. *Id.*
237. *Id.*
238. *Id.*

the Restatement (Second) of Contracts as support for this proposition.[239] Section 229, however, has nothing to do with a waiver by one of the parties. Rather, it suggests that a court may excuse a condition that is not a material part of the agreed exchange if its enforcement would cause extreme forfeiture.[240] Yet, draft section 2-210(d) is based exclusively upon facts that include a waiver. [241] Even Karl Llewellyn, who had blinding faith in judicial imagination, might wonder how a court could deal with an excuse of condition where there is no waiver under a section that clearly requires a waiver. The last type of waiver in the trio is the usual waiver of a condition before its time, which can be retracted absent reliance.[242]

It is not remarkable that the note is puzzling in light of the judicial confusion surrounding the application of the elusive term "waiver" and the various types of "waiver."[243] There is little justification for continuing the use of that term. It would be highly preferable to substitute an analysis based on modifications that may be enforced without consideration or reliance in certain situations. Apart from confusion, as suggested earlier, the note also delineates applications that the section language is insufficient to carry.[244] As contrasted with the first three subsections of draft section 2-210, a copious review and reconstruction of 2-210(d) is clearly desirable.

XI. Part 3: Gap Fillers and Warranties

A. *Gap Fillers*

Part 3 of the draft retains the caption, "General Obligation and Construction of Contract."[245] Section 2-301 is essentially an

---

239. U.C.C. § 210 note 4 (Proposed Draft 1996).

240. Restatement (Second) of Contracts § 229 (1979). Illustration 1 to Section 229 is a modification of the facts in the classic opinion of Justice Cardozo in *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (1921), where the contract called for "Reading pipe" to be used in the construction of house. *Jacobs*, 129 N.E. at 890; Restatement (Second) of Contracts § 229 illus. 1. The builder used pipe of equal quality but a different brand. Restatement (Second) of Contracts § 229 illus. 1. The builder brought an action for the final installment of the price and the owner refused to pay because the condition had not occurred. *Id.* In the actual case, the condition was a constructive condition that the court excused via the doctrine of substantial performance. *Jacobs*, 129 N.E. at 893-94. The Restatement Second illustration converts the "Reading pipe" specification to an express condition and holds it excused to prevent extreme forfeiture. Restatement (Second) of Contracts § 229 illus. 1. Neither the actual case nor the illustration involves a waiver.

241. U.C.C. § 2-210 note 4 (Proposed Draft 1996).

242. *Id.*

243. For an analysis, *see* Murray, *supra* note 52, § 111 F.

244. U.C.C. § 2-210 note 4 (Proposed Draft 1996).

245. *Id.* art. 2, pt. 3.

unchanged version of original section 2-304 dealing with how the price is payable.[246] Draft section 2-302, the former unconscionability section moved to Part 1,[247] replaces original section 2-307, which provides that unless the contract or circumstances make delivery in lots reasonable, all goods must be delivered at once.[248] This analysis is retained but clarified. Thus, where a seller is required to deliver 10 carloads, but a strike disrupts the transportation of all 10 and alternative transportation costs are high, the seller is obligated to deliver 3 carloads and the remainder when transportation becomes available.[249] Where the circumstances give either party the right to make or demand performance "in parts over a period of time," the draft continues the rule that payment can be demanded for each part performance absent contrary circumstances.[250]

The well-known "open price term" section, original 2-305, is unchanged in draft section 2-303.[251] It is followed by the output and requirements contract section, 2-304, which appears to modify the original 2-306 only by emphasizing that even where actual output or requirements occur in good faith, an unreasonably disproportionate quantity may not be offered or demanded.[252] The "default" term supplying the place of delivery is unchanged,[253] but a subsection of the "gap-filler" section supplying a "reasonable time" is moved to a section of its own.[254] Origi-

---

246. *Id.* § 2-301; U.C.C. § 2-304 (1995).

247. U.C.C. § 2-302 (1995); U.C.C. § 2-105 (Proposed Draft 1996).

248. U.C.C. § 2-302 (Proposed Draft 1996); U.C.C. § 2-307 (1995).

249. U.C.C. § 2-302 note 2 (Proposed Draft 1996). Note 2 of 2-302 distinguishes the operation of this section from draft section 2-616 (formerly 2-614) concerning excusable nonperformance and substitute performance, i.e., "it takes less disruption to vary a 'default' rule [herein, the rule that the entire performance is required] than to excuse an agreed performance." *Id.* § 2-302 note 2.

250. *Id.* § 2-302(b). Note 3 to 2-302 explains the situation where an entire delivery is to be paid for on 30 days credit and concludes that where circumstances allow the delivery to be made in installments, payment for the entire shipment should not be due until 30 days after the final installment is delivered. *Id.* § 2-302 note 3.

251. *Id. See* note to § 2-303.

252. U.C.C. § 2-304 (Proposed Draft 1996); U.C.C. § 2-306 (1995). The original 2-306(2) qualification of "lawful" agreements for exclusive dealing is excised from the essentially unchanged 2-304(b). *See* U.C.C. § 2-306(2) (1995); U.C.C. § 2-304(b) (Proposed Draft 1996). Presumably the original was concerned about exclusive dealing contracts that might violate the antitrust laws, particularly Section 3 of the Clayton Act, and substantially injure competition in a relevant market. Since only "lawful" agreements may be enforced in any event, the qualification appears unnecessary.

253. U.C.C. § 2-305 (replacing original 2-308) (Proposed Draft 1996).

254. Draft section 2-306 retains subsection (1) and (2) from original 2-309, but former section 2-309(3) is 2-311 in the draft and elaborates the notice requirement for the exercise of a power of termination, i. e., reasonable notice of termination is required unless termination is agreed to occur upon the "happening of an agreed event," the parties have agreed upon a notification that is not manifestly unreasonable, or the parties have agreed to dispense with notification and such elimination of notification is not

nal section 2-311, which supplied missing terms where the parties failed to specify particulars of performance, is essentially unchanged.[255] Original 2-325, dealing with the effect of failing to supply a letter of credit, is moved to 2-308, which incorporates definitions from Article 5.[256]

Original sections 2-319 through 2-324 define FOB, FAS, CIF, C&F, "Ex-Ship," "Overseas" and "No Arrival, No Sale" terms.[257] The May 1994 draft had deleted all of these terms.[258] In the current draft, section 2-309 is inserted as "a first step toward filling the gap on delivery terms."[259]

B. Warranties

(i). Warranty of Title and Against Infringement

Coincidentally, the warranty sections in the draft retain the same section numbers as the original.[260] The warranty of title and against infringement of the original version has produced precious little litigation. Draft section 2-312 tracks the original but contains desirable elaborations and clarifications. Thus, the "seller" who makes the warranty of title now includes an auctioneer or liquidator who fails to disclose its principal, and, more important, the warranty now covers not only good title and rightful transfer but protection against "contested" titles as well.[261] The warranty of title retains its own disclaimer provision, thereby continuing to hide its true characterization as an

---

unconscionable. U.C.C. §§ 2-306; 2-311 (Proposed Draft 1996). The underlying concept is to afford protection to the terminated party's investment in the contract and his opportunity to reinvest after termination—the more substantial the investment and more difficult the reinvestment process, the longer the period of notification. *Id.* § 2-311 note 2. Preceding section 2-310 focuses upon those obligations that survive the termination of a contract, i. e., "a right based on breach or performance before termination [or] . . . limitations on the scope, manner, method, or location of the exercise of rights in the goods." *Id.* § 2-310. The definition of "termination" is found in 2-102(40): "an act by a party to a contract under a power created by agreement or law which ends the contract for a reason other than for breach." *Id.* § 2-102(40).

255. *Id.* § 2-307; U.C.C. § 2-311 (1995).

256. U.C.C. §§ 2-325, 5-102 (1995); U.C.C. § 2-308, note (Proposed Draft 1996).

257. U.C.C. §§ 2-319-2-324 (1995).

258. U.C.C. § 2-309 note 1 (Proposed Draft 1996).

259. *Id.* Section 2-309 directs FOB, CIF or like terms to be interpreted according to applicable trade usage, course of dealing or course of performance. *Id.* § 2-309. In the absence of such evidence, "the meaning of shipment terms . . . may be interpreted by reference to the Incoterms as published by the International Chamber of Commerce." *Id.*

260. *Id.* §§ 2-312-2-315; U.C.C. § 2-312-2-315 (1995).

261. U.C.C. § 2-312(a), 2-312(a)(1), 2-312 notes 1, 2 (Proposed Draft 1996). This is designed to protect "the buyer against 'colorable clouds' on an otherwise good title." *Id.* § 2-312 note 2. There is no obligation to disclose the principal, but the auctioneer or liquidator gives the warranty of title. *Id.* § 2-312 note 1.

"implied warranty."[262] The disclaimer need not be in a record, but the draft provides "safe harbor" language for a recorded disclaimer: "There is no warranty of title or against infringement in this sale, or words of similar import."[263] This is obviously designed to deal with case law that required any disclaimer of this warranty to be excruciatingly clear.[264] A new subsection extends the warranty to "any remote buyer who may reasonably be expected to buy the goods and who suffers damage from breach of the warranty."[265] Such a remote buyer's rights, however, derive exclusively from the contract between the seller and the immediate buyer.

(ii). Express Warranties

The original 2-313 describes express warranties by promise, affirmation of fact, description, sample or model. Regardless of the type of manifestation, however, each is required to become "part of the basis of the bargain"—a phrase that continues to mystify courts and scholars. Questions continue as to whether "bargain" in this phrase was the equivalent of a "bargained-for-exchange" or whether it was a different kind of bargain—a continuum. A comment allows post-formation warranties,[266] suggesting a continuous bargain where the precise time of contract formation is not critical. Comments suggesting that "no particular reliance . . . need be shown"[267] and "all of the statements of the seller" become part of the basis of the bargain[268] arguably present a totally new paradigm for the discovery of express warranties. Courts and commentators, however, have struggled with the section language to meet these and other challenges.[269]

After a series of special definitions that apply to sections 2-313 to 2-318,[270] section 2-313(b) incorporates the formerly separate

---

262. *Id.* § 2-312(b). The only reason this warranty in the original or draft is not called an "implied" warranty (which it is) is because the disclaimer or exclusion of other implied warranties (of quality) are governed by 2-316. At its March 1995 meeting, the Drafting Committee concluded that the disclaimer provision should remain in 2-312 rather than be moved to 2-316. *Id.* § 2-312 note 5.

263. *Id.* § 2-312 note 4, 2-312(b).

264. *See, e.g.,* Sunseri v. RKO Stanley Warner Theatres, Inc., 374 A. 2d 1342 (Pa. Super. Ct. 1977).

265. U.C.C § 2-312(d) (Proposed Draft 1996). Draft section 2-312(d) in the statutory text (referred to as "(e)" in the notes following the section). *Id.* § 2-313 note 7.

266. U.C.C. § 2-313 cmt. 7 (1995).

267. *Id.* § 2-313 cmt. 2.

268. *Id.* § 2-313 cmt. 8.

269. *See, e.g.*, John E. Murray, Jr., *"Basis of the Bargain:" Transcending Classical Concepts*, 66 MINN. L. REV. 283 (1982).

270. U.C.C. § 2-313(a)(1) (Proposed Draft 1996). "Damage" is simply defined as all loss, except injury, to a person or property other than the goods sold or leased; "goods"

express warranties by affirmation of fact or promise, description, and sample or model into a definition that replaces "part of the basis of the bargain" with *"part of the agreement,"* and includes the familiar guide that no formal words or specific intention to make an express warranty are necessary. Section 2-313(c) then provides a test to determine whether any express warranty becomes part of the agreement: "If the seller establishes that a reasonable person in the position of the immediate buyer would believe otherwise or believe that any affirmation, promise, or statement made was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods," the alleged express warranty does not become part of the agreement.

This test conforms to a comment to the original section: "What statements of the seller have in the circumstances become part of the basis of the bargain? . . . [A]ll of the statements of the seller do so unless good reason is shown to the contrary."[271] Thus, as to an "immediate buyer," i.e., one in "privity" with the seller, who proves what the seller affirmed, promised or displayed to the buyer about the goods, there is an "assumption . . . that they become part of the agreement unless the seller establishes" that a reasonable person would not believe such statements or that the seller was merely "puffing," i.e., stating an opinion or commendation of the goods.[272] Such an "immediate buyer" would, however, have to know of the warranty. Thus, if the buyer did not "hear" the statement before making the contract, it would not be "part of the agreement" and would not, therefore, be an express warranty.[273]

"Remote buyers," i.e., buyers from sellers in the distributive chain other than sellers against whom a warranty claim is asserted, do not fare as well as "immediate buyers" under the draft. Such "remote buyers" have the burden of establishing that the statements were express warranties of which they had become aware, and that they were reasonable in believing that the goods would conform to warranties made by the remote seller.[274]

---

include a component incorporated in substantially the same condition in other goods; "immediate buyer" is a buyer in privity of contract with the seller; "remote buyer" or remote lessee" is a buyer or lessee from a seller in the distributive chain other than the seller against whom a warranty claim is asserted. *Id.* § 2-313(a)(1)-(4).

271. U.C.C. § 2-313 cmt. 8 (1995).

272. U.C.C. § 2-313 note 4 (Proposed Draft 1996).

273. *Id.* § 2-313 note 4. Presumably, if the immediate buyer did not read it, the result would be the same even in the literature supplied by the seller. *Id.*

274. *Id.* § 2-313(d)(1). Subsection 2 allows a buyer who meets these requirements to bring an action directly against the manufacturer. *Id.* § 2-313(d)(2). It should be noted,

The notes to this section suggest that several questions remain: (1) Is the section language clear enough to indicate that an express warranty made with regard to new goods does not survive when the goods become used? (2) In "direct response" sales, i.e., sales made through direct advertising to the public or, for example, an 800 telephone number or an internet site, should the buyer be treated as an "immediate buyer," i.e., in privity, or a non-privity buyer? (3) Should the warranty to the remote buyer, i.e., the so-called "pass through" warranty, be separately defined and clarified? [275]

The notes might have suggested other questions. The new "part of the agreement" phrase replacing the nefarious "part of the basis of the bargain" is in need of further clarification.[276] Subsection (c) is devoted to this need, but it does not expressly deal with post-formation warranties.[277] The explanatory note clearly exempts the seller's statement if the buyer did not hear or believe it. Suppose the buyer heard or read it *after* the contract was formed. Would a post-formation statement by the seller qualify? Would a statement in the seller's literature qualify if read by the immediate buyer after the contract was formed? Are these questions answered by the statutory test: would a reasonable buyer believe that such a statement became "part of the agreement?" The Article 1 definition of "agreement" continues to be the "bargain of the parties in fact as found in their language, or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act."[278] Does this "bargain in fact" include post-formation statements, either heard or read by the buyer?

The draft clearly requires a "remote buyer" to know of and be reasonable in believing that the remote seller's warranty attached to the sale.[279] Thus a remote buyer, including a consumer buyer, would not be entitled to all of the affirmations of fact or promise or descriptions of goods found in an operating manual or other literature supplied by a seller if the buyer became aware of such statements only after the sale was made. An otherwise clear express warranty in such literature dealing with one or more features of a new car, computer or other pro-

---

however, that an action for personal injuries or damage to other property may not be permitted under Article 2, which, under the draft, may be displaced by tort liability. *See infra* note 312 and accompanying text.

275. U.C.C. § 2-313 note 1 (Proposed Draft 1996).

276. *Id.* § 2-313(1)(c).

277. *Id.* § 2-313 note 1.

278. U.C.C. § 1-201(3) (1995).

279. U.C.C. § 2-313(d)(1) (Proposed Draft 1996).

duct would not be an express warranty if the buyer failed to read that literature before consummating the transaction. Yet, a buyer might reasonably believe that it is entitled to such features though it learned of them only after the sale was consummated. Though the seller had stated these features for all to see, the seller could successfully defend an express warranty claim by establishing the buyer's belated knowledge of these statements. Is the Drafting Committee justifying a seller who states: "Yes, that is what I said about the quality of the goods, but you did not read it or hear it in time, and I am, therefore, not bound by this statement I deliberately made to the public to induce the purchase of my product?"

These additional questions should be addressed by the Drafting Committee.[280] The substitution of "part of the agreement" for "part of the 'basis of the bargain'" may be another "emotionally satisfying incantation"[281] that avoids a necessary analysis.

(iii). Implied Warranties

Except for insignificant language changes, the draft version of the implied warranty of merchantability is identical to the original.[282] The Drafting Committee considered but rejected alternatives such as the United Nations Convention on Contracts for the International Sale of Goods (CISG),[283] Article 35,[284] which sug-

---

280. While the Committee studiously avoids any mention of "reliance" in relation to its new "part of the agreement" test, if both "immediate" and "remote" buyers must know of the warranty, this may be an incipient reliance test. Why must they know? If they do not know, they could not have relied. Another possible underlying notion is the fundamental requirement that one must know about an offer before it can be accepted. This is the classic requirement of "agreement" and "bargained-for-exchange." Though the current notes to 2-313 do not cite *Cipollone v. Liggett Group, Inc.*, the draft exudes the view adopted by the court in that case that the buyer's knowledge of the seller's statement before the consummation of the sale creates a presumption that the statement became "part of the basis of the bargain." *Compare* U.C.C. § 2-313 (1995) *with* Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990) *and* U.C.C. § 2-313 (Proposed Draft 1996). This view, however, displays a failure to understand what Llewellyn and friends were up to in the original section 2-313.

281. *See supra* note 54.

282. U.C.C. § 2-314 (Proposed Draft 1996); U.C.C. § 2-214 (1995). Language changes include "Subject to section 2-316" rather than the original "Unless excluded or modified (Section 2-316);" "To be merchantable, goods, at a minimum must . . . " rather than the original "Goods to be merchantable must be at least . . . ." *Id.*

283. CISG applies to transnational contracts for the sale of goods where the parties are in CISG countries, or private international law would apply CISG. CISG has been ratified by well over 40 nations including the United States. For a primer on CISG, *see* MURRAY, *supra* note 52, ch. 14.

284. Article 35(2) of CISG reads in part:

> Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
>
> (a) are fit for the purposes for which goods of the same description would ordinarly be used; * * * (d) are contained or packaged in the manner usual for such goods or,

gests the essential standard of merchantability in different language.[285] The notes, however, raise the question of whether a defect in tort should be coterminous with unmerchantability in warranty. This becomes important because a subsequent draft section, 2-319, states that Article 2 does not apply to the extent that an allegedly unmerchantable product proximately causing injury to person or property is defective under applicable tort law. The note suggests that, "in most cases," the tort and merchantability standard will be the same. It goes on to suggest that this issue should be resolved in the statutory language of the new section 2-319 as well as a comment to 2-314.[286]

Like the merchantability draft, the implied warranty of fitness for a particular purpose remains unchanged with the exception of stylistic language changes.[287] The Drafting Committee wisely avoided any significant modification of either section since both have proven to be effective.

(iv). Exclusion or Modification of Warranties

This section begins with a very disappointing start by replicating much of the convoluted language of its predecessor with respect to the so-called exclusion or modification of express warranties. While the draft is a bit shorter than the original, it manages to maintain all of the unnecessary complexity and confusion:

> Words or conduct relevant to the creation of or tending to exclude or modify an express warranty must be construed if reasonable as consistent with each other. Subject to 2-202 with regard to parol or extrinsic evidence, if such a construction is unreasonable, words excluding or modifying an express warranty are inoperative to that extent.[288]

What does this mean? The section starts with a reminder of an ancient rule of construction: if a court can reasonably construe seemingly inconsistent expressions of intention as consistent, it should opt for consistency and retain both. Having stated a truism, we are then greeted with a reminder of the parol evidence rule: if there is an express warranty prior to the execution of a writing that reasonable parties "would certainly" have included

---

where there is no such manner, in a manner adequate to preserve and protect such goods.

Id.

285. *See supra* note 7 for Professor Speidel's analysis for the rejection of CISG by the Drafting Committee.

286. U.C.C. § 2-319 notes 1-3 (Proposed Draft 1996). Further discussion of section 2-319 is found *infra* in part V at note 306.

287. U.C.C. § 2-315 (Proposed Draft 1996); U.C.C. § 2-315 (1995).

288. U.C.C. § 2-316(a) (Proposed Draft 1996).

in such a writing, the evidence of such express warranty is inadmissible. This would be true of any prior agreement, express warranty or other. It has absolutely nothing to do with disclaiming express warranties. Finally, if one cannot reasonably construe an express warranty and a disclaimer of that express warranty as consistent, then they are inconsistent and the disclaimer is *inoperative*. It is hard to argue with that truism. So what does the section mean?

It means what Karl Llewellyn said it means in an earlier draft of the UCC when the section read, ever so simply, "[i]f the agreement creates an express warranty, words disclaiming it are inoperative."[289] Even more simply, it means that you *cannot* disclaim an express warranty. You can certainly lose it through inadmissibility via the parol evidence rule just as you can lose any other prior agreement, but it is impossible to *disclaim* an express warranty.

Llewellyn's clear statement did not compute for his critics. He modified the section to its current convolution and must have chuckled when the new version was accepted. The absurdity is suggested by any contract that contains, at a minimum, an express warranty by description. Thus, in the sale of a described automobile evidenced by a record that includes a disclaimer of all express warranties, the seller delivers a cardboard box with painted wheels. When the buyer objects, the seller points to the exclusion of express warranties in the signed record. Should the analysis begin by comparing the express warranty and disclaimer to determine whether they can be reconciled so that both may be retained? It is impossible to retain both in *any* situation in which there is an express warranty and a disclaimer of that express warranty because you may not disclaim your agreement. May interpretation questions arise as to whether an express warranty exists? Of course, but there are interpretation questions in any contract. What does that have to do with disclaiming warranties? The draft version of express warranties sets forth the criteria to determine whether an expression becomes "part of the agreement."[290] If the criteria are met, an express warranty exists that it is impossible to disclaim. Why not just admit that Llewellyn was right early on and adopt his language

289. U.C.C. § 2-316(1) (1952). This was the 1952 version of 2-316(1), which was replaced by the convoluted current section 2-316(1), which is preserved in draft section 2-316(a). *See id.*; U.C.C. § 2-316(1); U.C.C. § 2-316(a) (Proposed Draft 1996).

290. U.C.C. § 2-313(b) (Proposed Draft 1996).

since that is what the Drafting Committee meant to say, "whether [they] got it said or not."[291]

After such a disappointing start, we might hope for soaring improvements with respect to the disclaimer of implied warranties. Unfortunately, our hope is dashed. After excepting consumer contracts, the draft provides the usual litany of ways in which the implied warranty of merchantability may be effectively disclaimed. Curiously, however, it begins with disclaimers through the use of "'as is,' 'with all faults,' or other language that under the circumstances calls the buyer's attention to the exclusion or modification of the warranties and states that the implied warranties have been excluded or modified."[292] This language need not be recorded, i.e., an oral disclaimer using such language would be effective. Nor is there any requirement that such language be conspicuous. Why is this method of disclaiming implied warranties found in such a prominent position? The answer is not long in coming.

The next subsection deals with disclaimers *only where there is a record*, i.e., only where there is a writing or electronic record. If there is a record containing a disclaimer, the familiar requirement of conspicuous language and the use of "merchantability" or "merchantable" applies. To provide a safe harbor for the seller's lawyer, the section adds, "[c]onspicuous language that states '[t]hese goods may not be merchantable' or language of similar import is sufficient."[293] If this section is enacted, there is little doubt as to how implied warranties of merchantability will thereafter be disclaimed whenever there is a record. Similarly, a recorded disclaimer of the implied warranty of fitness for a particular purpose in conspicuous language contains its own safe harbor provision.[294]

Suppose the language in either merchantability or fitness disclaimers was not conspicuous. It would not be effective under these subsections, but, if the disclaimer was negotiated, it would still be effective through "other language."[295] There is no provi-

---

291. *See* Llewellyn, *supra* note 1. For more on this, if you can stand it, *see* Murray, *Basis of the Bargain: Transcending Classical Concepts*, *supra* note 269 at 303, where I also examine the absurdity of courts finding disclaimers of express warranties to be operative *after the courts have already decided that no express warranties exist.*

292. U.C.C. § 2-316(b)(1) (Proposed Draft 1996).

293. *Id.* § 2-316(b)(2)(i).

294. *Id.* § 2-316(b)(2)(ii). "'There are no warranties that these goods will conform to the purposes for which they are purchased made known to the seller,' or words of similar import is [sic] sufficient." *Id.*

295. *Id.* § 2-316(b)(1). "[O]ther language that under the circumstances calls the buyer's attention to the exclusion or modification of the warranties and states that the implied warranties have been excluded or modified." *Id.*

sion for oral (unrecorded) disclaimers of either implied warranty except the general disclaimer provision allowing oral disclaimers through the use of "as is," "with all faults" or other appropriate language calling the buyer's attention to the disclaimer.[296] This methodology is now supreme. Using this method, the disclaimer of *all* implied warranties is effective without any record, conspicuousness or required use of the term "merchantability." It is the ultimate "safe harbor." The structure predicts a heightened use of "as is" or "with all faults" or, as many lawyers are wont to do, both phrases.

The draft continues the disclaimers by examination of the goods (or refusal to examine)[297] as well as disclaimers by course of performance, course of dealing or usage of trade.[298] Before concluding with a replication of the original subsection reminding everyone that remedies can be limited,[299] the draft deals with the knotty problem of disclaimers in consumer contracts:

> Terms in a consumer contract excluding or modifying the implied warranty of merchantability or the implied warranty of fitness for a particular purpose must be contained in a record and be conspicuous. [The terms are inoperative unless the seller establishes by clear and affirmative evidence that the buyer expressly agreed to them.][300]

The bracketed language had been deleted at the 1995 Annual Meeting of NCCUSL, but the current draft restores it with some modifications.[301]

Absent the bracketed statement, the section provides precious little protection for the consumer buyer. Even with the bracketed statement, the protection is doubtful. Suppose, for example, that a seller has the consumer sign a record disclaiming implied warranties. Would that suffice? Suppose the seller has the buyer separately manifest assent to the disclaimer provision. Would that suffice? If either would suffice, it is clear that the typical consumer will still lack anything resembling a complete understanding of the disclaimer. Even if a consumer could prevail, how many consumers will pursue litigation? How many lawyers are willing to represent consumers in such matters? The separate consumer protection section in the draft may be a snare and a delusion, with or without the bracketed statement.

---

296. *Id.*

297. U.C.C. § 2-316(b)(3) (Propoesd Draft 1996).

298. *Id.* § 2-316(b)(4).

299. Original section 2-316(4) becomes draft section 2-316(f), which follows 2-316(e), though there is no (c) or (d) in this draft. *See* U.C.C. 2-316(f) (Proposed Draft 1996); U.C.C. § 2-316(4) (1995).

300. U.C.C. § 2-316(e) (Proposed Draft 1996).

301. *Id.* § 2-316 note 3.

There is the cogent argument that limitations on implied warranties should not be permitted at all in consumer contracts since consumers do not have a clue as to what they are surrendering.[302] The implied warranty of merchantability is the *norm*. It protects a very basic quality standard—fit for the ordinary purposes of such goods. It is harsh enough to allow such a basic norm to be disclaimed or limited with respect to a merchant buyer. To allow it to be disclaimed as to a consumer buyer borders on the very unconscionability that the draft and its predecessor otherwise preclude. It is time for the Drafting Committee to bite the bullet and preclude any disclaimer, modification or limitation of any implied warranty in a consumer transaction.

The Committee apparently spent considerable time on this section. It is clear, however, that we would be no worse off if the original section had not been changed.

(v). Extension of Express or Implied Warranties

After replicating the original section on the cumulation and conflict of warranties with little change,[303] the draft attacks the difficult problem of warranty protection for remote parties who may be affected by the goods and who are damaged; i.e., those who were characterized as "third party beneficiaries" under the original section.[304] Not surprisingly, this section caused consider-

---

302. In 1975, President Gerald Ford signed the Magnuson Moss Warranty—Federal Trade Commissions Improvement Act. 15 U.S.C. §§ 2301-2312 (1996). The Act appears to preclude the disclaimer or modification of "any implied warranty to a consumer." *Id.* § 2308(a). With respect to the written warranty necessary to make the Act operative, however, such a warranty is allowed to be a "limited" rather than a "full" warranty. *Id.* § 2303(a). A "limited" warranty may limit the duration of a written warranty "to the duration of a written warranty of reasonable duration." *Id.* § 2308(b). Thus, a written "limited" warranty promising the consumer that any defects will be repaired within 90 days may limit the implied warranty of merchantability to 90 days. Only "full" warranties that meet the requirements of the Act, section 2304, preclude any limitation on implied warranties. It is difficult to discover any example of a "full" warranty. Every consumer product with a written warranty appears to be a "limited" warranty. Thus, the expanded implied warranty protection for the consumer becomes illusory. Moreover, the technical requirements of a "written warranty," section 2301(6), create threshold barriers to the application of the Act. *See* Skelton v. General Motors Corp., 660 F.2d 311 (7th Cir. 1981), *cert. den.*, 456 U. S. 974 (1982). Notwithstanding these serious imperfections, the question arises as to how a state statute allows implied warranties to be disclaimed with respect to consumer transactions in the face of a federal statute that precludes such disclaimers?

303. U.C.C. § 2-317 (Proposed Draft 1996). The change deals with "an implied warranty of merchantability in a consumer contract that is inconsistent with an express warranty." *Id.* § 2-317 note 1. Under draft section 2-317(3), such an implied warranty is not displaced. *Id.* § 2-317. Instead, the requirements of the previous section on the disclaimer of implied warranties must be met.

304. *Id.* § 2-318. Draft section 2-318 carries the same section number as the original version.

able discussion and the current draft "is still a 'work in progress.'"[305] The section begins by continuing the broadest standard of protection to remote buyers available in its predecessor while introducing several innovations.[306] Personal injury concerns are removed from the draft version since they are addressed in the next draft section, 2-319, in an interesting effort to reconcile warranty and tort law.[307] This subsection, however, deals with only one of the two ways in which a remote buyer (a "non-privity" buyer) may sue the seller. Here, the remote buyer derives its rights from the immediate buyer to whom the warranty was made by the seller. Such a remote buyer is a "beneficiary"[308] of the contract between the seller and the immediate buyer and is, therefore, in no better position than the immediate buyer. Thus, "[t]he seller's obligation to a remote purchaser of or person affected by the goods . . . shall not exceed that owed to the immediate buyer." Disclaimers and limitations on remedies, therefore, bind the remote buyer to the same extent that they bind the immediate buyer. Moreover, even where the contract fails, for example, to exclude consequential damages and the remote buyer suffers such damages but the immediate buyer does not, the remote buyer may not recover consequentials because the seller's obligation cannot exceed that owed to the immediate buyer.[309]

The second way in which a remote buyer can recover from a seller is where the seller made an express warranty to this buyer. Here, the remote buyer's rights are not derivative and the

---

305. *Id.* § 2-318 note 1.

306. *Compare* U.C.C. § 2-318 (Proposed Draft 1996) *with* U.C.C. § 2-318 (1995). Changed language from the draft section is italicized and different language from the original is in brackets. The remaining language is unchanged:

> A seller's *express or implied* warranty [whether express or implied] *made to an immediate buyer* extends to any *remote buyer or lessee or* person who may be reasonably expected to *purchase,* use, [consume] or be affected by the goods and who is *damaged* [injured] by breach of the warranty. *The rights and remedies against the seller for breach of warranty extended under this subsection are determined by the enforceable terms of the contract between the seller and the immediate buyer and this* [article]. *The seller's obligation to a remote purchaser of or person affected by the goods, however, shall not exceed that owed to the immediate buyer.* [A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.]

See U.C.C. § 2-318(a) Alternative C (1995); U.C.C. § 2-318(a) (Proposed Draft 1996).

307. *See infra* notes 313-35 and accompanying text for a discussion of draft section 2-319.

308. U.C.C. § 2-318 note 3 (Proposed Draft 1996). Though such remote buyers are "beneficiaries," note 3 to this section explains that the warranty extension to such parties is based more upon policy than the usual focus in third party beneficiary contracts, i.e., the intention of the parties. *Id.*

309. *Id.* The same note also distinguishes cases where an immediate buyer assigns the warranty to a remote purchaser who then, like any other assignee, is subject to relevant defenses between the seller and the immediate buyer. *Id.*

relationship is treated as if there is privity of contract.[310] Since remote buyers have nothing to do with the receipt of goods by the immediate buyer, the time for notice begins for the remote buyer only when he receives the goods.[311] As for consequential damages, however, a remote *commercial* buyer's rights are conditioned upon receiving a tender of the price paid by the remote buyer [from the seller]. If that complying tender is made, the remote commercial buyer may not recover consequential damages. A seller is, however, liable to a remote *consumer* buyer for consequential damages regardless of any such tender.[312]

As the notes to this section state, it is clearly a "work in progress" and much more progress is necessary.

(vi). Warranty vs. Tort Liability

The Drafting Committee confronts the challenge of eliminating confusion between the use of warranty and tort theory in personal injury and injury to property actions through a new section.[313] After Karl Llewellyn's precocious attempt to include a comprehensive products liability concept in a very early draft of the Code was rejected, he managed to retain a semblance of that theory by simply including recovery for "injury to person or property proximately resulting from any breach of warranty" in the definition of consequential damages.[314] Although the Drafting Committee considered the simple solution of eliminating this type of injury from the definition and thereby limiting Article 2 damages to economic losses and relegating such claims to tort law, this solution was rejected on the footing that products liability law is not uniform and Article 2 may be the prime vehicle for such recovery in certain states. Thus, the definition of consequential damages in the draft continues to include "injury to person or property proximately resulting from breach of warranty."[315] Such recovery, however, is subject to the new section that seeks a "less drastic route to harmonization" of tort and warranty theory.[316]

---

310. *Id.* § 2-318(b). Note 3 indicates that the same analysis applies if a court or applicable law dictates that the seller has a direct warranty obligation to the remote buyer. *Id.* § 2-318 note 3.

311. *Id.* § 2-318(c)(1).

312. *Id.* 2-318 note 4.

313. U.C.C. § 2-319 (Proposed Draft 1996).

314. U.C.C. § 2-715(2)(b) (1995). For an appreciation of Llewellyn's precocious efforts in this regard, *see* John B. Clutterbuck, Note, *Karl Llewellyn and the Intellectual Foundations of Enterprise Liability Theory,* 97 YALE L.J. 1131 (1988).

315. U.C.C. § 2-706(a)(2) (Proposed Draft 1996).

316. *Id.* § 2-319 note 3.

The harmonization begins by narrowly defining "property," restricting injuries to property other than to the goods purchased.[317] The major innovation, however, restricts warranty theory to injury to person or property only to the extent that the goods are not defective under other applicable law.[318] Thus, if tort law is applicable because of a defect or failure to warn, Article 2 does not apply. This change raises a fascinating question.

It is certainly possible for goods to be non-defective under tort law but still violate an express warranty or implied warranty of fitness for a particular purpose. If, however, a product contains no defect, thereby precluding a tort analysis, is a breach of the implied warranty of merchantability still possible? While the American Law Institute urges that the answer should be "no" and the Drafting Committee believes that this will certainly be the result in most cases, the Committee feels compelled to allow for the possibility that a non-defective product may still be unmerchantable. Here, it relies heavily upon a case that threatens to become celebrated.

A plaintiff sought recovery for personal injuries allegedly caused by a defective vehicle.[319] The jury found the vehicle not defective under products liability law, but found that the vehicle was not merchantable under the Code and awarded damages of $1.2 million to the plaintiff. The defendant claimed that the causes of action were identical, i.e., that "defect" had the same meaning under tort and warranty law. The New York Court of Appeals rejected that argument, finding a "subtle" distinction between the meaning of "defect" as used in tort versus warranty actions.[320]

---

317. *Id.* § 2-319(a)(1). This section defines "property" as "any real or personal property other than the goods purchased." *Id.* This conforms to the American Law Institute's proposed Restatement of Products Liability and case law. *Id.* § 2-319 note 3.

318. *Id.* § 2-319(b). "[This [article] applies to a claim for injury to person or property resulting from any breach of warranty to the extent that the goods are not defective under other applicable law.]" *Id.* The brackets indicate the lack of final resolution by the Drafting Committee.

319. Denny v. Ford Motor Co., 662 N.E.2d 730 (N.Y. 1995).

320. The case was tried in the Federal District Court in the Northern District of New York and a motion for rehearing was denied. Denny v. Ford Motor Co., 146 F.R.D. 52 (N.D.N.Y. 1993). The defendant then claimed the right to a new trial under Federal Rule of Procedure 59(a) on the footing that the jury verdicts were irreconcilable. The Second Circuit certified the question to the New York Court of Appeals. Denny v. Ford Motor Co., 42 F.3d 106 (2d Cir. 1994). That court found that the tort standard, "not reasonably safe," focuses upon a risk/utility balance, i.e., weighing the product's benefits against its risks in accordance with the social policy and risk allocation bases of products liability law. Denny v. Ford Motor Co., 662 N.E.2d 730 (1995). Warranty actions, however, are based on contractual expectations that the product will be minimally safe for ordinary purposes without regard to whether there were other possible manufacturing designs that would have made the product safer, or whether the manufacturer was rea-

The issue has not been finally resolved by the Drafting Committee.[321] If the Committee continues this distinction, Article 2 claims for injury to person or "property" (other than the goods purchased) will occur only in jurisdictions that agree with this "subtle" distinction. Even then, the small number of potential cases reduces the Article 2 analysis to something resembling theoretical importance. Most important, the analysis is circular under the Committee's current rationale.

The case relied upon by the Committee to maintain the subtle distinction suggests that a court is not free to merge the tort and warranty concepts as long as legislative authority exists for a separate (warranty) theory.[322] Thus, the Committee feels compelled to recognize the case law while the court feels compelled to maintain the statute, but the statute will not change unless the Committee recommends such change, which it may not do because it feels compelled to recognize the case law. The Committee would perform a considerable service by adopting the alternate simple solution which it considered: "delete Section 2-706(a)(2) which defines consequential damages to include 'injury to person or property proximately [resulting] from breach of warranty.'"[323]

Assuming the "subtle distinction" remains, i. e., that there are claims for injuries to person or property caused by products that are non-defective under tort law but unmerchantable under Article 2, the draft removes obstacles and clarifies former confusion. It expressly rejects the requirement of notice within a reasonable time after acceptance under original 2-607(3)(a) since aggrieved parties such as third party beneficiaries have nothing to do with acceptance of the goods.[324] The draft also renders any agreement to exclude or limit consequential damages for injury to the person unenforceable, though a note explains that warranty disclaimers may still be effective.[325] The draft then confronts the statute of limitations problem.

---

sonable in marketing the product in an unsafe condition. The court suggested that products liability is closer to a negligence standard whereas warranty theory is much more a pure strict liability standard. *Denny*, 662 N. E. 2d at 736. There is a comprehensive dissenting opinion. *Id.* at 739 (Simons, J., dissenting). Based upon this decision, the Second Circuit affirmed the judgment. Denny v. Ford Motor Co., 79 F.3d 12, *aff'g* 146 F.R.D. 52 (N.D.N.Y. 1993).

321. *See* U.C.C. 32-319 (Proposed Draft 1996).

322. *See Denny*, 662 N.E.2d at 319.

323. U.C.C. § 2-319 note 2 (Proposed Draft 1996).

324. *Id.* § 2-319(c)(1). Comment 5 to the original 2-607 recognized this anomaly. *See* U.C.C. § 2-607 cmt. 5 (1995).

325. U.C.C. § 2-319(c)(2) note 3 (Proposed Draft 1996).

XII. Statute of Limitations

The original Article 2 statute of limitations requires actions for breach to occur within four years after the cause of action accrues, i. e., from the time of breach, which occurs when tender of delivery is made, regardless of the aggrieved party's lack of knowledge of the breach.[326] Thus, it provides four years from the time of delivery to discover a breach. Clearly designed as a statute of limitations to protect expectation interests under a contract theory, the absence of any guidance on the application of the statute to warranty actions for personal injury or injury to property could and has led to absurd results. Thus, where a third party beneficiary suffered injury caused by an unmerchantable product that had been delivered to the buyer more than four years prior to the injury, the statute barred a recovery by the beneficiary even though she had nothing to do with the delivery or acceptance of the product more than four years earlier.[327] Once the alternative tort theory became available, with a torts statute of limitations providing two years from the time of the injury, the same beneficiary could recover essentially by changing the caption atop its complaint. If a beneficiary had the sheer good fortune of being injured by a product delivered to the buyer less than four years from the time of the injury, a cause of action would lie under Article 2. If the same beneficiary had an alternative action under, e. g., Section 402A of the Restatement Second of Torts, but failed to file an action within the two year torts statute, she could, nonetheless, resort to a warranty claim for the same injuries if the product happened to be delivered to the buyer less than four years from the filing of such action.

There were judicial attempts at symmetry and glimpses of recognition that original section 2-725 was not designed to deal with tort-like injuries.[328] Yet, even courts that recognized the absurdity of applying 2-725 to personal injury cases involving benefi-

---

326. U.C.C. § 2-725(1)-(2) (1995).

327. *See* Mendel v. Pittsburgh Plate Glass Co., 291 N.Y.S. 2d, 94 (N.Y. Sup. Ct. 1967), *aff'd* 253 N.E.2d 207 (N.Y. 1969).

328. *See* John E. Murray, Jr., *Products Liability—Another Word*, 35 U. Pitt. L. Rev. 255 (1973). *See also* Hahn v. Atlantic Richfield Co., 625 F.2d 1095 (3d Cir. 1980). For example, original section 2-725(2) states that "[a] cause of action accrues when the breach occurs, regardless of the *aggrieved party's* lack of knowledge of the breach. A breach of warranty occurs when *tender of delivery is made* . . . ." U.C.C. § 2-725(2) (1995) (emphasis added). The only possible aggrieved party when tender of delivery is made is the buyer, since an "aggrieved party" is defined as a party entitled to assert a claim. *Id.* § 1-201(2). A third party beneficiary who may have never met the buyer or saw the product until she was injured by it could not possibly be an "aggrieved party" until the injury occurred. A buyer, however, is an aggrieved party upon tender of delivery even though the buyer has no knowledge of the breach at that time. *Id.* § 1-725(2).

ciaries found other barriers in the section to justify absurd results.[329]

Shorter statutes of limitations for tort actions are commonplace and justifiable for the usual reasons including the gathering of evidence. They are predicated upon the type of injury suffered by the plaintiff, not upon the etiology of a theory allowing such recovery. Recovery of tort-like damages under a warranty theory, therefore, should be limited to the same torts statute of limitations that would apply if the action had been brought under a tort products liability theory.[330] There is not a scintilla of support for applying 2-725 to such actions in the statutory language or its history, which deals exclusively with defeated expectations and loss-of-bargain injuries. Yet, courts felt compelled to apply *the* statute of limitations in Article 2 to any action within that Article. This problem had to be addressed in the draft.

For loss-of-bargain actions, the draft statute of limitations retains the four-year period from the time the cause of action accrues, i. e., when the breach occurs, even though the aggrieved party had no knowledge of the breach. A breach occurs when the seller tenders delivery. If the warranty expressly extends to performance of the goods after delivery, the cause of action accrues when the buyer discovered or should have discovered the breach.[331] The draft, however, carves out an exception for injury to persons or property resulting from breach of warranty under 2-319(c): "A cause of action accrues when the purchaser discovers or should have discovered the breach. An action must be commenced within four years after the cause of action has accrued."[332]

---

329. *See, e.g.*, Williams v. West Penn Power Co., 467 A.2d 811 (Pa. 1983). In *Williams*, the court recognized that original section 2-725 should not be applied to beneficiaries, but felt compelled to apply the statute to a buyer who suffered personal injuries. *Williams*, 467 A.2d at 818. Both a buyer and beneficiary were injured by the same product in the same episode. *Id.* at 813. The court reasoned that since it had to apply the four-year statute to the buyer, justice required that it apply the same statute to the beneficiary, notwithstanding its recognition that the statute should not be applied to the beneficiary. *Id.* at 818. There was really no need for the court to apply the statute to the buyer, much less the beneficiary, but the court could not analyze its way to that desired result.

330. RESTATEMENT (SECOND) OF TORTS § 402A (1964). It is an open secret that warranty theory was used to circumvent the excessive burdens placed on plaintiffs to prove negligence prior to the Section 402A of the Restatement (Second) of Torts, which was first announced only in 1964 and required years to be adopted by courts throughout the country.

331. U.C.C. § 2-714(a)-(c) (Proposed Draft 1996).

332. *Id.* § 2-319(c).

Substituting a "discovery" statute for tort-like actions under a warranty theory is clearly desirable. Why, however, should a party enjoy a longer statute of limitations than he would enjoy under a tort statute, i.e., why "four years?" Remembering that this entire structure is designed to deal only with the exceptionally rare case of personal injury or property damage where there is a breach of warranty but no "defective" product under products liability law (assuming that distinction holds), there is still a total absence of justification for a longer statute of limitations. Where in the world did they get "four years?" Was that period derived from the original statute that remains for contract breaches having nothing to do with personal injury or property damage and is limited to four years from the time of delivery? What possible justification can the Drafting Committee assert for this innovation?

The new statute of limitations section also contemplates an exception for warranty of title claims.[333] "The risk is high that in sales of art work or antiques the limitation period will run before a 'true' owner makes a claim to the goods. Since there is no longer a warranty of quiet possession, the buyer will have no claim against the seller."[334]

XIII. Part 4: Transfers, Identification et. al.

The draft continues a section on the passing of title with the same recognition of its predecessor that "the location of title is largely irrelevant under Article 2."[335] The essential reason for this section has not changed, i. e., to deal with questions arising beyond Article 2 such as tax issues under appropriate statutes.

Draft section 2-402 moves the critically important concept of "identification" from its former abode in part 5.[336] Beyond stylistic changes for a "clear focus," the section remains essentially unchanged. The advantages of identification are not found in the section language, but a desirable note that should become a comment lists the advantages.[337]

---

333. *See id.* § 2-714(a) (excepting actions subject to sections 2-312(e) and 2-319(c)). There is no 2-312(e) in the current draft. A note referring to that subsection is obviously dealing with 2-312(d) concerning the extension of a seller's warranty of title to a remote buyer, removing the privity barrier.

334. *Id.* § 2-714 note 2.

335. *Id.* § 2-401 note 2.

336. U.C.C. § 2-501 (1995).

337. U.C.C. § 2-402 note 4 (Proposed Draft 1996). *Advantages to the buyer*: (1) acquisition of "goods oriented" remedies against the seller under 2-707 (specific performance) and 2-724 (prepaying buyer's right to goods); (2) protection against seller's creditors under 2-405 (rights of seller's creditors against goods sold); (3) earlier status (in some jurisdictions) as a buyer in the ordinary course of business as defined in original section 1-

Since part 4 deals, *inter alia*, with "transfers," new 2-403 incorporates 2-210 dealing with assignment of rights and contains no changes in substance. The draft, however, covers delegation of performance earlier in 2-211, which a note to 2-403 suggests should be integrated into 2-403.[338] Good faith purchasing and entrusting principles are found in 2-404, which clarifies the essential concepts in original 2-403.

Draft section 2-405 revises original 2-402 by making the rights of "creditors of the seller" rather than just "unsecured creditors" subject to a prepaying buyer's right to goods or a buyer's right to specific performance.[339] The purpose is to expand the goods-oriented remedies of the buyer against creditors of the seller, including secured and lien creditors, without disrupting the rights of an Article 9 secured creditor of the seller against a buyer. Thus, the revision protects only the buyer's right to recover the goods against the creditor. It does not "cut off" the security interest. The original section was subject to the original 2-502, which provided a narrow right to a buyer who had paid part or all of the price of identified goods where the seller had become insolvent within ten days after receipt of the first installment payment. That section has been completely transformed by 2-724, which simply states:

> A buyer who pays all or a part of the price of goods identified to the contract, whether or not they have been shipped, on making and keeping good a tender of full performance, has a right to recover them from the seller if the seller repudiates or fails to deliver as required by the contract.[340]

This is the product of an analysis that first considered repealing 2-502 because the insolvency requirement created a major risk of invalidation in bankruptcy. On second thought, however, simply repealing 2-502 would relegate a prepaying buyer to specific performance or replevin. The solution provides a parallel right in 2-724, which removes the "unsecured creditor," insolvency and "ten day" conditions, thereby allowing the prepaying buyer to recover the goods upon "full performance" against even

---

201(9); (4) right to inspect the goods under 2-513; (5) standing to sue parties who cause injury to identified goods under draft section 2-713. *Advantages to the seller*: (1) shipment under reservation under 2-508(a) [2-505]; (2) resale under 2-719(a) [2-706]; (3) possible excuse where goods identified at time of contracting suffer casualty under 2-615 [2-613]; (4) possible action for the price though goods have not been accepted under 2-722(a)(2) [2-709(1)(b)]; (5)(*sic*) standing to sue third parties who cause injury to identified goods, 2-713 [2-722].

338. U.C.C. § 2-403 note 1 (Proposed Draft 1996).

339. *Id.* § 2-405(a).

340. *Id.* § 2-724.

secured creditors *if* the buyer is a buyer in the ordinary course of business.[341]

Original section 2-326 deals with sale on approval ("approval"), sale or return ("return"), consignment sales and related creditor's rights, while 2-327 addresses "special incidents" of "approval" and "return" sales.[342] Section 2-406 incorporates all relevant concepts including "special incidents."[343]

Section 2-407 is relegated to the issues of consignments and creditor's rights formerly dealt with in 2-326. More recently, however, the Drafting Committee has decided to move draft section 2-407 to Article 9. Moreover, 2-406(e) states that both "approval" or "return" sales are subject to 2-407, which makes goods valued at more than $1000 and not delivered to an auctioneer subject to claims of creditors while they are in possession of a person who deals in goods of that kind, under a name other than the name of the person making delivery of the goods, for the purpose of sale.[344]

XIV. Part 5: Performance

A. *Service Contracts*

Part 5 of the draft opens with a series of sections designed to deal with service, support and maintenance contracts. Original section 2-301 stated the general obligation of the seller to transfer and deliver and the obligation of the buyer to accept and pay for the goods in accordance with the contract.[345] Section 2-501(a) broadens that general obligation language to allow for service contracts[346] and proceeds to constructively condition a party's duty of performance on substantial performance by the other

---

341. Note 4 to section 2-724 indicates that the issue of when the buyer becomes a buyer in the ordinary course of business must still be resolved. *Id.* § 2-724 note 4. For the purposes of 2-724, the note suggests that if the seller is in possession of identified goods and all other conditions are satisfied, i.e., seller's retention is not fraudulent against its creditor under 2-405(b) or the identification is not a preference under 2-405(c)(2), the buyer becomes a buyer in the ordinary course of business when the seller repudiates or fails to deliver. A buyer in the ordinary course of business takes free of a security interest under 9-307(1) or 2-404(c) (entrusting). If a prepaying buyer under 2-724 is *not* a buyer in the ordinary course of business, such a buyer has a right to possession of the goods but is still subject to secured creditors. The note suggests that in such cases, "the buyer, after tendering full performance, should arrange a subordination agreement with the creditors before paying the price due." *Id.* Section 2-724 remains subject to further discussion between the Article 2 and Article 9 Drafting Committees.

342. U.C.C. §§ 2-326, 2-327 (1995).

343. U.C.C. § 2-406 (Proposed Draft 1996).

344. U.C.C. § 2-407(a) (1995).

345. U.C.C. § 2-407(a) (Proposed Draft).

346. *Id.* § 2-501(a). "Parties to a transaction subject to this article are obligated to perform in accordance with the contract and this article." *Id.*

party.[347] "Substantial performance" is clearly designed to reflect its true nature under draft section 2-602, which unsurprisingly adopts the traditional material breach analysis as the equivalent of the "substantial impairment of value" analysis.[348] Thus, basic contract law is reaffirmed in the requirement of a material breach to justify the refusal of the aggrieved party to perform. A nonmaterial breach requires the aggrieved party to continue performance notwithstanding such party's right to pursue appropriate remedies.

Section 2-502 provides a "default" rule for performance quality in service contracts: "[T]he party shall render performance of a quality that is reasonable and no less than average under the circumstances." This is the quality standard absent displacing terms. It obviously does not apply to express or implied warranty standards that set forth the quality standard for goods.[349]

Section 2-503 provides guidance with respect to support contracts and sets forth the general rule that the seller is not required to provide support or instruction for the buyer's use of the goods after delivery unless the seller agrees to supply such support, which the seller must then make available at a time, place and quality consistent with the terms of the contract or, in the absence of such terms, in a commercially reasonable and workmanlike manner. If the support contract is breached, the buyer has remedies for breach under part 7 of Article 2, but the seller's breach does not justify buyer's cancellation of the contract concerning the goods unless the breach substantially impairs the value of the contract to the buyer.[350]

Section 2-504 is a form of the seller's right to "cure" defects in goods as applied to replacement, repair, maintenance or similar services pursuant to an agreement. If the seller agrees to provide such services for a limited time and in lieu of a warranty, the seller is contracting to complete its delivery of goods by providing such services in accordance with the contract and in a timely manner.[351] If a party simply agrees to provide services, it must do so in a timely and workmanlike manner in accordance with commercially reasonable standards, though such an agreement does not, in itself, guarantee that the services will correct

---

347. *Id.* § 2-501(b).

348. *Id.* § 2-602(b). This section utilizes standard Restatement (Second) of Contracts § 241 (material breach) criteria to determine whether a breach constitutes a "substantial impairment of the value of the contract."

349. *Id.* § 2-502.

350. U.C.C. § 2-503 (Proposed Draft 1996).

351. *Id.* § 2-504(a)(1).

defects.[352] The party receiving services is under a constructive condition of cooperation and may seek remedies for breach of a maintenance or repair contract under part 7 of Article 2.[353] The buyer may not cancel the contract upon breach of such a contract absent a substantial impairment of value to the buyer.[354]

B. Waiver of Objection

Original section 2-605 precludes reliance on a defect that was reasonably ascertainable, but not stated in connection with rejection of the goods where the seller could have cured had the defect been seasonably stated or, between merchants, where the seller made a written request for a full and written statement of all defects upon which the buyer proposed to rely. This concept seems to be incorporated in a new and broader section 2-505, "Waiver of Objection,"[355] that begins with a subsection on waiver of breach where a party accepts performance notwithstanding a breach and fails to object within a reasonable time.[356] There is, however, a later replication of 2-605 in part 6 of the draft.[357]

C. Seller's Tender and Delivery

Since the draft repeals original sections 2-319 through 2-323, which deal with delivery terms in favor of a flexible interpretation standard,[358] the new section on the manner of the seller's tender of delivery takes on added significance.[359] The draft, however, suggests only minor modifications to its predecessor.[360] Thus, a seller is not required to deliver at a particular destination "unless required by a specific agreement or by the commercial understanding of the terms used by the parties."[361] This language is also designed to favor the "shipment" contract as the normal contract by creating, in effect, a presumption against the "destination" contract.

Where the goods are in possession of a bailee and are to be delivered without being moved, tender occurs where the seller either tenders a negotiable document of title covering the goods

---

352. *Id.* § 2-504(a)(2).
353. *Id.* § 2-504(b)-(c).
354. U.C.C. § 2-504(d) (Proposed Draft 1996).
355. *Id.* § 2-505(b).
356. *Id.* § 2-505. Failure to object, however, does not preclude any other remedy for breach unless a party is prejudiced by the aggrieved party's inaction. *Id.* § 2-505(a).
357. *Id.* § 2-604. This section is identified as a particularized application of 2-505.
358. *See supra* notes 258 and 259 and accompanying text discussing draft section 2-309.
359. U.C.C. § 2-506 (Proposed Draft 1996).
360. U.C.C. § 2-503 (1995).
361. U.C.C. § 2-506(c) (Proposed Draft 1996).

or procures acknowledgment by the bailee of the buyer's right to possession of the goods. A question arises with respect to the latter method of tender, i.e., acknowledgment by the bailee to whom? If the acknowledgment is to the seller, the buyer is unaware of it. The identical issue arises when the question is whether risk of loss has passed to a buyer in such a bailee transaction, i. e., does the risk pass when the bailee's acknowledgment is to the seller, or only when it is "to the buyer?"[362] The draft resolves this issue in the tender of delivery section and in the new risk of loss section by adding the phrase "to the buyer" to both.[363]

As to the seller's shipment duties, draft section 2-507 replicates its predecessor, 2-503, notwithstanding criticism that the section's requirement on the seller to make arrangements for shipment is allegedly abnormal in the real commercial world.[364] Similarly, the only change in original section 2-505 dealing with the seller's shipment under reservation is its new section number, 2-508, and the same is true of original 2-506, which becomes 2-509 concerning the rights of a financing agency. Original 2-507 concerning the effect of the seller's tender, however, is modified in the draft to emphasize that the seller must be the first party to tender performance,[365] and to emphasize that the seller's right to reclaim the goods is subject to the limitations on that right of reclamation as detailed in another section.[366]

D. Payment and Inspection

While the seller must be the first to tender, tender of payment by the buyer is a condition to the seller's duty to *complete* a delivery. This principle as well as other tender of payment rules in original section 2-511 are unchanged in draft section 2-511.[367] The next section, "Payment by buyer before inspection," is a

---

362. This precise issue arose in a risk of loss context under original section 2-509(2)(b) in *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.*, 774 F.2d 214 (7th Cir. 1985).

363. U.C.C. §§ 2-516(d)(1) (Proposed Draft 1996).

364. *See id.* § 2-507; U.C.C. § 2-503 (1995). Allegedly, real world commercial deals do not require the seller to make shipping arrangements unless required by the contract or commercial practice. Note 1 to draft section 2-507 states, "[t]his issue should be resolved." U.C.C. § 2-507 (Proposed Draft 1996).

365. U.C.C. § 2-510(a) (Proposed Draft 1996).

366. *Id.* § 2-510(b). Section 2-510(b) is subject to 2-716 dealing with the seller's right to reclaim goods after delivery to the buyer. *Id.* Draft section 2-716 replaces original section 2-702. *Id.* § 716.

367. *Id.* § 2-511. Here, the section numbers are identical because original 2-509 dealing with risk of loss is moved to draft section 2-516, and original 2-510, which changed the original 2-509 risk of loss rules in breach situations, has been repealed. *Id.* § 2-516. See *infra* notes 369 to 382 and accompanying text for an analysis of the new risk of loss section.

duplicate of original 2-512, as are 2-513, the buyer's right to inspect goods, and 2-514, concerning the delivery of documents against which a draft is drawn. The only change in 2-515 dealing with time for payment is the section number.[368]

E. Risk of Loss

Up to this point, part 5 of the proposed revision to Article 2 has been thoroughly unexciting because its sections are so often virtual or precise replications of its predecessors. In the last section of part 5, however, the Drafting Committee pursues a radically new paradigm of considerable interest. Section 2-516, simply captioned, "Risk of Loss," is the sole risk of loss section. It replaces the original 2-509, which is captioned, "Risk of Loss in the Absence of Breach," to distinguish it from the next section in the original, 2-510, "Effect of Breach on Risk of Loss." Any surface impression that the draft simply merged the two former sections is immediately overcome. The draft *repeals* original section 2-510.[369]

Though it may be almost shocking to students of the original risk of loss process where there has been a breach, only one "remnant" remains: the seller continues to assume the risk of loss until cure or acceptance where the goods or documents fail to conform to the terms of the contract, including those supplied by Article 2.[370] Other rules relying upon the extent of insurance coverage where the buyer rightfully revoked acceptance or repudiated before risk of loss passed to the seller are excised.

The Drafting Committee concluded that the effect of breach on risk of loss rules is largely irrelevant[371] and the notion that risk of loss should be reallocated in breach situations is dubious at best, particularly where there is no causal connection between the breach and casualty to the goods. Moreover, the application of reallocation rules based upon the extent of insurance coverage is unclear in original sections 2-510(2) and (3). The underlying concept that these subsections operated as "anti-subrogation"

---

368. U.C.C. § 2-515 (Proposed Draft 1996) (replacing U.C.C. § 2-310 (1995)).

369. *Id.* § 2-516. The second sentence of the notes following 2-516 reads: "Section 2-510 dealing with the effect of breach on risk of loss has been repealed." *Id.*

370. *Id.* § 2-516(3); U.C.C. § 2-510(1) (1995).

371. U.C.C. § 2-516 note 1 (Proposed Draft 1996). Where S agrees to sell a haystack to B located in a place controlled by S's agent, who is not an independent bailee, the goods are identified to the contract though B never expects to take possession. *Id.* B intends to resell the hay to another who will take possession. *Id.* Here, when S tenders deliver under 2-506(a), B, though not in possession, has control of the goods and risk of loss has passed. *Id.* The fact that B may have breached the contract after tender but before possession is taken is irrelevant. *Id.*

provisions has not been shown to have had any effect on insurance companies or calculated premiums.[372]

The new risk of loss section emphasizes the fundamental principle that risk of loss passes when the buyer receives or takes control of the goods.[373] The distinction between merchant and non-merchant sellers in original 2-509(3) is excised.[374] The basic distinction between "shipment" and "destination" contracts remains. In "shipment" contracts, the risk passes to the buyer when the goods are tendered and delivered to the carrier as required by sections 2-506 and 2-507. In "destination" contracts, the risk of loss passes when the goods are tendered at that destination as required in 2-506 to enable the buyer to take delivery.[375] Unfortunately, the Committee fails to correct a defect in the original by not inserting in the section language the presumption that the "shipment" contract is the normal contract in the absence of specific contract language to the contrary. Rather, it relies upon an earlier statement dealing with the seller's manner of tendering delivery that "in effect" creates such a presumption.[376] Since it would have been relatively simple to include this presumption in the statutory language, its absence suggests another illustration of what "we are attempting to say, whether we got it said or not."

Similarly, it is left to notes to explain that "carrier" as used in "shipment" contracts refers to independent carriers rather than transportation facilities operated or controlled by the parties to the contract.[377] While this has been the clear assumption under the original section, why not characterize such carriers as "independent" in the section language?

As suggested earlier, the confusion concerning acknowledgments by bailees is overcome by the insertion of the phrase "to the buyer,"[378] while questions concerning the application of the appropriate subsection to sellers who become bailees are properly left to the notes.[379] Finally, the entire section is subject to 2-

372. *Id.* § 2-516 note 4.

373. *Id.* § 2-516(a).

374. *Id.* Under original section 2-509(3), the risk passes to the buyer upon his receipt of the goods if the seller is a merchant, but upon tender of delivery if the seller is not a merchant. U.C.C. § 2-509(3) (1995). The Drafting Committee sees no merit in this distinction, which it rejects in favor of the general principle that the seller is in the best position to avoid loss or insure against it until the buyer takes possession or control of the goods. *See* U.C.C. § 2-516 note 1 (Proposed Draft 1996).

375. U.C.C. § 2-516(b) (Proposed Draft 1996).

376. *Id.* § 2-516 note 2 (referring to U.C.C. § 2-506(c) (Proposed Draft 1996)).

377. *Id.* § 2-516 note 2.

378. *See supra* notes 362-63 and accompanying text.

379. U.C.C. § 2-516 note 3 (Proposed Draft 1996). Note 3 explains that "bailee" typically refers to a third party such as a warehouse or a carrier. *Id.* But if S sells a

406 dealing with "approval" or "return" sales.[380] Under a "sale on approval," risk of loss does not pass to the buyer until acceptance of the goods, i. e., use of the goods on a trial basis is not "acceptance" of the goods.[381] Under a "sale or return," presumably the risk is on the buyer. Since the section is unnecessarily silent on this question, this conclusion must be implied from the absence of express risk of loss language with respect to such sales, as contrasted with "approval" sales. The same implication was necessary in the original section that includes a comment to confirm the distinction.[382]

Notwithstanding the criticism of certain elements in this effort, the Drafting Committee has clearly succeeded in presenting an improved risk of loss analysis.

XV. Part 6: Breach, Repudiation and Excuse

A. *Breach, Substantial Impairment, Material Breach*

The two sections of original Article 2 that list seller and buyer remedies each begin with the ways in which the other party may breach the contract.[383] The Drafting Committee begins its latest version of part 6 with a definition of breach, thereby eliminating other more specific definitions.[384] This definitional section is followed by a new section called "Breach of the Whole Contract; Substantial Impairment,"[385] which sets forth traditional criteria from the Restatement (Second) of Contracts to determine

---

horse to B, who pays the price and leaves the horse to be boarded with S, S then becomes a bailee. *Id.* Here, the risk of loss should be determined under either 2-516(a) (did the buyer have "control" of the goods?), or 2-516(c) before S becomes a bailee. *Id.* Section 2-516(b) would not apply since no shipment was contemplated. *Id.* Thus, the risk should remain on S absent a contrary agreement with B. *Id.*

380. U.C.C. § 2-516(d) (Proposed Draft 1996). *See supra* notes 347-48 and accompanying text for a discussion on the terms "approval" and "return" sales.

381. U.C.C. § 2-406(b) (Proposed Draft 1996).

382. U.C.C. § 2-327 cmt. 3 (1995). Original section 2-326 also dealt with "approval" and "return" sales. *Id.* § 2-326.

383. U.C.C. §§ 2-703, 2-711 (1995). The former (seller's list of remedies) includes the buyer's wrongful rejection or revocation of acceptance, failure to make a payment, or repudiation. *Id.* § 2-703. The latter (buyer's list of remedies) includes seller's failure to deliver or repudiate or buyer's rightful rejection or revocation. *Id.* § 2-711.

384. U.C.C. § 2-601 (Proposed Draft 1996). In 2-601(b)(1), a seller breaches "if it fails to deliver or to perform an obligation, makes a nonconforming tender of performance, repudiates the contract, or exceeds a contractual limitation." *Id.* § 2-601(b)(1). In 2-601(b)(2), a buyer breaches "if it wrongfully rejects a tender of delivery, wrongfully revokes acceptance, repudiates the contract, fails to make a required payment or to perform an obligation or exceeds contractual limitations." Note 2 to this section reminds us that conduct that would otherwise be a breach is not a breach if it is excused under one of the later sections (2-615 through 2-618). *Id.* § 2-601 note 2.

385. *Id.* § 2-602.

whether a breach is "material."[386] There is an express recognition that these criteria are to be applied to determine whether there is a substantial impairment of the value of the contract, thereby eliminating any vestige of doubt that "substantial impairment of value" and "material breach" criteria and analyses are coextensive. Moreover, when this section is juxtaposed with the new "substantial performance" section that opens part 5 of the draft, the unified analysis is, again, confirmed.[387]

B. "Perfect Tender Rule"

The introduction to these sections postpones the appearance of original 2-601 dealing with rightful rejection until 2-603, which is otherwise remarkably similar to the original and retains the phraseology, "if the goods or the tender of delivery fail in *any* respect to conform to the contract."[388] Thus, the "perfect tender" rule is preserved, but only to the extent it was preserved under the original. The otherwise "absolute" right to reject is made subject to 2-507(b), which does not permit rejection for a nonconforming tender if the nonconformity is a failure to notify the buyer of shipment or to make a proper contract where neither causes a material delay or loss.[389] Like its predecessor, the "absolute" right to reject is also subject to 2-611, which does not permit rejection of nonconforming installments for "any" nonconformity, but only for those where substantial impairment of value can be shown. Beyond these stated qualifications of the "perfect tender"/"absolute" right to reject rule, this section can be varied by the agreement of the parties under the general freedom of contract principle set forth earlier in the draft.[390] Similarly, other generally accepted limitations on the "perfect tender rule" are recognized in the notes following the section such as: "good faith," the seller's right to cure, and acceptance of the goods, which can only then be revoked under a substantial impairment of value standard rather than rejected for *any* nonconformity.[391]

---

386. RESTATEMENT (SECOND) CONTRACTS § 241 (1979).

387. U.C.C. § 2-501 (Proposed Draft 1996). *See* text accompanying *supra* notes 351-52. It has long been an open secret that substantial performance and material breach are identical analyses with different etiologies. *See* MURRAY, *supra* note 52, § 108.

388. U.C.C. § 2-601(a) (Proposed Draft 1996).

389. *Id.* This replicates the last paragraph of original section 2-504, which curiously remains otherwise unidentified. *Id.*

390. *Id.* § 2-109(a). *See supra* text prior to note 62. The original section 2-601 includes a reminder of the freedom to vary this provision through the usual "unless otherwise agreed" phrase. U.C.C. § 2-601 (1995). The draft does not include such a reminder though note 2 suggests that the parties may "vary the rejection standard by agreement." U.C.C § 2-603 note 2 (Proposed Draft 1996).

391. U.C.C. § 2-603 note 2 (Proposed Draft 1996).

Since these limitations have been established under the original version, and the Drafting Committee wishes to continue them, they could easily be listed in the section language to become part of the enacted law rather than commentary support.

Finally, the section incorporates the requirement of notice of rejection within a reasonable time, which is part of a separate section in the original Article 2 on the manner of rejection.[392]

C. *Duty of Care—Rejection and Revocation of Acceptance*

If a buyer rightfully rejects or justifiably revokes acceptance of goods, the buyer must hold the goods with reasonable care at the seller's disposition for a sufficient time to allow the seller to remove them.[393] Where the buyer uses such goods in a manner inconsistent with the seller's ownership, the draft clarifies the effect: the seller has the option of treating such use as an acceptance or conversion of the goods.[394] Even where the rejection is wrongful, thereby precluding acceptance, the buyer is subjected to the same duties as if the rejection were rightful. Use of goods retained after rejection or revocation of acceptance may not constitute acceptance; it may be a justifiable use as where a buyer cannot effect cover for some time and uses nonconforming goods in its business. The draft includes a new subsection allowing for this situation, providing that the buyer has not accepted the goods under such circumstances, but is liable for the reasonable value of such use.[395]

The next section effectively merges and clarifies two original sections dealing with further duties of the buyer and the buyer's option as to salvaged goods where the goods have been rejected or acceptance was revoked.[396]

D. *Acceptance, Notice of Breach, Revocation of Acceptance and Cure*

(i). Acceptance

What constitutes acceptance of goods by the buyer? The answers are largely unchanged under the draft.[397] There is, however, an important clarification with respect to an acceptance

---

392. U.C.C. § 2-603(b) (Proposed Draft 1996); U.C.C. § 2-602(1) (1995).

393. U.C.C. § 2-605(a) is similar to U.C.C. § 2-602(2)(b) (1995).

394. U.C.C. § 2-605(b)(1) (Proposed Draft 1996); U.C.C. § 2-602(2)(a) (1995).

395. U.C.C. § 2-605(b)(2) (Proposed Draft 1996).

396. *Id.* § 2-606; U.C.C. §§ 2-603, 2-604 (1995).

397. U.C.C. § 2-607 (Proposed Draft 1996) (replacing original U.C.C. § 2-606 (1995)). Draft section 2-607 provides that after a reasonable opportunity to inspect, one of the following three actions may take place: (1) buyer signifies that it accepts the goods, (2) fails to make an effective rejection under 2-603, or (3) "does any unreasonable act incon-

that occurs through the buyer's actions. The draft distinguishes between a buyer's reasonable acts and unreasonable acts inconsistent with the seller's ownership. A buyer's reasonable acts will not constitute acceptance.[398] Moreover, the buyer's reasonable acts may occur before or after rejection or revocation of acceptance.[399]

(ii). Rightful, Wrongful, Effective, Ineffective Rejections

An interesting note to this section reflects the Drafter's contemplation about the continuation of rightful but ineffective rejections and wrongful, but effective, rejections. Where the buyer discovers a nonconformity, but fails to notify the seller in time, the rejection is rightful, but ineffective, and acceptance occurs. Yet, there is no acceptance where the rejection is wrongful because there is no nonconformity and the buyer effectively rejects. While the buyer can be sued for wrongful rejection, there is no acceptance. The note asks, "[d]oes this make sense? Why not state simply and clearly that a wrongful rejection under Section 2-603(a), even though effectively communicated under Section 2-603(b), is an acceptance?"[400]

One rationale for the continuation of the wrongful but effective rejection precluding acceptance is the efficiency in allowing the seller, who normally sells such wrongfully rejected goods, to dispose of them and recover damages from the breaching buyer. The buyer has not, in fact, accepted the goods. Calling an effective, but wrongful, rejection an acceptance would allow a forced sale as the seller could sue for the price under draft section 2-722. Since the seller can be made whole without this remedy, there is no compelling need to call the effective but wrongful rejection an acceptance.

(iii). Notice of Breach—Accepted Goods

There is an important change in the next section dealing with the effect of acceptance, notice of breach as to accepted goods, the burden of establishing breach and notice of claims or litigation to an answerable person.[401] Original section 2-607(3)(a) requires the buyer to notify the seller of breach as to accepted goods within a reasonable time after the buyer discovers, or should

---

sistent with the seller's ownership of buyer's claim of rejection or revocation of acceptance and seller ratifies that act as an acceptance." *Id.*

398. *Id.* § 2-607(3). Thus, a buyer who continues to use the goods after rejection or revocation of acceptance may be reasonable in that use. *Id.*

399. *Id.*

400. *Id.* § 2-607 note 1.

401. *Id.* § 2-608 (replacing original U.C.C. § 2-607 (1995)).

have discovered, such breach. Failure to comply with this notice requirement bars the buyer from *any* remedy. The important draft change bars the buyer from a remedy "only to the extent that the seller establishes that it was prejudiced by the failure." Supported by Restatement (Second) of Contracts, Section 229, the note explains that the statutory notice condition should be excused "where the failure is not material and implementation would result in 'disproportionate forfeiture.'"[402]

Still another issue involves the *content* of the notice. While the original section requires notice of "breach," a comment suggests that, on the one hand, the "content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched." On the other hand, the same comment ends with the statement that the "notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach . . . ."[403] Perhaps the best-known case dealing with the content of notice is *Eastern Air Lines, Inc. v. McDonnell-Douglas Corporation*,[404] where a long-term contract to supply jet aircraft was plagued by a series of delays.[405] Since it would have been impracticable for the buyer to switch suppliers in this marriage-like contract, the buyer's notices of delays appeared to meet the standards of the first part of the comment ("troublesome"), but did not mention "breach."[406] The court seemed to understand the buyer's dilemma in cajoling performance rather than threatening litigation, but still found the content of the notice insufficient.[407]

The draft continues the statutory requirement of a notice of breach[408] and the note following the section states that the notice "need state only that the buyer is claiming a breach."[409] This requirement, however, must be viewed in light of the significant change already discussed, i.e., the failure to provide any notice at all will not bar a remedy unless the seller establishes that it was prejudiced by the failure.[410] Thus, if notice of "trouble that must

---

402. U.C.C. § 2-608 note 2 (Proposed Draft 1996).

403. U.C.C. § 2-607 cmt. 4 (1995).

404. Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976).

405. *Eastern Airlines*, 532 F.2d at 864.

406. *Id.* at 976 n.62.

407. *Id.*

408. U.C.C. § 2-608(c)(1) (Proposed Draft 1996). The section provides: "The buyer . . . shall notify the seller of the claimed breach." *Id.*

409. *Id.* § 2-608 note 2.

410. *Id.* This is described in note 2 to 2-608 as "a middle position between an absolute bar and requiring proof of material prejudice." *Id.*

be watched" is given, it may be extremely difficult for the seller to establish that it was prejudiced by the failure of the notice to include that nasty word "breach" or other threats of litigation.

(iv). Revocation of Acceptance and Cure

While the draft section on revocation of acceptance is unchanged,[411] the next section enlarges the right of the seller to *cure* even after revocation of acceptance.[412] There has never been any justifiable reason to preclude cure after revocation of acceptance where "contract time" remains. Thus, an acceptance could be signified before the buyer reasonably discovers a substantial nonconformity giving rise to revocation of acceptance. Assuming a perfect tender can be made within the original time for performance, the seller should have the right to cure, i. e., that right should not be curtailed simply because of an early "acceptance" of the goods. The original section, however, speaks exclusively in terms of cure after rejection.[413] The change in the draft is not only desirable, but necessary as are its qualifications.

If a buyer accepts goods on the reasonable assumption that the nonconformity will be cured, and it is not cured, the seller will not receive a second chance to cure under this section. Nor will the section apply if an agreed remedy fails of its essential purpose.

(v). Cure After "Contract Time"

Beyond its enlargement to include cure after revocation of acceptance, the new cure section insists on a "rightful" rejection, which an accompanying note explains must be both "rightful" and "effective."[414] As for a "cure" beyond what the original section calls "contract time," the draft suggests a considerable liberalization: "If the agreed time for performance has expired, the seller may provide a cure that is appropriate in the circumstances if the buyer has no legitimate interest in refusing the cure and the cure is effected within a reasonable time."[415]

While this may be a very desirable change, it raises a number of questions. Who must establish that the cure is appropriate in

411. *Id.* § 2-609 (designed to replace U.C.C. § 2-608 (1995)).

412. *Id.* § 2-610.

413. U.C.C. § 2-508 (1995).

414. U.C.C. § 2-610 (Proposed Draft 1996). This section begins, "[i]f the buyer rightfully rejects . . . ." *Id.* § 2-610 note 2. Note 3 states that this means a "rightful" and "effective" rejection, that the note calls a "proper" rejection. The section would be more clear if "effective" were included along with "rightful." *Id.* § 2-610 note 3.

415. *Id.* § 2-610(2). The original requirement that the seller have "reasonable grounds to believe" that its nonconforming tender "would be acceptable with or without a money allowance" in original section 2-508(2) is excised from the draft. *Id.* § 2-610.

the circumstances? Presumably the seller has that burden, but this should be stated. Who must establish that the buyer has no legitimate interest in refusing the cure? The question should be clearly answered. A note to the section suggests an illustration of a ten-day delay in performance and summarily concludes that a second late tender by the seller is not appropriate in the circumstances.[416] Is this true even where the delay does not prejudice the buyer who has no legitimate interest in refusing such a cure? The requirement that the buyer have no legitimate interest in refusing a cure appears to be a species of the pervasive good faith requirement. As such, it should predominate in determining whether a cure after "contract time" must be accepted.[417]

E. Installment Contracts

Draft section 2-611 "clarifies the definition of installment contracts" to include contracts that allow "either party the right to make or demand delivery in lots,"[418] and where installment deliveries will be made though payment is in lump sum.[419] The section is enlarged to include nonconforming installment payments by the buyer as well as nonconforming installment deliveries by the seller.[420] Rejection continues to require substantial impairment of the value of an installment or of the "whole contract."[421] Like its predecessor, the section states that power to cancel the "whole contract" is waived "if the aggrieved party accepts a nonconforming installment" and does not notify the seller of cancellation, and "brings an action" only with "respect to past installments or demands performance" of future installments.[422]

F. Adequate Assurance—Anticipatory Repudiation

While there are no changes in the section providing a right to demand adequate assurances,[423] the anticipatory repudiation section modifies its predecessor by including a non-exclusive defi-

---

416. *Id.* § 2-610 note 2.

417. *Id.* Note 1 to this section states: "Additional research and thought will be devoted to new Section 2-610 and its implications." *Id.* § 2-610 note 1.

418. *Id.* § 2-611 note 1 (pursuant to U.C.C. § 2-302 (Proposed Draft 1996)).

419. U.C.C. § 2-611(a) (Proposed Draft 1996). A contract requiring delivery in one lot with payment in installments is not, however, an installment contract under this section. *See id.* § 2-611 note 1.

420. *Id.* § 2-610(b). It should be noted, however, that a delay in payment as contrasted with a breach by the seller cannot be cured though a seller will have every incentive to accept a delayed payment. *See id.* § 2-610 note 2.

421. *Id.* § 2-610(b), (c).

422. *Id.* § 2-610(c).

423. *Id.* § 2-612 (formerly U.C.C. § 2-609 (1995)).

nition of "repudiation."[424] A repudiation continues to require substantial impairment of the value of the contract to the other party.[425] A note to the section suggests that a qualified statement such as "I will not continue to perform until our 'good faith' dispute over the interpretation of the contract is resolved" may be a repudiation in one sense, but arguably does not substantially impair the value of the contract and is not, therefore, a repudiation under the section.[426] The notes also alert us to changes in the installment contract section allowing "repudiation of an installment" not yet due to "constitute a substantial impairment of the entire contract."[427] There are no revisions to the next section, "Retraction of Anticipatory Repudiation."[428]

G. Excuse—Casualty, Impracticability et. al.

The draft section on casualty to identified goods opens with a change in language, as it provides "[i]f the parties to a contract *assume the continued existence* and eventual delivery to the buyer *of goods* identified when the contract is made,"[429] instead of "[w]here the contract requires for its performance goods identified *when the contract is made* . . . ."[430] The new phraseology is preferable, at least because of its similarity to the commercial impracticability section which continues the original language, "basic assumption on which the contract was made."[431] The section, itself, is otherwise unchanged. A note, however, suggests that this is a default rule, i. e., where "the parties have not otherwise agreed."[432] It then suggests that in a contract for goods *not* identified at the time the contract is made, evidence of whether

---

424. U.C.C. § 2-613(b) (Proposed Draft 1996). The section provides: "Repudiation includes but is not limited to language that one party will not or cannot make a performance still due under the contract or voluntary affirmative conduct that reasonably appears to the other party to make a future performance impossible or apparently impossible." *Id.*

425. *Id.* § 2-613(a).

426. *Id.* § 2-613 note 1. This is an important distinction that the section or comments thereto should make clear. If performance is suspended because of a good faith dispute over the interpretation of the contract, it is difficult to understand why this would be a repudiation in any sense.

427. *Id. See* U.C.C. 2-611(c) (1995). Original section 2-610 requires repudiation of *the contract* rather than an installment to constitute substantial impairment of the entire contract. U.C.C. § 1-613 note 1 (Proposed Draft 1996).

428. U.C.C. § 2-614 note 1 (Proposed Draft 1996).

429. *Id.* § 2-615 (emphasis added).

430. *Id.* § 2-613 (emphasis added).

431. *Id.* § 2-617(a)(1); U.C.C. § 2-615(a) (1995).

432. U.C.C. § 2-615 note 1 (Proposed Draft 1996).

the parties nonetheless "assumed their continued existence should be considered."[433]

There are no revisions in the "Substituted Performance" section,[434] but the proposed commercial impracticability section, "Excuse By Failure of Presupposed Conditions," allows buyers as well as sellers to pursue the "slim" chance that they can establish this excuse.[435] The section uses the rubric, "frustration of purpose" for buyer excuse, and substitutes "unless otherwise agreed" for "assumed a greater obligation" in the original section.[436] The "Procedure on Notice Claiming Excuse" is modified to provide for buyer notification to the seller concerning a material delay or non-performance in payment.[437]

Part 6 ends with a replication of original section 2-515 fostering adjustments of claims or disputes by setting forth rules for the ascertainment of facts and preservation of evidence.[438] A different placement, e. g., near the buyer's right to inspect in section 2-513, seems more appropriate.

XVI. Part 7: Remedies

A. *Structure—General Principles*

The draft divides part 7 into subparts: Subpart A contains general remedial policies to which subparts B (seller's remedies) and C (buyer's remedies) are subject. Subpart A opens by expressing this thought. A note, however, states that "[t]he Committee on Style strongly recommends that 2-701 be deleted as a superfluous 'roadmap' and the sections be renumbered. This will be done in the next draft."[439] Section 2-702, called "Breach; Procedures," states that a party can pursue the remedies available to

---

433. *Id.* The note suggests that in a contract for growing crops not required to be grown on the seller's land, a drought affecting such crops should still be considered as a possible excuse for nonperformance if "both parties assumed the[ir] continued existence for performance."

434. *Id.* § 2-616; U.C.C. § 2-614 (1995).

435. U.C.C. § 2-617(a) (Proposed Draft 1996). Note 2 confirms the "slim" nature of the opportunity to be excused. *Id.* § 2-617 note 2.

436. *Id.* § 2-617 notes 1-2. Draft section 2-617 provides:

> (a) Subject to Section 2-616 [Substituted Performance] and subsection (b) [a requirement of notification of delay or nonperformance to the other party], delay in performance or nonperformance by either party is not a breach if performance as agreed has been made impracticable or a party's principal purpose is substantially frustrated by: (1) the occurrence of a contingency whose nonoccurrence was a basic assumption on which the contract was made; or (2) compliance in good faith with any applicable foreign or domestic governmental regulation, statute, or order, whether or not it later proves invalid, which both parties assumed would not occur.

Id. § 2-617(a)(1)-(2).

437. *Id.* § 2-618 (modifying U.C.C. § 2-616 (1995)).

438. *Id.* § 2-619.

439. *Id.* § 2-701 note 1.

it and pursue arbitration if it was agreed to by the parties. Since two earlier sections define "breach" and "default,"[440] it would be merciful for the Style Committee or other official group to recommend the deletion of this section since it is of marginal benefit at best.

(i). Purpose

Part 7 should begin with what is now section 2-703 in the draft, "Remedies in General," primarily because that section opens with a restatement of the critical albeit traditional *purpose* of U.C.C. and contract remedies: "[P]lacing the aggrieved party in as good a position as if the other party had fully performed."[441] The section also contains the important mitigation principle[442] while continuing the general policy of cumulation of remedies, but precluding a party from recovering more than once for the same injury. It adds the critically important limitation on the cumulative nature of remedies, i. e., a party should not be free to choose a remedy that will violate the overriding expectation principle. Unfortunately, the language suggests judicial discretion: "A court *may* deny or limit a remedy if, under the circumstances, it would put the aggrieved party in a better position than if the other party had fully performed.[443] Why "may?" Is there a situation where the aggrieved party ought to be placed in a better position than if the other party had fully performed? If, for example, a buyer makes a "cover" purchase at a favorable price, should that buyer ever be permitted to choose to recover damages for nondelivery or repudiation that would enhance the buyer's position? It is essential that this limitation have the same status as the limitation preventing a double recovery.[444]

Section 2-704 is rather mysteriously called "Damages in General" because it is designed as a supplement to allow recovery of damages where normal Article 2 remedies "fail to put the aggrieved party in as good a position as if the other party had

---

440. U.C.C. § 2-601, 2-602 (Proposed Draft 1996).

441. *Id.* § 2-703(a) (restating the same principle found in U.C.C. § 1-106(1) (1995)).

442. *Id.* § 2-703(b).

443. *Id.* § 2-703(c) (emphasis added).

444. *Id.* § 2-703(c) note 4. Section 2-703(c) now reads:

> The rights and remedies provided in this article are cumulative, but a party may not recover more than once for the same injury. A court may deny or limit a remedy if, under the circumstances, it would put the aggrieved party in a better position than if the other party had fully performed.

Id. § 2-703. A simple change in this draft would accomplish the desired result. For example, a provision stating: "The rights and remedies provided in this article are cumulative, but an aggrieved party may neither recover more than once for the same injury nor pursue a remedy that would put the aggrieved party in a better position than if the other party had fully performed."

fully performed." For example, a party who is unable to establish general or "direct" damages may still recover incidental and consequential damages. Protection of reliance or restitution interests may fall within this section. It would be extremely helpful if the section expressly recognized the protection of such interests. It should then be merged into the previous section, "Remedies in General."

(ii). Incidental and Consequential Damages

Incidental and consequential damages are defined in original Sections 2-715(1) and (2). They contemplate recovery of such damages only by buyers. The draft allows their recovery by buyers or sellers, but does so in separate sections. Except for this change, the new incidental damages section replicates the substance of its predecessor.[445] The draft section on consequential damages effects the same change,[446] but there is another critically important change in this section.

In addition to the classic limitations on consequential damages of foreseeability, factual causation, mitigation and reasonable certainty that are stated in the section, the new section includes still another limitation: recovery of consequential damages is precluded if they are "unreasonably disproportionate to the risk assumed by the breaching party."[447] This *additional* limitation is designed to control "the risk of uncertain and potentially heavy consequential damages . . . to sellers," and "should be limited to cases where there is an extreme disparity between the price charged by the seller and the foreseeable loss caused to the buyer (this suggests that the price was not intended to cover the risk) or there is an 'informality of dealing, including the absence of a

445. U.C.C. § 2-705 (Proposed Draft 1996).

446. *Id.* § 2-706. Illustrations of a seller's recovery of incidential and/or consequential damages include: (a) a seller making a special expenditure in preparation to perform, not to be reimbursed by buyer's full performance, buyer breaches and seller cannot salvage the investment, seller may recover this expenditure as consequential damages; (b) at the time of formation, buyer was aware of seller's profitable business opportunity that depended upon buyer's prompt payment of the contract price, buyer was also aware that substitute financing would probably not be available to the seller, seller's lost profits, if reasonably certain, are recoverable as consequentials, had seller been able to obtain substitute financing at some rate of interest, "the interest paid would be consequential rather than incidental damages;" (c) seller borrowed money at a certain rate of interest to finance performance of the contract with the buyer, "the loan was to be repaid from the contract price," buyer's late payment results in consequential damages, i.e., the interest paid between the time buyer promised to pay the contract price and the time it was paid. *Id.* § 2-706 note 1.

447. U.C.C. § 2-706(1) (Proposed Draft 1996).

detailed written contract, which indicates that there was no careful attempt to allocate all of the risks.'"[448]

The recognition that the classic limitations on the recovery of consequential damages may be insufficient in certain cases is, on balance, desirable. If the additional "unreasonably disproportionate" limitation is part of a new Article 2, however, there can be no doubt that it will spawn considerable case law. In its pure form, the "unreasonably disproportionate" standard is necessarily uncertain and could be seen as still another manifestation of the war against unconscionable results. At the very least, special efforts should be made to provide clear illustrations on the use of the additional limitation in the new comments to this section.

(iii). Specific Performance

Under the original version, the seller can obtain what is sometimes called a specific performance remedy through its action for the contract price. This, however, was a remedy "at law" for damages.[449] The true specific performance remedy in the original version limits that extraordinary relief to buyers.[450] The first major change in the draft version expands the remedy to sellers, allowing courts to provide *in personam* directives to a defendant to perform a contract, e. g., a long term supply contract.[451] While such relief is not unknown in the courts, it is now recommended for codification in the draft.[452]

The second major change in the specific performance section is more radical. The draft section allows the parties to expressly provide for the remedy of specific performance in their contract with the expectation that a court will grant such remedy, notwithstanding the availability of adequate remedies "at law."[453] Whether this specific relief is granted necessarily depends upon the discretion of the court.[454] A note explains that this change "is consistent with a growing consensus that specific performance is, in most cases, a more efficient remedy than damages."[455] Concerns that this change may force buyers, particu-

---

448. *Id.* § 2-706 (citing RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. f (1981)).

449. U.C.C. § 2-709 (1995).

450. *See id.* § 2-716.

451. U.C.C. § 2-707 note 1 (Proposed Draft 1996).

452. *Id.* § 2-707 note 1.

453. *Id.* § 2-707(a).

454. *Id.* This section reads: "A court may, in its discretion, decree specific performance if the parties have expressly agreed to that remedy or the goods or the agreed performance of the breaching party are unique or in other proper circumstances." *Id.*

455. *Id.* § 2-707 note 1 (citing Alan Schwartz, *The Myth that Promisees Prefer Supra Compensatory Remedies: An Analysis of Contracting for Damage Measures,* 10 YALE L.J. 369 (1990)). Note 2 also mentions that specific performance is the preferred remedy

larly consumer buyers, to take and pay for goods that are not needed or desired are overcome by the policy that unless resale is not reasonably available, the seller cannot recover the price of identified goods that the buyer has not accepted.[456] In such a case, a court should, in its discretion, deny the remedy of specific performance.[457] The section ends with a continuation of what the original version calls a replevin remedy,[458] though that term is missing from the revision.[459]

(iv). Cancellation

Like their predecessors,[460] the draft sections listing seller and buyer remedies include the remedy of "cancellation,"[461] a remedy that is rarely understood. If one "cancels" a contract, do remedies survive such "cancellation?" The Drafting Committee answers this and other relevant questions in a new section describing the remedy and its effects.[462] Thus, while cancellation discharges executory obligations,[463] any right based on previous default survives cancellation, as does any limitation on the exercise of rights in goods, any limitation of disclosure of information, any obligation to return goods or any remedy for default of the whole contract.[464] Moreover, unless a contrary intention clearly appears, expressions such as "cancellation," "rescission" or "avoidance" of the contract are not construed as a discharge of any claim in damages for antecedent breach.[465] Cancellation is not effective until the canceling party sends notice of cancellation to the other party,[466] and an aggrieved party may cancel a contract when the usual conditions for breach are met, giving rise to other seller and buyer remedies.[467]

This new section is one of the more desirable additions in the draft.

---

under CISG, Articles 46 and 62. *Id.* § 2-707 note 2. While CISG is not a dominant influence in the draft (*see* note 7, *supra*), its influence has been felt to a limited degree.

456. U.C.C. § 2-722(a)(3) (Proposed Draft 1996).

457. *Id.* § 2-707 note 1.

458. U.C.C. § 2-703(f) (1995).

459. U.C.C. § 2-707(c) (Proposed Draft 1996) (designed to replace U.C.C. § 2-716(3) (1995)).

460. U.C.C. §§ 2-703(f), 2-711(1) (1996).

461. U.C.C. §§ 2-715(8), 2-723(a)(2) (Proposed Draft 1996).

462. *Id.* § 2-709.

463. *Id.* § 2-708(d).

464. *Id.* § 2-708(e).

465. *Id.* § 2-708(f).

466. U.C.C. § 2-708(b) (Proposed Draft 1996).

467. *Id.* § 2-708(a).

(v). Modifications of Remedy—Failure of Essential Purpose

Under the original Article 2, parties are free to modify the remedies provided by Article 2.[468] They may add to or subtract from the normal or "default" remedies set forth in part 7.[469] They may substitute repair and replacement remedies for those that would normally flow from breaches of warranty[470] and limit remedies to return of the goods and repayment of the price.[471] The difficult question is, when do substituted remedies become excessive, operating as a penalty or are inadequate, failing to provide even minimal relief? It is a truism that excessive agreed damages clauses creating penalties will not be enforced.[472] On the other hand, what is the remedial "floor," i. e., when does an agreed remedy fall below an acceptable minimum?

A comment to the original section states the general principle that "it is of the very essence of a sales contract that at least minimum adequate remedies be available."[473] Again, however, what is a minimal remedy? Relying upon case law that has allowed wide latitude to the parties in commercial cases,[474] the Drafting Committee could not improve upon the quoted comment to the original section, i. e., "[a]n agreed remedy . . . may not operate to deprive the aggrieved party of a minimum adequate remedy under the circumstances."[475] A note suggests that the minimum should be not less than restitution of the goods or the purchase price.[476] Thus, anything above this "floor" will depend upon the circumstances.

When an agreed remedy "fails of its essential purpose," the original section allows the aggrieved party to ignore the agreed remedy and to pursue the "default" remedies available under Article 2,[477] but the application of this section has been problematic. If, for example, an agreed repair or replacement remedy fails because it has not been performed at all, has been delayed or fails to achieve the desired result, a buyer is clearly permitted to seek a default remedy such as cover or other appropriate Article 2 remedies.[478] If the agreed remedy, however, excluded conse-

468. U.C.C. § 2-719 (1995).
469. *Id.*
470. *Id.* § 2-719(1)(a).
471. *Id.*
472. U.C.C. § 2-718 (1995); U.C.C. § 2-710 (Proposed Draft 1996).
473. U.C.C. § 2-719 cmt. 1 (1995).
474. *E.g,* Canal Elec. Co. v. Westinghouse Elec. Corp., 973 F.2d 988 (1st Cir. 1992).
475. U.C.C. § 2-709(2) (Proposed Draft 1996); U.C.C. § 2-719 cmt. 1 (1995).
476. U.C.C. § 2-709 note 1 (Proposed Draft 1996) (citing McDermott, Inc. v. Iron, 979 F.2d 1068 (5th Cir. 1992)).
477. U.C.C. § 2-719(2) (1995).
478. *See id.* § 2-719(1).

quential damages, the question is whether the failure of the agreed remedy not only allows substitution of a typical default remedy but also excises the clause excluding consequentials to allow their recovery.[479] Judicial reactions to such a situation range from the excision of the consequential damages clause to its continued enforcement absent unconscionability. The result could hinge upon how a clause was drafted.[480]

The draft addresses this problem in non-consumer cases as follows: "[T]he aggrieved party may, to the extent of the failure, resort to remedies provided in this article, but is bound by any other agreed remedy that is not dependent upon the failed remedy."[481]

The Drafting Committee is clearly convinced that an exclusion of consequential damages is typically not dependent upon a failed agreed remedy such as a repair or replacement remedy.[482] Thus, in commercial cases, the consequential damages clause would continue to be enforceable unless it was unconscionable or its enforcement would deprive the aggrieved party of a minimum adequate remedy, which is extremely unlikely.[483]

The draft allows an aggrieved consumer to reject goods or revoke acceptance, and if the agreed remedy fails of its essential purpose, the consumer may choose another buyer's remedy.[484] The last subsection expressly allows consequential damages to be limited or excluded by agreement, except for injury to the person, unless the exclusion or limitation is unconscionable.[485]

(vi). Liquidated Damages

The draft continues the basic policy of its predecessor by allowing damages to be liquidated in an amount that is reasonable in light of the actual or anticipated loss caused by the breach and the difficulties of proof of loss in the event of breach.[486] There is no longer a requirement, however, that the liquidation

---

479. *See id.* § 2-719(2).

480. For a case analyzing these questions, *see* Cooley v. Big Horn Harvestore Sys., Inc., 813 P.2d 736 (Colo. 1991).

481. U.C.C. § 2-709(b)(1) (Proposed Draft 1996).

482. *See id.* § 2-709 note 2.

483. *Id.* Recognizing the difficulty of a merchant establishing unconscionability, the note adds, "[i]n commercial cases, however, neither of these outcomes is probable." *Id.*

484. *Id.* § 2-709(b)(2) (referring to the listing of buyer's remedies in U.C.C. § 2-723 (Proposed Draft 1996)).

485. *Id.* § 2-709(c). Since it is impossible to limit or exclude consequential damages for injury to the person, there is no longer any need to continue the original distinction that treated such exclusions in consumer goods as "prima facie unconscionable." U.C.C. § 2-719(3) (1995).

486. U.C.C. § 2-710(a) (Proposed Draft 1996) (designed to replace U.C.C. § 2-718(1) (1995)).

be reasonable in light of the difficulties in obtaining a remedy.[487] The draft also changes the original by prohibiting the enforceability of unreasonably small, as well as unreasonably large, amounts.[488]

The notes emphasize a distinction between liquidation and limitation of damages.[489] Thus, if parties fix $5000 as a reasonable amount of liquidated damages, but the actual damages amount to $100,000, the note states that the agreement may be enforceable even though the damages were underliquidated with respect to actual loss.[490] If, however, absent any thought of liquidating damages, the parties agree that in no event will the seller's damages exceed $5000, this is not an agreed damages provision governed by section 2-710.[491] It is a *limitation* (arbitrary fixing) provision that is governed by the preceding section on modification of remedies, section 2-709.[492]

The draft clarifies a breaching party's right to restitution after the aggrieved party's damages have been calculated and paid.[493] Thus, a breaching buyer is entitled to restitution in the amount by which its payments exceed the amount to which the seller is entitled under any agreed damages clause.[494] The draft follows its predecessor in allowing an offset to the buyer's restitutionary recovery of any amount of damages established by the seller and the amount of value of any benefits received.[495]

(vii). Proof of Market Price Not Readily Available

After a section allowing all Article 2 remedies to be pursued for material misrepresentation or fraud,[496] the draft tackles the problem of determining market price if evidence of a price is not readily available.[497] The common sense solution found in the draft allows evidence of prevailing prices within any reasonable

---

487. U.C.C. § 2-710 note 1 (Proposed Draft 1996).

488. *Id.*

489. *See id.* § 2-710 note 2.

490. *Id.*

491. *Id.*

492. *See* U.C.C. § 2-709(c) (Proposed Draft 1996). Specifically, this hypothetical is said to be covered by 2-709(c), which states that consequential damages may be limited or excluded. *Id.*

493. *See id.* § 2-710(b).

494. *Id.* There is no longer an alternative such as now exists in 2-718(2)(b), i. e., "twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500 whichever is smaller." U.C.C. § 2-718(2)(b) (1995).

495. U.C.C. § 2-710(c) (Proposed Draft 1996) (which replicates U.C.C. § 2-718(3) (1995)).

496. *Id.* § 2-711.

497. *See id.* § 2-712.

time before or after the time described.[498] The prevailing price at any other place that is reasonable in terms of usage of trade or commercial judgment can be used,[499] as can reports in official publications, trade journals, periodicals and other published reports in general circulation.[500] A party offering evidence of a reasonable price must give the other party notice to avoid unfair surprise.[501]

The section is designed to replace original sections 2-723 and 2-724.[502] The Drafting Committee, however, decided to delete original section 2-723(1), which measures market price at the time the aggrieved party "learned of the repudiation" if an action based on anticipatory repudiation comes to trial before the time for performance.[503] Yet, where an anticipatory repudiation occurs, the aggrieved party may, among other options, await performance for a commercially reasonable time.[504] The Drafting Committee decided that this standard makes a great deal of sense for the measurement of damages where there is no resale or cover, i.e., where the aggrieved party brings an action for the difference between the contract and market prices.[505] The Committee recommends the repeal of 2-723(1) and a new measure where the case comes to trial before the agreed time for performance, i. e., measuring the market price a commercial reasonable period after the aggrieved party learned of the repudiation.[506] This is a desirable change.

B. Seller's Remedies

After a section replicating original section 2-722, dealing with liability of third parties for injuries to goods,[507] and a section dealing with the statute of limitations discussed earlier,[508] the draft proceeds to "Part B. Seller's Remedies," starting with a section listing all of the remedies of the seller.[509] There is no significant change from the original, though the preamble of events that trigger these remedies is removed since "breach" is earlier

---

498. *See id.* § 2-712(a)(1).
499. *Id.*
500. U.C.C. § 2-712(b) (Proposed Draft 1996).
501. *See id.* § 2-712(a)(3).
502. *See id.* § 2-712 note 1.
503. U.C.C. § 2-723(1) (1995).
504. U.C.C. § 2-613(a)(1) (Proposed Draft 1996); U.C.C. § 2-610(a) (1995).
505. U.C.C. § 2-613 note 1 (Proposed Draft 1996).
506. *See id.* § 2-721(a)(2) (seller's damages); *Id.* § 2-726(a)(2) (buyer's damages).
507. U.C.C. § 2-713 (Proposed Draft 1996).
508. *See id.* § 2-714. *See also supra* notes 328-36 and accompanying text.
509. U.C.C. § 2-715 (Proposed Draft 1996) (which would replace U.C.C. § 2-703 (1995)).

elaborated in 2-601 and 2-602.[510] While the remedies remain cumulative, the notes remind us of the critical limitation on remedial choices expressed in 2-703(c): to place the party in no better position than such party would have been in had the contract been performed.

The next section is 2-716, the seller's right to reclaim goods.[511] The section quite sensibly combines parts of two original sections dealing with the two historic grounds for a seller's reclamation: the seller's right to reclaim from a buyer who received goods on credit while insolvent,[512] and reclamation in the "cash sale" where payment is due upon delivery. The seller may reclaim goods upon a demand made within a reasonable time after discovering that the buyer has failed to pay.[513] The section ends with the usual caveat that reclamation is subject to the rights "of a buyer in the ordinary course of business or other good faith purchaser for new value that arise before the seller takes possession" pursuant to its timely demand for reclamation.[514]

Section 2-717 replicates 2-704, allowing sellers to identify goods to the contract to enable the seller to pursue appropriate remedies.[515] Though there are structural changes in 2-718, already noted,[516] there are no substantial revisions of predeces-

---

510. U.C.C. § 2-715 (Proposed Draft 1996); U.C.C. § 2-703 (1995).

511. U.C.C. § 2-716 (Proposed Draft 1996). The section's full caption appears redundant: "Seller's Right to Reclaim Goods After Delivery to Buyer." *See id.* It is pretty hard to reclaim goods *before* their delivery to buyer. Presumably, the drafters sought to distinguish this section from the original 2-702, which is much broader, "Seller's Remedies on Discovery of Buyer's Insolvency," and opens with the right of the seller to refuse delivery except for cash where the seller discovers the buyer to be insolvent. U.C.C. § 2-702(1) (1995). That subsection has been moved to draft section 2-718, which combines this seller's right to refuse delivery in draft section 2-718(a) with a replication of the original 2-705, the seller's stoppage of delivery in transit of otherwise. The result is a long caption for 2-718: "Seller's Refusal to Deliver Because of Buyer's Insolvency; Stoppage in Transit or Otherwise." U.C.C. § 2-718 (Proposed Draft 1996). Draft section 2-718 changes the original 2-705(1) requirement that the shipment must be a carload, truckload or planeload. That language is deleted. A substantial breach is not required.

512. U.C.C. § 2-716(a)(1) (designed to replace U.C.C. § 2-702(2) (1995)). The seller's right continues to be limited to reclamation only if a demand is made within 10 days after the buyer received the goods absent misrepresentation of solvency made in a record to the seller less than three months before delivery. Where misrepresentation has occured, instead of ten days, the seller has a reasonable time after delivery to make its demand.

513. *Id.* § 2-716(a)(2) (Proposed Draft 1996) (designed to replace U.C.C. § 2-507(2) (1995)). The notes to this section explain that this subsection does not apply where, after delivery in such a "cash sale," the buyer discovers a nonconformity in the goods and stops payment on the check.

514. *Id.* § 2-716(b). Like its predecessor, U.C.C. § 2-702(3) (1995), this subsection reminds us that successful reclamation preclude all other remedies with respect to the reclaimed goods. *Id.*

515. U.C.C. § 2-717 (Proposed Draft 1996); U.C.C. § 2-702(3) (1995).

516. *See supra* note 516.

sor section 2-705 concerning the seller's right to stop goods in transit or otherwise.[517]

The seller's resale remedy in section 2-719 removes a notice requirement in a private resale found in the original section.[518] The Drafting Committee reasoned that the buyer in the typical resale is not a debtor and has no interest in the goods.[519] The draft also replaces "public sale" in the original with "public auction" because there is no practical difference between the two.[520]

A replication of original 2-707 identifying a "person in the position of a seller"[521] is followed by the seller's damage remedy for buyer's "nonacceptance, failure to pay or repudiation."[522] The draft reflects the Drafting Committee's significant change concerning the determination of market price if the case comes to trial before the agreed time for performance, i. e., pursuant to an anticipatory repudiation.[523] If the case comes to trial after the agreed time for performance, the formula changes the original. The measure of damages under the draft is the "contract price less the market price of comparable goods at the time and place for tender" as contrasted with the measure in the original section, "the difference between the market price at the time and place of tender and the unpaid contract price. . . ."[524]

The draft's choice of "contract price less market price" rather than the "difference between" seems innocuous. The deletion of "unpaid," however, is based upon the restitutionary concepts of 2-710 discussed earlier.[525]

Original section 2-708(2), which allows a seller to collect lost profits and incidental damages where the normal contract price/ market price differential would be inadequate, is replicated in 2-

---

517. U.C.C. § 2-718 (Proposed Draft 1996); U.C.C. § 2-705 (1995).

518. U.C.C. § 2-706(3)(c) (Proposed Draft 1996).

519. *Id.* § 2-719. "The Drafting Committee . . . decided to limit the notice requirement to sale made to enforce a security interest created by agreement or clearly imposed by statute." *Id.*

520. *Id.* § 2-719(c).

521. *Id.* § 2-720 (designed to replace U.C.C. § 2-707 (1995)).

522. *Id.* § 2-721 (designed to replace U.C.C. § 2-708 (1995)). Since the draft has gone to a great deal of trouble to define "breach" in sections 2-601 and 2-602, the caption might be simplified through the use of that term. *See id.* § 2-601, 1-602.

523. U.C.C. § 2-721(a)(2) (Proposed Draft 1996). Market price is determined at the time when a commercially reasonable period following the seller's knowledge of the repudiation has expired. *See supra* notes 506-10 and accompanying text for a discussion of this change in relation to draft section 2-712.

524. U.C.C. § 2-721(a)(1) (Proposed Draft 1996). Both draft section 2-721(a)(1) and original 2-708(1) also allow recovery of consequential and incidental damages less expenses avoided as a result of the breach. *Id.*; U.C.C. § 2-708(1) (1995).

525. U.C.C. § 2-710 (Proposed Draft 1996). *See supra* notes 490-91 and accompanying text.

721(b).[526] The calculation of "reasonable overhead" that both versions allow in addition to lost profits is simplified by a note that suggests the subtraction of seller's total variable costs, actual or estimated, from the contract price.[527] The notes also emphasize the overriding philosophy of 2-703(c) in the use of any of these remedies to preclude the seller from being placed in a better position than it would have been in had the contract been performed.[528]

The seller's action for the price under original 2-709 is unchanged except for a clarification.[529] The original allows the seller to recover the contract price of goods accepted or goods identified to the contract if the seller is unable to resell or the circumstances indicate that resale would be unavailing.[530] The original section also allows the seller to recover the price of conforming goods lost or damaged "within a commercially reasonable time after risk of their loss has passed to the buyer."[531] The draft clarifies the "commercially reasonable time" limitation: "[B]ut if the seller has regained control of the goods, the loss or damage must occur within a commercially reasonable time after the risk of loss has passed to the buyer. . . ."[532] Thus, the "commercially reasonable time limitation applies only where the seller has retained or regained possession of the goods."[533]

C. Buyer's Remedies

This section begins with a listing of buyer's remedies designed to replace original section 2-711.[534] The draft adds a familiar remedy to the list that was inadvertently omitted in the 2-711

---

526. U.C.C. § 2-708(2) (1995); U.C.C. § 2-721 (Proposed Draft 1996). The provision sets forth:

> A seller may recover damages measured by other than the market price including: (1) lost profits, including reasonable overhead, resulting from the breach determined in any reasonable manner, together with incidental and consequential damages; and (2) reasonable expenditures made in preparing for or performing the contract if, after the breach, the seller is unable to obtain reimbursement by salvage, resale, or other reasonable measures.

U.C.C. § 2-721(b) (Proposed Draft 1996). This measure is appropriate for "lost volume" sellers, sellers who do not have completed goods on hand (jobbers and middlemen) and sellers who stop work and salvage under 2-717(b). *See* U.C.C. § 2-721 note 5 (Proposed Draft 1996).

527. U.C.C. § 2-708(2) (1995); U.C.C. § 2-721 (Proposed Draft 1996). *See* U.C.C. § 2-721 note 5 (Proposed Draft 1996).

528. U.C.C. § 2-703(c) (Proposed Draft 1996).

529. U.C.C. § 2-709 (1995).

530. *Id.*

531. *Id.* § 2-709(1)(a).

532. U.C.C. § 2-722(a)(2) (Proposed Draft 1996).

533. *Id.* § 2-722 note 1.

534. *Id.* § 2-723.

list—the buyer's remedy for breach of warranty in regard to accepted goods.[535] The draft also replicates the buyer's statutory security interest in goods in the buyer's possession after rightful rejection or justifiable revocation of acceptance.[536]

Following the section protecting a prepaying buyer's right to goods discussed earlier,[537] the draft "cover" remedy appears with no substantial modifications to its predecessor.[538] It requires the "cover" buyer to procure "comparable" goods and, consistent with a language change in other remedies sections, dismisses the original "difference between" contract price and cover price language in favor of "cost of covering less the contract price."[539] There is an express recognition that a buyer need not choose the cover remedy, but a recovery of, e.g., market damages, can be overcome by the seller's proof that such a recovery would place the buyer in a better position than full performance by the seller.[540]

The next section deals with market damages, the buyer's "hypothetical cover" or "fall back" remedy. If the case comes to trial *after* the agreed time for performance, a buyer who does not cover, but does seek damages for *nondelivery* will receive the market price for comparable goods at the time the buyer *learned of the breach*, less the contract price together with incidentals and consequentials less expenses saved by the breach.[541] A note explains that if the seller failed to ship as agreed on October 1, but buyer did not learn of this failure until October 4, market price is determined as of October 4—when the buyer learned of the breach.[542] If, however, the breach is by *repudiation* rather than nondelivery, the formula changes the market price to the agreed time for performance. Thus, if the buyer learned of an anticipatory repudiation on September 15 and chose not to cover or take other remedial action, market price is determined as of October 1, the agreed time for performance, rather than the date the buyer learned of the repudiation.[543]

---

535. *See id.* Original section 2-711 failed to list this remedy, which appeared in original section 2-714. *See* U.C.C. §§ 2-711, 2-714 (1995). The listing omission is cured in U.C.C. § 2-723(5) (Proposed Draft 1996).

536. U.C.C. 2-723(c) (Proposed Draft 1996) (designed to replace U.C.C. § 2-711(3) (1995)).

537. *See supra* note 340 and accompanying text for a discussion of U.C.C. § 2-724 (Proposed Draft 1996).

538. U.C.C. § 2-725 (Proposed Draft 1996) (designed to replace U.C.C. § 2-712 (1995)).

539. *Id.* § 2-725(b).

540. *Id.* § 2-725(c) note 4.

541. *Id.* § 2-726(1)(i) (designed to replace U.C.C. § 2-713(1) (1995)). Again the "difference between" language in the original is replaced. *See id.*

542. *Id.* § 2-726(1) note 2.

543. U.C.C. § 2-726(1)(ii) (Proposed Draft 1996); *see id.* § 2-726 note 2.

If the case comes to trial *before* the agreed time for performance, the measure is "the market price of comparable goods at the time when a commercially reasonable period after the buyer has learned of the repudiation has expired less the contract price" plus incidentals and consequentials, less avoided expenses.[544] This is consistent with the same formula applied to other remedies.[545] The place for the determination of market price is unchanged.[546]

Where the buyer accepts goods that are nonconforming, the original version allows the buyer to recover all foreseeable losses, and *the* measure of damages for breach of warranty of quality is the difference between the value of the goods accepted and the value they would have had if they had been as warranted.[547] Draft section 2-727 adds a condition to the basic formula: "unless special circumstances show proximate damages of a different amount."[548] Where, for example, the seller warrants that a device will be fit for particular purposes, but the delivered device fails to meet those purposes, the measure of damages is the difference in the market value of the delivered system and the value of a hypothetical system that will meet the purposes.[549]

The draft also substitutes "*a* measure" for "*the* measure" of damages. Recognizing that such damages are generally measured by "the value of goods as warranted less the value of the goods accepted,"[550] a note explains that damages have been measured in different ways depending upon the circumstances.[551] Thus, goods that are nonconforming, but usable without repairs suggest damages measured by the difference in market values. Damages for goods not usable without repairs are measured by the reasonable cost of repairs. Damages for goods not usable under any circumstances are measured by the difference in the market value of the scrap and the cost of purchase (market value) of the goods as warranted.[552] Thus, the Drafting Commit-

---

544. *Id.* § 2-726(2).

545. *See supra* note 509 and accompanying text. *See also* U.C.C. § 2-721(a)(2) (Proposed Draft 1996) discussed in text accompanying *supra* note 527.

546. U.C.C. § 2-726(b) (Proposed Draft 1996); U.C.C. § 2-713(2) (1995).

547. U.C.C. § 2-714(1)-(2) (Proposed Draft 1996). Incidental and consequential damages are also recoverable under original section 2-714(3). *See* U.C.C. § 2-714(3) (1995).

548. U.C.C. § 2-727(b) (Proposed Draft 1996).

549. *Id.* § 2-727. *See id.* § 2-727 where the notes cite *Hospital Computer Systems, Inc. v. State Island Hospital*, 788 F.Supp. 1351 (D.N.J. 1992)).

550. Again, the "difference between" language of the original is replaced.

551. U.C.C. § 2-727 note 4 (Proposed Draft 1996).

552. U.C.C. § 2-727(b); *Id.* at note 3.

tee prefers "*a* measure" rather than "*the* measure" for this section.

Part 7 ends by reproducing original section 2-717, which allows a buyer to deduct all or any part of the damages resulting from any breach from any part of the price still due under the same contract.[553]

While the draft of this part of Article 2 demonstrates relatively modest changes, the recommendations of the Drafting Committee are beneficial.

XVII. Conclusion

There are some very desirable clarifications, elaborations and modifications in this draft of a new Article 2, but there are also disappointments, and some are major disappointments. The Drafting Committee did a lot of tinkering and moving things around, but assumed few risks. When the Committee came eyeball to eyeball with anything resembling a radical change, except for the courageous repeal of the Statute of Frauds and the elimination of the cumbersome risk of loss analysis in original section 2-510, the Committee blinked.

While part 7 dealing with remedies contains several important changes and clarifications, a review of the conspicuous changes effected in the draft reveals limited creativity. In general, the beneficial changes are obvious. Beyond a tightening here, a loosening there, the questionable insertion of a standard analysis of materiality of breach, substantial performance or a desirable, but nonexclusive, definition of "repudiation," the "battle of the forms" consumed a lot of time and effort. Unfortunately, the result is obviously the product of a Committee that thought it discovered the solution by separating this elusive admixture of frustrating concepts into different sections—a solution that may prove illusory.

Modifications in sections dealing with warranties and disclaimers of warranties reveal a tentative approach. The products liability challenge was met with uncertainty. The necessary inclusion of the "electronic" material may have seemed difficult, but the product is rather pedestrian. Most of the desirable changes were so obvious that their absence would have been indefensible. For example, should a new Article 2 permit cure after revocation of acceptance? The question scarcely survives its statement. Unlike its predecessor, the draft is anything but a radical new paradigm.

---

553. *Id.* § 2-728; U.C.C. § 2-717 (1995).

In mitigation, it is important to recognize how extremely difficult it is to improve upon the genuinely radical paradigm of the precocious and ingenious Karl Llewellyn. *His* Article 2 has proven so highly workable over almost half a century that only a few sections require a complete overhaul. Moreover, among those sections in obvious need of change, the need was not always proximately caused by the sections themselves, but by the distortions generated by limited judicial imagination and creativity.[554]

It is equally important to recall Llewellyn's disappointment with *his* final product that manifested so much compromise. Llewellyn knew it could have been better—much better. But he also knew how critically important it was to assure the acceptance of a radical new design that would react much more effectively to the felt needs of commercial society.[555] Like his creation, the draft manifests a dangerous degree of compromise that operates as the enemy of the pristine. It is not unwarranted to assume that the Drafting Committee is well aware of the high price of enactability. Such awareness, however, cannot erase the frustration of not "getting the words right."[556] There will be a new Article 2 that will probably look very much like this draft. Unfortunately, those who draft it will be called upon to explain what they were "attempting to say, whether [they] got it said or not."[557]

---

554. Llewellyn severely overestimated "the ability of the collective judicial mind to achieve [his goals]." *See* Murray, *The Revision of Article 2: Romancing the Prism*, *supra* note 130 at 1468.

555. Speaking before the Tennessee Bar Association, Llewellyn said:

> I am ashamed of the [U.C.C.] in some ways; there are so many pieces that I could make a little better; there are so many beautiful ideas I tried to get in that would have been good for the law, but I was voted down. A wide body of opinion has worked the law into some sort of compromise after debate and after exhaustive work. However, when you compare it with anything that there is, it is an infinite improvement.

Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 784 (1953).

556. When Ernest Hemingway was asked why he felt compelled to rewrite the last page of "A Farewell to Arms" thirty-nine times, he is said to have replied that he was "getting the words right." *See* THEODORE A. REES CHENEY, GETTING THE WORDS RIGHT: HOW TO REVISE, EDIT AND REWRITE, at page three of the Introduction (1983).

557. LLEWELLYN, *supra* note 1.