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An Analysis of Insurable Interest Under Article Two of the Uniform Commercial Code

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An Analysis of Insurable Interest Under Article Two of the Uniform Commercial Code

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The author undertakes a study and critique of the provisions of article two of the Uniform Commercial Code concerning the insurable interest of buyers and sellers in goods sold. The author concludes that while the Code leaves the previous law of insurable interest unchanged in most situations, it needlessly leaves many questions about insurable interest unanswered.

I. Introduction

The basic requisite of an insurable interest pervades all types of insurance contracts.[1] The reason most commonly given to justify this requirement is that in the absence of such an interest the agreement is no more than a common wager.[2] A second reason is that the absence of an insurable interest might encourage the insured willfully to destroy the property (or life) of the insured.[3]

Despite universal recognition of its need, insurable interest is a term of indefinite meaning. This is evidenced by the many opinions in which courts have had difficnlty in determining the existence of such an interest.[4] Definitions of the term necessarily are broad and largely useless in the solution of cases.

The purpose of all property insurance is to indemnify the insured for casualty to the insured property. If the insured has an insurable interest there is some risk of loss to him in case of casualty to the property, and this risk may be shifted to the insurer. If, on the other hand, there is no risk of loss to shift, there is no insurable interest.

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1. For a discussion of insurable interest see 4 Appelman, Insurance §§ 2121-25 (1941); Patterson, Insurance §§ 109-87 (2d ed. 1957); Vance, Insurance §§ 28-34 (3d ed. 1951).

2. See, *e.g.*, Howard Fire Ins. Co. v. Chase, 72 U.S. (5 Wall.) 509 (1867); Commonwealth Life Ins. Co. v. George, 248 Ala. 649, 28 So. 2d 910 (1947); Bennett v. Mutual Fire Ins. Co., 100 Md. 337, 60 Atl. 99 (1905); Crossman v. American Ins. Co., 198 Mich. 304, 164 N.W. 428 (1917); Cherokee Foundries v. Imperial Assur. Co., 188 Tenn. 349, 219 S.W.2d 203 (1949).

3. See Patterson, *op. cit. supra* note 1, at 111.

4. For example see the cases collected in Annot., 9 A.L.R.2d 181 (1950), dealing with the question of whether one has an insurable interest based on an invalid or unenforceable contract.

A. *Bases of Insurable Interest in Property*

Analysis of case law reveals that in property insurance cases courts have found an insurable interest on the basis of one or more of the following: a property right, a contract right, a potential legal liability, a factual expectation of damage.[5] Each of these categories represents a special relationship between the insured and the insured property which the courts recognize as creating risk of loss to the insured if the property is damaged or destroyed.

1. *Property Right.*—A property right of the insured in the insured property is one of the commonest and clearest bases upon which courts have recognized an insurable interest. Such a right includes not only a right to the property based on legal or equitable title,[6] but also the interest one has in property by his right to possession,[7] or by possession alone, even though wrongful.[8] It also embraces the insurable interest of one having a specific lien on property.[9] The distinctive characteristic of an insurable interest based on a property right is that the insured has some right, either legal or equitable, in the res.

2. *Contract Rights.*—A second kind of insurable interest has been recognized as arising out of contract rights. If the contract gives a party in rem rights in the property he has an insurable interest on the basis of the property right alone as discussed above. In some instances, however, when the contract has not given the insured any right in the res, he has been recognized as having an insurable interest on the basis of the contract right alone.[10]

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5. See generally PATTERSON, *op. cit. supra* note 1, at 111-23; Harnett & Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept*, 48 COLUM. L. REV. 1162, 1165-75 (1948); Patterson & McIntyre, *Unsecured Creditor's Insurance*, 31 COLUM. L. REV. 212, 220-26 (1931).

6. See, *e.g.*, Milwaukee Mechanics' Ins. Co. v. Rhea, 123 Fed. 9 (6th Cir. 1903); Farmer's Mut. Fire Ins. Ass'n v. Hodges, 142 Ark. 577, 219 S.W. 13 (1920); Cummings v. Dirigio Mut. Fire Ins. Co., 112 Me. 379, 92 Atl. 298 (1914); Lowenstein v. Queen Ins. Co., 227 Mo. 100, 127 S.W. 72 (1910); Dunning v. Firemen's Ins. Co., 194 S.C. 98, 8 S.E.2d 318 (1940); Thompson v. Gearheart, 137 Va. 427, 119 S.E. 67 (1923); Scott v. Dixie Fire Ins. Co., 70 W. Va. 533, 74 S.E. 659 (1912).

7. See, *e.g.*, Globe v. Rutgers Fire Ins. Co. v. Rose, 91 F.2d 635 (8th Cir. 1937), *cert. denied*, 302 U.S. 749 (1937); Farmers' and Merchants' Ins. Co. v. Mickel, 72 Neb. 122, 100 N.W. 130 (1904); Baird v. Fidelity-Phenix Fire Ins. Co., 178 Tenn. 653, 162 S.W.2d 384 (1942).

8. See, *e.g.*, Barnett v. London Assur. Corp., 138 Wash. 673, 24 Pac. 3 (1926) (good faith purchaser of stolen automobile). *Contra*, Henssen v. Iowa Auto. Ins. Co., 195 Iowa 141, 190 N.W. 150 (1922).

9. See, *e.g.*, Fageol Truck & Coach Co. v. Pacific Indem. Co., 18 Cal. 2d 731, 117 P.2d 661 (1941) (conditional seller of goods); Hayward Lumber & Inv. Co. v. Lyders, 139 Cal. App. 517, 34 P.2d 805 (1934) (mechanics lien); First Nat'l Bank v. Newark Fire Ins. Co., 118 Pa. Super. 582, 180 Atl. 163 (1935) (judgment creditor with statutory lien).

10. In Fire Ins. Ass'n, Ltd. v. Merchants' & Miners' Transp. Co., 66 Md. 339, 7 Atl. 905 (1887), a transportation company carried cotton under a bill of lading exempting it from liability from loss by fire. The court held that the company had

3. *Potential Legal Liability.*—The possible legal liability of the insured has been another basis for an insurable interest in property. In most cases in which this basis has been recognized it would have been possible to tie the insurable interest to one of the concepts already discussed. For example, it is recognized that a contractor who has contracted to construct a building has an insurable interest in the building while it is under construction.[11] His insurable interest, even though he has no in rem right in the property, may be rested either on the potential legal liability if the building is destroyed before the completion date, or on the theory that damage or destruction to the building before completion would impair his rights under the construction contract.[12] Similarly, a bailee of goods under a mutual benefit bailment would have an insurable interest based either on his potential legal liability should the goods be lost, damaged, or destroyed because of his failure to exercise proper care regarding their custody, or on his in rem right in the goods based on possession or right to possession.[13]

4. *Factual Expectation of Damage.*—A fourth basis, the broadest and most inclusive, has been recognized in some jurisdictions. In some instances it has been used to justify an insurable interest when none could be based on any of the other three concepts. This fourth concept rests on the very general theory that one should have an insurable interest in any property which if lost, damaged or destroyed, might result in economic disadvantage to him.[14]

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an insurable interest in the cotton against loss by fire on the basis of the freight which it expected to earn by transporting the goods. In Planters' & Merchants' Ins. Co., 93 Ala. 255, 9 So. 268 (1890), an insured was held to have an insurable interest against fire in a house which he had contracted to move, to the extent of the compensation he was to have earned under the contract.

11. See, *e.g.*, National Fire Ins. Co. v. Kinney, 224 Ala. 586, 141 So. 350 (1932).

12. In King v. Phoenix Ins. Co., 195 Mo. 290, 92 S.W. 892 (1906), the court held that a builder had an insurable interest even though he had completed the building and had been paid. His insurable interest was based on his legal liability to the owner to rebuild the building if it were destroyed by fire.

13. See, *e.g.*, Home Ins. Co. v. Baltimore Warehouse Co., 93 U.S. 527 (1876); *In re* Podolsky, 15 F.2d 965 (3d Cir. 1940); Gillespie v. Federal Compress & Warehouse Co., 265 S.W.2d 21 (Tenn. App. 1953).

14. For example the question has arisen as to whether a husband who is a mere tenant at sufferance on his wife's property has an insurable interest in the property. At least one court has recognized that the husband has an insurable interest on the basis of a factual expectation of loss as discussed in the text. See Kludt v. German Mut. Fire Ins. Co., 152 Wis. 637, 140 N.W. 321 (1913). Most courts, however, have held that the husband does not have an insurable interest. See, *e.g.*, Traders' Ins. Co. v. Newman, 120 Ind. 554, 22 N.E. 428 (1889); LaFont v. Home Ins. Co., 193 Mo. App. 543, 182 S.W. 1029 (1916); Bassett v. Farmers' & Merchants' Ins. Co., 85 Neb. 85, 122 N.W. 703 (1909).

For a discussion of the factual expectation of loss concept see Harnett & Thornton, *supra* note 5, at 1171-75 and cases cited therein.

B. *Provisions of the Uniform Commercial Code*

Case law relating to insurable interest in contracts for the sale of goods is fragmentary. Legal literature dealing specifically and exclusively with these same problems is scarce. Most treatises on insurance deal with insurable interest in property in very general terms and usually without differentiating problems of insurable interest in the sale of real property from those involved in the sale of goods.[15] In many instances the problems involved in these two types of transactions are quite different.[16] It is to the credit of the drafters of the Uniform Commercial Code [hereinafter referred to as the Code] that they saw fit to include a section dealing specifically with insurable interest in goods which are the subject matter of a sales contract.[17]

The Code provides that the seller retains an insurable interest in the goods as long as he has title to or any security interest in them,[18] and that the buyer has an insurable interest upon identification of the goods to the contract.[19] The drafters make it clear that the adoption of the Code will not in any way impair an insurable interest recognized by any other rule of law in the jurisdiction.[20] This means that the insurable interest of the parties to a sales contract will never be narrower than recognized by the specific provisions of the Code; however, it may be broader.

II. THE SELLER'S INSURABLE INTEREST

A. *Based on Title*

In contracts for the sale of goods the traditional rationale for recognizing insurable interest based on title is that it is usually the owner

15. For example, see generally PATTERSON, *op. cit. supra* note 1, at 109-52; VANCE, *op. cit. supra* note 1, § 29.

16. For example, a contract to sell real property gives the buyer equitable title to the property. At common law and under the Uniform Sales Act a contract to sell goods, unless it is sufficient to give legal title, ordinarily would not give the buyer a property interest in the goods.

Contracts to sell real estate not identified at the time the contract is made would be most unusual. However, contracts to sell unidentified goods are common.

17. UNIFORM COMMERCIAL CODE § 2-501 [hereinafter cited as U.C.C.]. As of March 6, 1964, the Code had been adopted by the following thirty jurisdictions: Alaska, Arkansas, California, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, West Virginia, Wisconsin, Wyoming.

18. U.C.C. § 2-501(2).

19. U.C.C. § 2-501(1).

20. U.C.C. § 2-501(3). This subsection was not placed in the 1952 draft of the code. It was placed in all subsequent drafts, evidently, to meet the criticism of the New York Law Revision Commission. See 1 REPORT OF THE LAW REVISION COMMISSION FOR 1955: *Study of the Uniform Commercial Code, Article 2,* N. Y. Leg. Doc. 65(e), at 335 (1955).

who bears the loss if there is casualty to the property.[21] Under the Code this is not necessarily true. In fact, title and risk of loss are expressly divorced.[22] It is not clear, therefore, why the drafters did not specifically recognize insurable interest based on risk of loss. Analysis of the provisions of the Code reveals that while in some situations title and risk of loss pass to the buyer at the same time, in other situations they do not. Risk of loss usually is borne by the seller as long as he is in possession of the goods, even though title may already have passed.

Under the Code title passes from the seller to the buyer when the parties agree that it shall pass,[23] except that title to goods cannot pass before they have been identified to the contract.[24] The question of when risk of loss passes is also subject to an agreement between the parties.[25] If they agree on the matter, their intention will control. In cases in which the parties have not otherwise explicitly agreed the Code sets out detailed rules by which to determine when title passes.[26] Similar rules are set out to determine who bears the risk of loss.[27] It must be emphasized again, however, that the two problems are dealt with separately in the Code. Several short factual situations will serve to illustrate the operation of these rules as they relate to the seller's insurable interest in the goods.

Case 1. Under the contract the seller is to ship the goods to the buyer but is not required to deliver them at destination. Here neither title nor risk of loss passes to the buyer until the goods are shipped and the seller has an insurable interest, at least, until that time.[28]

Case 2. The contract not only requires the seller to ship the goods but also obligates him to deliver them at destination. Here title and risk of loss do not pass until the goods are tendered by the seller at their destination.[29] Therefore, he retains an insurable interest at least until that time.

Case 3. The contract calls for delivery of documents of title without moving the goods. Title passes when these documents are delivered, regardless of whether the documents are negotiable.[30] Risk

21. See generally, VOLD, SALES § 38 & n.1 (2d ed. 1959).
22. U.C.C. § 2-509, comment 1. Section 2-401 deals with passing of title and §§ 2-509 and 2-510 deal with risk of loss.
23. U.C.C. § 2-401(2) and (3).
24. U.C.C. § 2-401(1).
25. U.C.C. § 2-509(4), comment 5.
26. U.C.C. § 2-401. The drafters provide that the provisions of this section shall apply "unless otherwise explicitly agreed." Under § 18 of the Uniform Sales Act the implied intent of the parties may be used to vary the effect of the rules in § 19.
27. U.C.C. § 2-509.
28. U.C.C. §§ 2-401(2)(a), 2-509(1)(a).
29. U.C.C. §§ 2-401(1)(b), 2-509(1)(b).
30. U.C.C. § 2-401(3)(a).

of loss in this case requires further elaboration. If the goods are in possession of a bailee and delivery is to be made by the delivery of a negotiable document of title, risk of loss passes to the buyer as soon as he receives this document.[31] On the other hand, if delivery is made by means of a non-negotiable document of title, risk of loss remains on the seller even after the buyer receives the document and until the buyer has had a reasonable time to obtain the bailee's acknowledgment of the transfer.[32] This means that during this interim period of time the buyer has title but the seller has the risk of loss. Of course, the seller may have expressly reserved a security interest in the goods, or he may have such an interest based on his right to stop delivery;[33] otherwise, during this time the seller's insurable interest is dependent upon other rules of law in the jurisdiction.[34]

Case 4. The contract calls for delivery without moving the goods and without the delivery of documents of title. If the goods are already identified at the time the contract is made title passes at the time of contracting.[35] If the goods are not identified at the time the contract is made the Code does not state specifically when title passes. It implies, however, that title passes as soon as goods are marked or otherwise designated as goods to which the contract refers.[36] The time when risk of loss passes in this situation requires further comment. If the seller is a merchant and the goods are in his possession risk of loss does not pass until the buyer receives the goods.[37] Otherwise, the risk of loss passes to the buyer when delivery is tendered.[38] Thus the seller bears the risk of loss even though title has passed. If he has not expressly reserved a security interest his insurable interest would again be dependent upon other rules of law, unless he has a

31. U.C.C. § 2-509(2)(a).

32. U.C.C. § 2-509(2)(c).

33. U.C.C. § 2-705. The seller's security interest based on the right to stop delivery is discussed below.

34. U.C.C. § 2-501(3).

35. U.C.C. § 2-401(3)(b).

36. U.C.C. § 2-401, comment 2, provides: "Future goods cannot be the subject of a present sale. Before title can pass the goods must be identified in the manner set forth in Section 2-501 . . . ." Section 2-501(b) provides: "In the absence of explicit agreement identification occurs if the contract is for the sale of future goods other than those described in paragraph (c) [crops aud unborn young of animals], when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers."

37. U.C.C. § 2-509(3). Comment 3 to this section states: "The underlying theory of this rule is that a merchaut who is to make physical delivery at his own place continues meauwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession." See U.C.C. § 2-104(1) and comments for defiuition of the term "merchant."

38. U.C.C. § 2-509(3). "Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to euable him to take delivery . . . ." U.C.C. § 2-503(1).

security interest based on the right to withhold delivery.[39] If in this same fact situation the goods are in the possession of a bailee, whether the seller is a merchant or non-merchant, risk of loss does not pass to the buyer until the bailee acknowledges the buyer's right to the goods.[40] As in *Case 3* where delivery of goods in possession of a bailee is made by delivery of a non-negotiable document of title this is a situation in which the seller may have risk of loss without having either title or possession. The same discussion regarding his insurable interest is also relevant here.

All that has been said in the above cases regarding risk of loss assumes that neither party has breached the contract. The Code provides that if the seller tenders or delivers goods which are non-conforming, to the extent that the buyer has a right to reject them, risk of loss remains on the seller until either the non-conformity is corrected or the buyer accepts the goods.[41] Whether the buyer rightfully or wrongfully rejects the goods, however, title revests in the seller.[42]

An interesting problem arises when the buyer accepts non-conforming goods and then rightfully revokes the acceptance.[43] The Code provides that in such a case while title revests in the seller,[44] risk of loss is placed on the seller only to the extent that there is any deficiency in the buyer's effective insurance coverage.[45]

B. *Based on a Security Interest*

The Code gives the seller an insurable interest in the goods so long as he retains a security interest in them even though title and risk of loss have passed to the buyer.[46] A security interest gives the seller an in rem right in the goods. The effect of such an interest is to give the seller recourse against the goods in order to secure the perform-

39. U.C.C. §§ 2-702(1), 2-703(a). The security interest of the seller based on the right to withhold delivery is discussed below.

40. U.C.C. § 2-509(b). Comment 4 to this section explains that such acknowledgment completes "delivery."

41. U.C.C. § 2-510(1).

42. U.C.C. § 2-401(4).

43. Care should be taken to distinguish revocation of acceptance from rejection. Rejection is simply refusal to accept the goods. Under the Code revocation is roughly analagous to rescission at common law. It is a means of avoiding the sale and revesting title in the seller despite acceptance of the goods, and gives the buyer the same rights as if he had originally rejected the goods. See U.C.C. §§ 2-601, -602, -606, and -608.

44. U.C.C. § 2-401(4).

45. U.C.C. § 2-510(2). To balance this provision § 2-510(3) provides: "Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time."

46. U.C.C. § 2-501(2).

ance of one or more of the buyer's duties, usually payment of the purchase price. Casualty to the goods could seriously impair not only his ability to collect the price but also the marketability of his chose in action.

1. *Security Interest by Reservation.*—The most common method for the creation of a security interest is for the seller to reserve title to the goods even though they have already been delivered to the buyer. The Code provides that retention of title under such circumstances is limited in effect to a reservation of a security interest.[47] Retention of title is usually accomplished by making the sale under a conditional sales contract or some similar legal device.

A seller may also reserve a security interest under a bill of lading. For example, it is provided in the Code that every shipment of identified goods by the seller under a negotiable bill of lading reserves a security interest in him whether the bill of lading calls for delivery to the order of the seller, the buyer, or some other party.[48] The seller has a security interest in such a case even though title may have passed to the buyer.[49] The reason for the existence of a security interest here is that so long as the seller retains control of the bill of lading he retains control of the goods. The carrier is not required to surrender the goods except to the holder of the bill of lading who must surrender the bill for cancellation or notation (in case of partial deliveries).[50] In fact, delivery to one who is not the holder could render the carrier liable to an injured party.[51] The seller by naming himself, or his nominee, as consignee may also reserve a security interest in identified goods if they are shipped under a non-negotiable bill of lading.[52] If, however, the buyer is named as consignee in such a document, the seller does not after shipment retain a security interest under the bill of lading, except in the case of a conditional delivery under section 2-507(2), even though he retains possession of the bill.[53] This is because a carrier is obligated under a non-negotiable bill of lading to deliver the goods to the named consignee who properly identifies himself, even though the bill of lading is not presented.[54]

The Code makes it clear that any reservation of a security interest by the seller by the form of the bill of lading is not rendered invalid by the sole fact that it may constitute a breach of contract.[55]

47. U.C.C. § 2-401(1).
48. U.C.C. § 2-505(1)(a) and comment 2.
49. U.C.C. § 2-505, comment 1.
50. U.C.C. § 7-403.
51. U.C.C. § 7-403 and comments.
52. U.C.C. § 2-505(1)(b) and comment 3.
53. U.C.C. § 2-505(1)(b) and comment 4.
54. U.C.C. § 2-505, comment 4.
55. U.C.C. § 2-505(2).

Special problems arise in those cases in which the contract provides that payment is to be made upon delivery of the goods or documents of title, but the seller gives the buyer possession of the goods without either receiving payment or expressly reserving title. It has been held that despite delivery of possession if the cash on delivery term has not been waived, the seller may repossess the goods provided the buyer does not pay for them.[56] It has been held that delivery of possession alone in expectation of immediate payment is not of itself a waiver of the condition.[57] What constitutes a waiver in doubtful cases has been held to be a question of fact to be determined from all of the circumstances.[58]

The Code deals with this special problem by stating: "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due."[59] The Code indicates that if the delivery is conditional under this section the seller has a security interest in the goods until the purchase price is paid.[60] Evidently, the right of the seller to repossess the goods, and hence a security interest in them, is dependent upon his "demanding payment upon delivery." Do the drafters mean an "express" demand? If not, it could be argued that in every case of this sort there is at least an implied demand for payment unless the term is waived.

2. *Security Interest by Operation of Law.*—Even in the absence of the reservation of a security interest such an interest may arise by operation of law in the course of a sales transaction.[61] The provisions of the Code give very little assistance in determining when the seller has a security interest by operation of law. The definition given the term "security interest" is of little assistance.[62] The most enlightening language in this connection is found in a comment to a section in article 9.[63] This comment recognizes that whether or not the seller

56. For a collection of cases see 2 WILLISTON, SALES § 343 n.17 (rev. ed. 1948). Such transactions are commonly called "cash sales."

57. For a collection of cases see VOLD, *op. cit. supra* note 21, § 29 nn.85-94.

58. See, *e.g.*, U.S. v. Lutz, 142 F.2d 985 (3d Cir. 1944); Lehmann v. Peoples Furniture Co., 42 Okla. 761, 142 Pac. 986 (1914).

59. U.C.C. § 2-507(2).

60. U.C.C. § 2-504(1)(b) and comment 4.

61. "Security is an interest in chattels, in land, or in the obligation of a third party. A security interest must be the result of a transaction that gives recourse against a particular chattel or land or against a third party on an obligation. The purpose of security is generally to secure the repayment of money, but it may also secure the performance of any duty." RESTATEMENT, SECURITY, scope note (1941).

A security interest which arises by operation of law is one created by a rule of statutory or common law because of the status of the parties, and is not dependent for its existence upon the consent of the parties. See U.C.C. § 9-102 and comment 1.

62. "'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation." U.C.C. § 1-102(37).

63. U.C.C. § 9-113, comment 1.

reserves a security interest his right of stoppage and resale give him rights in the goods "similar to those of a secured party." It seems fairly clear from what the drafters have said and mainly from what they have not said that they have not intended to abrogate any of the common law rules as to when a seller has a security interest in goods even though he has not reserved such an interest.

It is recognized at common law that the seller's possessory lien and his right to stop goods in transit give him a security interest in them.[64] These same two rights are recognized, adopted and expanded under the Code.

(a) *Seller's Right to Withhold Possession.*—Section 2-702(1) allows the seller to refuse to deliver the goods upon discovery of the buyer's insolvency, except for cash. This provision in effect allows the seller to cancel any credit terms if the buyer becomes insolvent before the goods are delivered.[65] Another section gives the seller the right to withhold possession if the buyer wrongfully refuses to pay for the goods or otherwise breaches the contract.[66] This latter section would include the situation in which the seller cancels a credit term upon the buyer's insolvency while the purchase price remains unpaid.[67]

(b) *Seller's Right of Stoppage.*—Section 2-705 of the Code allows a seller who has not been paid all of the purchase price to stop delivery of goods in the possession of a carrier or other bailee when he discovers that the buyer is insolvent. This same section also allows the seller to stop delivery of carload, truckload, planeload or larger shipments of express or freight in the possession of a carrier or other bailee if the buyer repudiates or fails to make a payment or in any other way breaches the contract in such a way as to have justified the seller in withholding possession under the circumstances discussed above. The right of the seller to stop delivery under this section continues until any one of the following occurs:

64. See, *e.g.*, *In re* Charles T. Stork & Co., 271 Fed. 279 (2d Cir. 1921); McElwee v. Metropolitan Lumber Co., 69 Fed. 302 (6th Cir. 1895); Memphis & L.R.R. v. Freed, 38 Ark. 614 (1862); Perrine v. Barnard, 142 Ind. 448, 41 N.E. 820 (1896); Johnson v. Eveleth, 93 Me. 306, 45 Atl. 35 (1899); Arnold v. Delanco, 58 Mass. (4 Cush.) 33 (1849); Rowley v. Bigelow, 29 Mass. (12 Pick.) 307 (1832); Burke v. Dunn, 117 Mich. 430, 75 N.W. 931 (1898); Conrad v. Fisber, 37 Mo. App. 352 (1889); Bohn Mfg. Co. v. Hynes, 83 Wis. 388, 53 N.W. 684 (1892); RESTATEMENT, SECURITY § 61 (1941).

The Uniform Sales Act adopts the common law rules regarding the seller's possessory lien and his right to stop goods in transit. Uniform Sales Act §§ 53-59.

65. This is also the rule at common law. See, *e.g.*, McElwee v. Metropolitan Lumber Co., *supra* note 64; Crummey v. Raudenbush, 55 Minn. 426, 56 N.W. 1113 (1893).

66. U.C.C. § 2-703(a).

67. This is because cancellation of the credit term would make the price due immediately. Section 2-703(a) allows the seller to withhold delivery of goods if the buyer fails to make a payment due on or before delivery.

(1) The goods are received by the buyer.[68]

(2) Acknowledgment to the buyer by any bailee other than a carrier that the goods are being held for the buyer.[69]

(3) Acknowledgment by a carrier to the buyer, either by reshipment or acting as a warehouseman, that the goods are being held for the buyer.[70]

(4) A negotiable document of title covering the goods is negotiated to the buyer.[71]

Until one of these events occurs the seller has a security interest and, therefore, an insurable interest in the goods.

(c) *Seller's Right of Reclamation.*—Even though the goods have been delivered to the buyer without the reservation of a security interest, the Code allows the seller to reclaim the goods from a buyer who has received them on credit while insolvent, provided the seller demands their return within ten days after the buyer receives them.[72] This ten day limitation does not apply, however, if the buyer has made a misrepresentation of solvency in writing to the seller within three months before delivery is made.[73] The basis of the ten day rule is that receipt of goods on credit by an insolvent buyer is a misrepresentation of solvency and therefore a fraud on the seller.[74]

A question can be raised as to whether this right of reclamation of itself gives a seller who delivers goods on credit a security interest in the goods for at least ten days after they have been received by the buyer against the possibility that the buyer was insolvent when he received the goods. The Code gives no specific answer to this question.

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68. U.C.C. § 2-705(2)(a).

69. U.C.C. § 2-705(2)(b).

70. U.C.C. § 2-705(2)(c).

71. U.C.C. § 2-705(2)(d).

72. U.C.C. § 2-702(2).

73. *Ibid.*

74. U.C.C. § 2-702, comment 2.

This section evidently attempts to resolve a problem which has caused difficulty at common law. It seems clear that if a buyer receives goods with no intention of paying for them, the transaction is fraudulent and may be rescinded by the seller. See, *e.g.*, Maxwell v. Brown Shoe Co., 114 Ala. 304, 21 So. 1009 (1896); Nashville Grain & Feed Co. v. American Co-op Ass'n, 203 Ky. 458, 262 S.W. 634 (1924). A difficult problem is presented when a buyer receives goods under a transaction of sale, knowing himself to be insolveut and knowing that the seller is ignorant of this fact. Is the buyer's conduct fraudulent? Some courts have held that if the buyer knows his situation to be desperate his conduct indicates an intention not to pay, and the seller may rescind on the basis of fraud. See, *e.g.*, California Conserving Co. v. D'Avanzo, 62 F.2d 528 (2d Cir. 1933). Other courts have held, however, that mere failure of the buyer to disclose his "technically" insolvent condition does not of itself constitute fraud. See, *e.g.*, Rochford v. New York Fruit Auction Corp., 116 F.2d 584 (2d Cir. 1940).

Several provisions in article 9 indicate, however, that it does not.[75] The question of whether the seller *should* have an insurable interest based solely on the fact that the purchase price has not been paid is discussed below.

C. *Should an Unsecured Seller Have an Insurable Interest?*

The question of whether a seller who has not been paid the entire purchase price should have an insurable interest in goods delivered to the buyer although he has not reserved a security interest is encompassed in the broader question of whether an unsecured creditor should have an insurable interest in his debtor's property. As some writers have pointed out, the destruction of the debtor's property, especially his stock in trade, machinery and equipment, will adversely affect his earning capacity and his ability to pay his debts.[76] In addition, destruction of any of his property, especially that on which he has no insurance, reduces the assets available to be levied on if the creditor reduces his claim to judgment. These same things hold true regarding goods delivered to a buyer under a sales contract.

Case law as to whether an unsecured creditor has an insurable interest in his debtor's property is not settled.[77] There is little authority on the more specific question of an unsecured seller's insurable interest in goods sold and delivered under a sales contract.[78] The Uniform Commercial Code does not deal specifically with the problem. Instead the question is left up to other rules of law in the jurisdiction.[79]

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75. Section 9-102(2) and comment 1 indicate that except as provided in § 9-310, article 9 applies only to consensual security interests. Section 9-113(a) provides that a security interest arising solely under article 2 is subject to the provisions of article 9 except that no security agreement is necessary to make the security interest enforceable *"so long as the debtor does not have or does not lawfully obtain possession of the goods."* (Emphasis added.) Comment 3 to § 9-113 states in part: "A secured party who wishes to retain a security interest after the debtor lawfully obtains possession must comply fully with all the provisions of this article . . . ."

The provisions seem to indicate that the seller's right of reclamation alone does not give him a security interest. Rather, as the buyer is in possession, the existence of a security interest is dependent upon an agreement between the parties that the seller has retained such an interest.

76. See Patterson & McIntyre, *Unsecured Creditor's Insurance*, 31 COLUM. L. REV. 212, 214-16 (1931).

77. See Harnett & Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept*, 48 COLUM. L. REV. 1162, 1169 (1948) and cases cited therein; Patterson & McIntyre, *supra* note 76, at 218-19 and cases cited therein.

78. One of the few cases in which this problem was considered is Perryman Burns Coal Co. v. Northwestern Fire & Marine Ins. Co., 130 Misc. 396, 223 N.Y.S. 559 (1927). In that case the seller was to deliver coal to the buyer by loading it on barges belonging to the buyer. The court held that title and risk of loss passed to the buyer after delivery; therefore, the seller had no further interest in or duty with respect to the coal and no insurable interest.

79. U.C.C. § 2-501 (3).

There seems to be little reason why it should not be recognized that the seller has an insurable interest in the goods under these circumstances. An argument basing such an interest on the property right concept discussed above can be advanced. There are many circumstances under which it is recognized that a buyer gets only a voidable title as the result of a sales transaction. In such a case, assuming the goods have not been resold to an innocent party, the seller may rescind the sale and recover the property.[80] In short, in every sales contract there is the possibility that even though the goods have been delivered to the buyer without reservation of a security interest the seller will be able to regain possession of them in case the buyer's title is voidable. It would not be stretching matters too much for the courts to recognize this potential right to recover the goods as giving the seller at least a limited property right in them.[81]

Perhaps a better argument for an insurable interest could be based on the contract right to the purchase price. While in some cases in which a contract right has been held to be the basis for an insurable interest in property the performances were dependent upon the continued existence of the property,[82] there are cases recognizing the interest of the insured even though his contract rights would not have been extinguished by the destruction of the insured property.[83] The unpaid seller's contract right to the price might be impaired by casualty to the goods. As was mentioned earlier, destruction of the property, especially if it were not insured by the buyer, would reduce the value of assets available for levy in case the claim was reduced to judgment, and would also reduce the saleability of the claim.

Clearly and for the same reasons an insurable interest could be found to exist on the broad basis that destruction of the property might result in economic disadvantage to the insured seller, or, stated positively, the continued existence of the property would be economically advantageous to the seller.

III. The Buyer's Insurable Interest

A. *Identified Goods*

The Code specifically gives the buyer an insurable interest in goods which are identified to the contract.[84] No other requirement for such

80. See Williston, Sales §§ 10, 28, 40, 73, 273, 623 (rev. ed. 1948).

81. *Cf.* U.C.C. § 2-501(1).

82. For example in Graham v. Ins. Co. 48 S.C. 195, 26 S.E. 323 (1897), a superintendent was held to have an insurable interest in a factory in which he was to be employed under a long term coutract. It would seem that his right to employment was contingent upon the continued existence of the factory. See also cases cited in note 10 *supra.*

83. See National Filtering Oil Co. v. Citizens Ins. Co., 106 N.Y. 535, 13 N.E. 337 (1887). See generally Patterson, Insurance 115-16 (2d ed. 1957).

84. U.C.C. § 2-501(1).

an interest exists. It is not necessary, for example, that the buyer have title, risk of loss, or any other interest in the property. This insurable interest exists even though the goods identified to the contract may be non-conforming so as to justify the buyer in returning or rejecting them.[85]

Identification is the process by which goods are particularized or designated as the goods to which the contract refers.[86] The parties may agree when identification is to take place.[87] However, as in the case of passage of title and risk of loss, the Code contains specific rules to determine when identification occurs if the parties have not "explicitly" agreed otherwise.[88] Therefore, what is said below regarding the problem of identification assumes that there is no contrary agreement between the parties.

If the contract is for specific goods, identification occurs as soon as the contract is made.[89] For example, if Buyer and Seller contract to buy and sell an original Van Gogh, identification occurs as soon as the contract is made, and the buyer has an insurable interest at that time.

As a general rule, if the contract is for the sale of future goods identification occurs as soon as goods are in some way designated or particularized by the seller as the goods to which the contract refers. This particularization may be by shipment, marking or any other action sufficient to show that these are the goods to which the contract refers.[90] For example, Seller contracts to sell Buyer one thousand bushels of a described grade of wheat in sacks. A short time later Seller sacks one thousand bushels of the described grade of wheat. The wheat is segregated in Seller's warehouse and tagged with Buyer's name and address. No doubt this would constitute an identification and Buyer would have an insurable interest as soon as the wheat is segregated and tagged. This would be true even though the wheat sacked is defective or otherwise does not conform with the terms of the contract.[91]

Special problems regarding identification are presented when the parties contract to buy and sell growing crops or the unborn young of animals. To cover these problems the drafters of the Code have in-

85. *Ibid.*

86. The code does not specifically define the term "identified;" however, throughout article 2 it is used to describe the process stated in the text.

87. U.C.C. § 2-501(1).

88. *Ibid.*

89. U.C.C. § 2-501(1)(a).

90. U.C.C. § 2-501(1)(b). Future goods are described under the Code as "goods which are not both existing and identified." U.C.C. § 2-105(2).

91. U.C.C. § 2-501(1).

cluded a special provision.[92] If the parties agree to buy and sell growing crops, identification occurs as soon as the crop is planted, provided it is to be harvested within twelve months or the next normal harvest season after contracting, whichever is longer.[93] Following are several cases intended to illustrate the operation of this provision.

Case 1. On January 30, 1962, Seller contracts to sell Buyer all the corn to be raised on a certain tract of land. Identification occurs when the corn is planted on May 4, 1962, for the corn normally would be harvested in the fall of 1962.

Case 2. The contract is made on January 30, 1962, for the sale of corn to be raised on a certain tract during the 1963 season. Identification would not occur under the provisions of the Code when the corn is planted in the spring of 1963. This is because the corn is not to be harvested within twelve months or the next normal harvest season after the contract is made.

Case 3. A field of corn is planted in May, 1962, and on June 10, 1962, Seller contracts to sell all of the corn harvested from the field in the fall at a stated price per bushel. Identification occurs as soon as the contract is made.

Case 4. On February 4, 1963, Seller, a wholesale nurseryman, contracts to sell Buyer, a retail nurseryman, one hundred Norway maples for delivery in March, 1965. The maples are planted in April, 1963. Identification occurs when the maples are planted if it would normally take Norway maples at least two years to attain the growth necessary for sale in retail trade.

In the case of contracts for the sale of the unborn young of animals identification takes place as soon as the young are conceived, provided birth will take place within twelve months after the contract is made.[94] Suppose for example, on July 2, 1962, Seller contracts to sell Buyer the first foal to be born of a certain mare. The mare is bred a few days later. Identification occurs at conception. The gestation period for horses is eleven months, therefore, the foal would be born within twelve months after the contract is made. If the mare had not been bred until sometime in November, identification would not occur at conception. The foal would not be born within twelve months after the contract is made.

B. *Analysis of Insurable Interest Based on Identification*

As was mentioned earlier, identification of goods to the contract gives the buyer an insurable interest even though he does not have title or risk of loss. Identification under the Code gives the buyer a

92. U.C.C. § 2-501(1)(c).
93. *Ibid.*
94. *Ibid.*

special property in the goods.[95] Traditionally the right of the buyer to get possession of goods wrongfully withheld from him by the seller is dependent upon showing either that title has passed[96] or that the goods are unique so that the legal remedy for damages would be inadequate.[97] The right to recover the goods on the basis of title is based on the theory that one who has title as owner, has a right to possession unless he has given up this right by contract or otherwise. So far as the buyer of goods is concerned article two of the Code departs from this theory. The right of the buyer to replevy identified goods in no way depends upon whether he has title. Instead, his right to get possession of the goods usually is dependent upon his inability to effect cover.[98] If he can effect cover he is not entitled to the goods even though title has passed; if he cannot effect cover he is entitled property interest in the goods in that subsequent inability to effect to replevy goods identified to the contract even though title has not passed. Thus under the Code identification gives the buyer a special cover in case the seller wrongfully withholds possession entitles him to maintain an action in replevin for possession.

This insurable interest seems to be based primarily on the property right concept, but it could also be based on either the contract right or economic disadvantage concept.

C. *The Buyer's Insurable Interest in Unidentified Goods*

The Code does not specifically give the buyer an insurable interest in unidentified goods. Rather, this question is left up to other rules of

95. U.C.C. § 2-501(1).

96. See, *e.g.*, Capitol Lumber Co. v. Mullinix, 208 Ala. 266, 94 So. 88 (1922); Deutsch v. Dunham & Nelson, 72 Ark. 141, 78 S.W. 767 (1904); Rudin v. King-Richardson Co., 311 Ill. 513, 143 N.E. 198 (1924); Wright v. Frank A. Andrews Co., 212 Mass. 186, 98 N.E. 798 (1912); Chellis v. Grimes, 72 N.H. 104, 54 Atl. 943 (1903); Shaddon v. Knott, 32 Tenn. 358 (1852).

"Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld." UNIFORM SALES ACT § 66. "Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for non-delivery." UNIFORM SALES ACT § 67(1).

97. For a collection of cases allowing speeific performance of contracts for the sale of goods see 3 WILLISTON, SALES § 602, at 328 nn.14-18, at 329 nn.1-3 (rev. ed. 1948).

98. U.C.C. § 2-716(3). This same section also gives him the right to replevy goods shipped under reservation when satisfaction of the security interest in them has been made or tendered.

Section 2-502 articulates a third eircumstance under which the buyer may obtain the goods. It provides that the buyer may recover goods identified to the contract by paying or tendering payment of the unpaid portion of the purchase price if the seller becomes insolvent within ten days after he receives the first installment of the purchase price.

"Cover" means obtaining goods or contracting to obtain goods either identical with those involved in the contract breached by the seller, or goods sufficiently similar to them to be commercially usable as reasonable substitutes. See U.C.C. § 2-712(1) and comment 2.

law in the jurisdiction.[99] While there is no authority on the question, it is doubtful whether any jurisdiction, in the absence of statute, would recognize such an interest.[100]

While there are no cases on the point it seems basic that one cannot have an insurable interest in goods not yet in existence. It is well recognized, however, that one can effect a contract of insurance to cover property once it does come into existence.[101] It is not improbable that in some situations in which he contracts to purchase goods to be manufactured or procured from others by the seller, the buyer may wish to procure insurance to cover possible casualty to the goods once they come into existence but before they are identified to the contract.

While it is true that in most instances casualty to the goods before they have been identified to the contract would not excuse the seller from his obligations,[102] damages, even if collectable, might be totally inadequate to compensate the buyer for his possible losses. This would be especially true in output and requirement contracts where the buyer's entire operation is dependent upon the proper supply of goods from the seller, or in those situations in which the buyer has made commitments for the resale of the goods to others.

There seems to be no reason why the buyer should not have an insurable interest in such cases. There certainly would be no possibility of a wager; instead a definite risk of loss exists which the buyer should be allowed to shift to the insurer.[103]

This conclusion is strengthened by the provisions of the Code dealing with the buyer's right to specific performance of a sales contract.[104]

99. U.C.C. § 2-501(3).

100. See 1 REPORT OF THE LAW REVISION COMMISSION FOR 1955: *Study of The Uniform Commercial Code, Article 2*, N.Y. Leg. Doc. 65(c) at 129-30 (1955).

A number of states have enacted statutes defining insurable interest in very broad terms. The wording of the New York statute is typical: "The term 'insurable interest,' as used in this section, shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage." N.Y. INS. LAW § 148. See PATTERSON, CASES ON INSURANCE 123-24 (3d ed. 1955), for a list of states with similar statutes. The New York Law Revision Commission expressed the opinion that the language of the New York statute is broad enough to give a buyer an insurable interest in unidentified goods. See 1 REPORT OF THE LAW REVISION COMMISSION FOR 1955: *Study of The Uniform Commercial Code, Article 2, op. cit. supra*, at 129-30.

101. See VANCE, INSURANCE 176-79 (3d ed. 1951) and authorities cited.

102. U.C.C. §§ 2-613 and 2-615 provide for the situations under which casualty to goods will excuse the seller from performance.

103. U.C.C. § 2-716(1) and comments 1 and 2.

104. "Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting." U.C.C. § 2-716, comment 2.

During the post World War II period when new and used automobiles were in extremely short supply, a number of cases were decided denying the buyer the right to specific performance in contracts for the sale of automobiles. In some of these cases the court relied upon the language of the Sales Act as a basis for refusing specific performance. Section 68 of the Sales Act provides: "Where the seller has broken a contract to deliver *specific or ascertained goods*, a court having the powers of a court of equity

These provisions make it clear that this remedy is no longer limited to contracts for specific goods.[105] Evidently, the buyer under the proper circumstances may get specific performance of a contract for goods not yet identified to the contract. More importantly, so far as the present problem is concerned, the concept of uniqueness has been changed.[106] The traditional concept of what constitutes unique goods has been limited to such things as original works of art, rare manuscripts, and family heirlooms. The Code repudiates this limited test of uniqueness, and, in fact, suggests that "output and requirement contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation . . . ."[107] Even under this expanded concept of uniqueness it is made clear that specific performance is not limited to situations where the goods are unique.[108] In particular, the inability to purchase similar goods elsewhere if the seller breaches evidently entitles the buyer to specific performance even though no goods have been identified to the contract at the time the breach occurred.

In view of these very broad and liberal provisions it seems especially fitting that it should be recognized that the buyer has an insurable interest in existing goods demonstrably intended for the particular contract even though they have not yet been identified to the contract, or, in the case of goods to be manufactured, even though they have not been finished.[109]

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may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just." (Emphasis added.)

In a typical case in which the court denied specific performance under this section of the Sales Act the parties had contracted for the sale of "one new car . . . make Plymouth Type Sedan year 1946 color open." In the opinion the court stated: "The language (Section 68) which is a codification of the common law . . . clearly implies that the remedy of specific performance is available to the buyer of personal property only when the goods are specific or ascertained . . . ." Cohen v. Rosenstock, 188 Misc. 426, 427, 65 N.Y.S.2d 481, 482 (Sup. Ct. 1946). Evidently, it is this sort of decision which the drafters of the code seek to avoid.

In similar fact situations other courts have granted specific performance. See DeMoss v. Conort Motor Sales, 149 Ohio St. 299, 72 N.E.2d 158, *aff'd*, 78 N.E.2d 675 (1948).

105. U.C.C. § 2-716, comment 2.

106. U.C.C. § 2-716, comment 2.

107. *Ibid.*

108. U.C.C. § 2-716(1) and comment 2. Comment 2 states in part: "However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted 'in other proper circumstances' *and inability to cover is strong evidence of 'other proper circumstances.'*" (Emphasis added.)

109. It is well recognized that expected profits in a venture may be insured. See PATTERSON, *op. cit. supra* note 83, at 135-37 and cases cited. In most cases in which the buyer insured against loss of profits in a sales transaction, it appears likely that be also had an insurable interest in the goods.

IV. Conclusions

A. *The Seller's Insurable Interest*

The provisions of the Code regarding the seller's insurable interest add nothing to prior law. Case law already recognizes that the seller has an insurable interest in goods to which he has title or in which he has a security interest. Divorce of risk of loss from title provides several possible situations in which the seller does not have title but does bear the risk of loss. In some of the situations he would still have possession, which would under many circumstances give him a security interest by virtue of his possessory lien. In others, however, he could have risk of loss, but neither title nor a security interest. In this latter type situation any insurable interest is dependent upon rules of law other than those found in the Code. While a court certainly should find an insurable interest on the basis of risk of loss alone, existing law is tied to the general concept that risk of loss generally follows title, and would be doubtful authority for the proposition that risk of loss alone gives the seller an insurable interest.

In still other situations in which both title and risk of loss have passed to the buyer, the seller might still be in possession of the goods, but if the buyer has performed all of his obligations under the contract, there would be no security interest in the seller. Again, the extent of the seller's insurable interest must be determined by other rules of law. In such a case he is holding the goods as bailee for the buyer, and even though risk of loss has passed is under a duty to exercise a certain standard of care in the custody of the goods. Insurable interest could easily be based on his potential legal liability to the buyer. Under the Code, however, it is not clear whether in such a case the seller holds the goods as bailee for the buyer. The buyer's right to possession is qualified; if the seller withholds the goods the buyer must show that he cannot effect cover in order to replevy them. Does this mean that there is no bailee-bailor relationship until it can be shown that cover cannot be effected, or is there a bailee-bailor relationship subject to dissolution if the buyer is able to cover? The Code does not give an answer. In any case, possession alone *should* give the seller an insurable interest. If the buyer cannot get

The New York Law Revision Commission in discussing the question of the buyer's insurable interest in unidentified goods concluded: "However, it would be possible to argue that insurance of the foregoing interests relate only to 'contracts' and the Code's rules on the insurability of 'goods' are wholly inapplicable. This interpretation would be consistent with the probable intent of the Code to liberalize rather than to restrict the area of insurability. It is less than certain, however, that this contention would be accepted; in any event, litigation would probably be necessary to fix the scope of the Code provision." 1 Report of the Law Revision Commission for 1955: *Study of The Uniform Commercial Code, Article 2, op. cit. supra* note 100, at 130.

possession the seller is for all practical purposes the owner. If the buyer would be entitled to possession there is potential legal liability by the seller if the goods are damaged because of his failure to exercise the proper degree of care regarding them. Also he would be entitled to possession as against any one except the buyer and this alone should provide sufficient basis for an insurable interest.

The point is, however, that insurable interest in such cases is left by the Code to other rules of law. Why leave these questions open, especially when some traditional concepts upon which insurable interest has been held to depend have themselves been changed by the Code? The drafters could have removed all doubt by recognizing expressly that the seller has an insurable interest so long as he has title, risk of loss, a security interest, or possession.

It is not known whether the drafters considered the problem of the unsecured seller's insurable interest in goods delivered to the buyer on which the full purchase price has not been paid. As this is really a part of a larger problem of the creditor's insurable interest in his debtor's property, perhaps it is sounder to have the solution to this problem depend upon the general law of the jurisdiction.

B. *The Buyer's Insurable Interest*

The provision giving the buyer an insurable interest as soon as the goods are identified is in line with the policy of divorcing the buyer's right to replevy identified goods from passage of title. Identification creates a special property in the buyer and certainly, therefore, should give him an insurable interest.

The drafters did not see fit to deal with the question of the buyer's insurable interest in existing but unidentified goods. In most jurisdictions other rules of law would probably not sustain such an interest. For the reasons indicated above such an interest should have been recognized.