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I. THE ATTEMPT TO REVISE ARTICLE TWO

I can easily summarize the modern attempt to revise Article 2 of the Uniform Commercial Code ("UCC"):

In an attempt to lessen the legal burdens on the sellers of mass-produced goods, the proposed amendments to Article 2 of the Uniform Commercial Code (UCC) set out a single statutory standard for the responsibility of sellers that direct advertisements to the ultimate buyer of the goods. Generally consistent with the existing case law, the new rule eliminated the problems sellers had in dealing with the differences in this area among the various state laws. The provision was manufacturer friendly. How did the manufacturing industry react to this helpful amendment? They opposed it.[1]

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1. Henry Gabriel, *Uniform Commercial Code Article Two Revisions: the View of the Trenches*, 23 BARRY L. REV. 129, 129 (2018) (citing Nat'l Assn. of Mfrs., Industry Concerns About Final Article 2 Revisions (2005) (on file with author)).

The reason articulated by the National Association of Manufacturers was that:

The new rule is a major change that conflicts with the direction of most recent court and legislative action. It creates liability for public communications, even though the communication was not a part of the agreement and even if it did not cause personal injury. The rule may be unconstitutional under the First Amendment. In any event, this is a contract statute and should deal with contracts. This rule is a huge step backward that invites class action litigation and is outside the domain of a commercial contract law. Id.

It may be that some did not fully appreciate the limited and clarifying purpose of this section. It is well explained in a report of the UCC Committee of the California State Bar which wrote a detailed response to the memo from the National Association of Manufacturers:

A majority of state courts that have ruled on the issue have held that statements contained in brochures, catalogs and other advertisements could create a basis for an express warranty under [e]xisting UCC [s]ection 2-313. Many states have also held that privity is not required in order for an express warranty to be asserted. Furthermore, largely, the absence of privity is either effectively conceded, or not raised, in such litigation. To the extent a state has adopted these rules, [a]mended UCC [section] 2-313B codifies these rules, and does not create any new liability (indeed, it might even serve in some jurisdictions to limit liability that might exist by virtue of prior court decisions). In a state which has not adopted these rules, [a]mended UCC [section] 2-313B may create a new potential liability for sellers in that state. One of the goals of the UCC is to promote commerce through a uniform set of rules governing commercial transactions in all states. This not only protects customers, but also creates a level playing field among competing sellers. Thus, when different states have different rules, it is a necessary and desirable outcome that, when a uniform rule is adopted, the rule in some states will change.

After 24 years of effort that ended with substantial organized opposition, the Uniform Law Commission ("ULC")[2] lost the will to move forward with the enactment of the revisions to Article 2, and the revisions were officially withdrawn in 2011.[3]

The proposed revisions of Article 2 of the UCC began in 1987 when the Permanent Editorial Board ("PEB") for the UCC, in conjunction with the sponsors, appointed a study group and charged it with identifying major problems of practical importance in the interpretation and application of Article 2.[4] The drafting process began in 1991 with the original drafting committee.[5] The original drafting committee was disbanded in 1999, and the second drafting committee was appointed.[6] This second drafting committee worked for four years from 1999 until 2003. The completed revisions sat unenacted anywhere, and out of an appreciation that there was no future for the revisions, the ULC and the American Law Institute ("ALI") officially withdrew the revisions in 2011.[7]

To salvage some of the work undertaken with the proposed revisions to Article 2, the PEB decided to reexamine the revisions in 2019 to see if any of the proposals might warrant PEB Commentary for future guidance to understand how Article 2 has developed over time. In this paper, I examine some of the proposed revisions and discuss how some of the proposed revisions to Article 2 might be addressed in PEB Commentary to achieve some of the clarifications the drafters had envisioned.

What, of course, needs to be decided is the proper use of PEB commentary. Certainly, it should not be used to suggest correction to every perceived misapplication of the UCC. For the commentary to be effective, it should probably be drafted sparingly. How important must an issue be to warrant the concern of the PEB to justify new commentary? This question goes to both the perceived need for the commentary as well as the question of how to allocate the limited resources available to the PEB. These are questions I cannot resolve in this article, and I will not attempt to do so. The limited scope of this Article is to articulate

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Unif. Commercial Code Comm., *Analysis by the UCC Committee of the State Bar of California Business Law Section of the NAM Industry Concerns About the UCC Article 2 Revisions* 4, 2005 STATE BAR OF CAL. BUS. L. SEC. (footnotes omitted). I will discuss below how this might be partially addressed with P.E.B commentary.

2. The official name of the organization is the National Conference of Commissioners on Uniform State Laws.

3. *Recommendation of the Permanent Editorial Board for the Uniform Commercial Code to withdraw the 2003 Amendments to UCC Articles 2 and 2A from the Official Text of the Uniform Commercial Code*, 65 Consumer Fin. L. Q. Rep. 150, 160–61 (2011). [hereinafter *Recommendation of PEB*]

4. *See generally* Preliminary Report, *PEB Study Group Uniform Commercial Code Article 2*, Permanent Editorial Bd. for the Unif. Com. Code (1990); *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (1991) (providing a concise summary of the PEB preliminary report).

5. Henry Deeb Gabriel, *The 2003 Amendments of Article Two of the Uniform Commercial Code: Eight Years or a Lifetime After Completion*, 52 S. TEX. L. REV. 487, 490 (2011).

6. *Id.* at 491.

7. *See Recommendation of PEB*, *supra* note 3, at 161. The history of the attempt to revise UCC Article 2 has been well documented by me and others; it need not be repeated here. *See, e.g.*, *Id.* at 493.

those parts of the failed revision to Article 2 of the UCC that might warrant consideration by the PEB. It is up to the PEB itself to decide whether any of these suggestions merit further consideration.

There are two distinct drafts of revised Article 2: the 1999 draft and the 2003 draft.[8] Only the latter was approved by the ULC and the ALI for adoption by the states. Although one might fruitfully mine the 1999 draft for suggestions for PEB commentary, in this Article I limit the discussion to the draft proposed 2003 revisions to Article 2. This limitation is suggested by the nature of the two drafts themselves. Unlike the proposed 1999 revision, which sought to revise all of Article 2, the 2003 amendments were much more modest. They proposed a set of discrete changes, rather than a thoroughgoing revision. The changes suggested in the 2003 draft were designed to clarify ambiguities in the existing Code; to update Article 2 considering modern commercial practices, in particular electronic commerce; and in a few places, to place in the black-letter text of what developed in the case law. These are precisely the limited types of changes that might be fruitfully clarified by PEB commentary.

During the drafting of the 2003 revisions, the "revisions" to Article 2 became the "amendments" to Article 2 because of a procedural requirement of uniform acts drafted by the ULC. A total revision of a uniform act is in effect a new uniform act, and as such, is subject to the full drafting process of a uniform act. This includes conforming the entire act to the current drafting rules of the conference. A revision of Article 2 would have entailed some change to most sections—however minimal—to conform with the current drafting rules. Amendments to existing acts do not require this. Thus, to avoid making non-substantive but stylistic changes to Article 2, the "revisions" were re-designated "amendments." The drafters made this change to avoid the criticism that the drafters were making unnecessary changes. For purposes of consistency, I will refer to the proposed changes as amendments, as this is how they are commonly known.

II. THE PEB

This Article focuses on the possible commentary by the PEB of the Uniform Commercial Code. The PEB acts under the authority of the ALI and the ULC (also known as the National Conference of Commissioners on Uniform State Laws). These two organizations jointly sponsor the UCC.

8. The proposed revisions of Article 2 of the UCC began in 1987 when the PEB for the UCC, in conjunction with the sponsors, appointed a study group and charged it with identifying major problems of practical importance in the interpretation and application of Article 2. The drafting process began in 1991 with the original drafting committee. That drafting committee was disbanded in 1999, and the second drafting committee was appointed. This second drafting committee worked for four years from 1999 until 2003. It is the draft from the second drafting committee that is discussed in this article. These revisions sat unenacted anywhere until 2011. Out of an appreciation that there was no future for the revisions, The Uniform Law Commission and the American Law Institute officially withdrew the revisions that year.

Founded by a resolution between the two organizations in March 1987, the PEB resolved to issue from time to time supplementary commentary on the UCC to be known as PEB Commentary. These PEB Commentaries are intended to further the underlying policies of the UCC by affording guidance in interpreting and resolving issues raised by the UCC and its Official Comments.

The Resolution states that:

> A PEB Commentary should come within one or more of the following specific purposes, which should be made apparent at the inception of the Commentary: (1) to resolve an ambiguity in the Uniform Commercial Code by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the Uniform Commercial Code where the statute and/or the Official Comment leaves doubt as to inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with U.C.C. § 1-102(2)(b), to apply the principles of the Uniform Commercial Code to new or changed circumstances; (5) to clarify or elaborate upon the operation of the Uniform Commercial Code as it relates to other statutes (such as the Bankruptcy Code and various federal and state consumer protection statutes) and general principles of law and equity pursuant to U.C.C.§ 1-103; or (6) to otherwise improve the operation of the Uniform Commercial Code.

As of December 2019, the PEB has issued twenty commentaries.

III. POSSIBLE PEB COMMENTARY TO CLARIFY THE APPLICATION OF ARTICLE 2

A. Scope

There were three proposed changes to the scope of Article 2. Two were uncontroversial and I suggest can easily be dealt with by clarifying commentary.

1. Relation of Article 2 with Other Law

First, there was a proposed new section that clarifies the relationship of Article 2 to other law.[9] This section copied existing UCC § 2A-104(1) and did not

9. This is contained in U.C.C. § 2-108 (amended 2003) (withdrawn 2011):

(1) A transaction subject to this article is also subject to any applicable:

(a) [list any certificate of title statutes of this State covering automobiles, trailers, mobile homes, boats, farm tractors, or the like], except with respect to the rights of a buyer in ordinary course of business under Section 2 403(2) which arise before a certificate of title covering the goods is effective in the name of any other buyer;

(b) rule of law that establishes a different rule for consumers; or

create any new substantive rules. This new provision was uncontroversial and served the function of clarifying the relationship between Article 2 and other possible applicable law. A short commentary pointing out that, as with Article 2A, Article 2 must necessarily work with other law could be useful. One objection might be that the proposed section to Article 2, and therefore PEB commentary, is unnecessary as it is already generally understood that Article 2 must work in conjunction with other law.[10] What this clarification may achieve though, is to provide guidance about the priority between these laws and Article 2 when both may be applicable.

Would this be an inappropriate attempt to create by non-binding commentary a legal result that should more appropriately be done by binding statute as it does in fact attempt to create binding and not merely suggested law? This should be a concern. If there is PEB commentary on the relationship of Article 2 and other law, I suggest that to the extent that language and intent of Article 2A is the same as Article 2, the two Articles should be interpreted similarly.

2. Foreign Exchange Transaction

A second proposal in the revisions to limit the scope of Article 2 was the express exclusion from the definition of goods for a "foreign exchange transaction."[11] This exclusion was meant to clarify what should be evident from Article

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(c) statute of this State to which the transaction is subject, such as statutes dealing with:

(i) the sale or lease of agricultural products;

(ii) the transfer of blood, blood products, human tissues, or parts;

(iii) the consignment or transfer by artists of works of art or fine prints;

(iv) distribution agreements, franchises, and other relationships through which goods are sold;

(v) the misbranding or adulteration of food products or drugs; and

(vi) dealers in particular products, such as automobiles, motorized wheelchairs, agricultural equipment, and hearing aids.

(2) Except for the rights of a buyer in ordinary course of business under subsection (1) (a), in the event of a conflict between this article and a law referred to in subsection (1), that law governs.

(3) For purposes of this article, failure to comply with a law referred to in subsection (1) has only the effect specified in that law.

(4) This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., except that nothing in this article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., except that nothing in this article modifies, limits, or supersedes Section 7001(c) of that Act or authorizes electronic delivery of any of the notices described in Section 7003(b) of that Act.

10. U.C.C. § 1-103(a)(3), (b).

11. U.C.C. § 2-103(1)(i) (amended 2005) (withdrawn 2011):

"Foreign exchange transaction" means a transaction in which one party agrees to deliver a quantity of a specified money or unit of account in consideration of the other party's agreement to deliver another quantity of different money or unit of account either currently or at a future date, and in which delivery is to be through funds transfer, book entry accounting, or other form of payment order, or other agreed means to transfer a credit balance. The term includes a transaction of this type involving multiple moneys and spot, forward, option, or other products derived from underlying moneys and any combination of these transactions. The term does not include

2 itself: the definition of "goods" does not include the transfer of an intangible such as a monetary credit. This clarification would not change the existing law and therefore could easily be provided for in PEB commentary.[12]

3. Relationship Between Article 2 and Computer Software

A third—and the most controversial—proposed change to the scope of Article 2 was the question of whether computer software was within or outside the scope of Article 2.[13] This singly was the most controversial issue in the revisions, and this issue alone may have been the most significant reason for the failure of the adoption of the revisions. There was never an agreement on this issue, and no amount of compromise was ever found. I can think of no useful PEB commentary on this issue.

It is worth noting that some of the questions raised in the discussion in the drafting of the revisions have been addressed in the American Law Institute's PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS.[14] Whether this Restatement

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a transaction involving multiple moneys in which one or both of the parties is obligated to make physical delivery, at the time of contracting or in the future, of banknotes, coins, or other form of legal tender or specie.

12. One objection to proposed PEB commentary is whether this issue is one worth bothering with. If there is too much commentary on insignificant matters, the effectiveness of the PEB commentary may well be diminished.

13. The drafting committee attempted to resolve the problem by defining computer software as "information" and then removing information from the definition of "goods". U.C.C. § 2-103(1)(k) cmt. 7 (amended 2005) (withdrawn 2011). As for pure software transactions, this at least drew a coherent bright line to exclude some transactions from Article 2; albeit, this did not satisfy those who thought the protections of Article 2 should be imported into software transactions. What the draft did not do—because we could not figure out how—was to give clear guidance for the application of Article 2 to mixed contracts, those contracts that include both goods and software. This lack of guidance appeared to please no one but the beleaguered reporter and chair of the drafting committee.

Because no compromise could be found, this question of mixed goods and information contracts was left unresolved in the revision. A major concern expressed by the software industry was that by not resolving the question in the Code, we were tacitly approving the existing case law. Largely, the cases brought software within the scope Article 2, and therefore provided software users with article 2 warranty and other protections. The software industry thought these Article 2 protections did not accurately reflect the true nature of a software agreement, and therefore the industry was not content with this result, and because of this, balk at the whole package of amendments. This, along with some other unhappy industry commentators, moved the revisions to the dustbin of statutory amendments.

14. In 2004, a year after the amendments were completed and approved, the ALI began a project called the Principles of the Law of Software Contracts. This project, completed and approved by the ALI in May 2009, sets out basic principles to govern software contracts, irrespective of whether the parties call their transaction a license, sale, lease, or something else. The Principles are designed to set out rules that transcend Article 2, UCITA, or the common law, and thereby avoid the question of which of these laws would govern. The clear intent of the Principles is to fill in the gap left by Article 2 as to when a software agreement is covered by the UCC. *See* AM. LAW INST., *Introduction to* PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (2010).

Not surprisingly, even before the Principles were promulgated, representatives of the software industry had already complained about them. One major complaint was that the standard of performance for software that the Principles created extended warranty protection beyond what was provided for under the current Article 2. In a letter to the ALI, Microsoft Corporation and the Linux Foundation note:

We have particular concerns with [section] 3.05(b), which establishes an implied warranty of no material hid-

will have a significant impact on the development of the law is yet to be seen. As the Restatement is not subject to the political process of statutory enactment as is the case with the UCC, the Restatement can succeed or fail without raising the political issues that are necessarily a part of the enactment of the UCC. This is a concern that should not be sidestepped by the PEB by assuming that the Restatement can achieve the same result as PEB commentary.

B. Shipping and Delivery Terms

The delivery terms in the UCC have never reflected commercial practice outside, and to a large extent inside, the United States. Only in the UCC, for example, does "free on board" not mean "on board."[15] In an attempt to conform Article 2 to general commercial usage, the amendments eliminated the statutory shipping terms for F.O.B., F.A.S., C.I.F., C. & F., ex-ship, and all cross-references to those terms. Also eliminated were the provisions on overseas shipment, bills of lading in a set, and a provision setting out the meaning of the "no arrival, no sale" term. As statutorily defined in the Code, it was generally recognized that these terms were outdated at best and, in some cases, inconsistent with generally accepted practices.[16]

The elimination of these terms recognized that parties did not rely on them, and often would use more current and widely recognized shipping terms such as the Incoterms.[17] The drafting committee quite sensibly did not attempt to rewrite the shipping terms in Article 2 to conform to current commercial practice, as the committee quite correctly noted that the terms used in actual practice change over time.[18] By eliminating them from the UCC altogether, Article 2 would have allowed the parties by trade usage or express choice to set out shipping terms that

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den defects that is non-disclaimable. This warranty does not reflect existing commercial law: no similar warranty appears in the Uniform Commercial Code (UCC), and no explanation is given in the commentary for treating software contracts differently from sale of goods [contracts] on this point.

The reporters of the Principle responded to this criticism by suggesting that this rule only states the existing law of contracts. Whether this is true or not will continue to be debated. What is clear, however, is that the ALI has picked up the discussion on what law governs software contracts where the amendments of Article 2 left off. The debate on the Principles is just as heated as it was with the Article 2 amendments. It has yet to be seen what effect this debate will have on the viability of the Principles. Thus far, only two cases have cited the Principles, both from the time the Principles were still being drafted, so the utility of the Principles has yet to be shown. *See*, *e.g.*, Wong v. True Beginnings, LLC., No. 3:07-CV-1244-N, 2008 WL 11348237, at *2 (N.D. Tex. Dec. 3, 2008); Conwell v. Grey Loon Outdoor Marketing Group, Inc., 906 N.E.2d 805, 811 (Ind. 2009).

15. U.C.C. § 2-319.

16. The terms are also somewhat limited in their application, as they are limited to questions of risk of loss, contract price and in some instances insurance, whereas the INCOTERMS, for example, also include the risk of having to clear customs and arrange for import and export of the goods.

17. The INCOTERMS or International Commercial Terms are commercial terms published by the International Chamber of Commerce that are widely used in contracts of carriage.

18. The INCOTERMS, for example, are rewritten and reissued every ten years.

reflect actual commercial practices and party expectations.[19]

Although the elimination of the shipping terms would have brought the Code in closer conformity with current business practices, since the Code's terms are generally superseded expressly or by trade practice, the terms' continued presence in the Code is not likely to be significant. Having said that, there may be some utility in a concise commentary noting the terms are often (if not usually) superseded expressly or by trade usage.

C. Remedial Promises

A substantive change in the law of express warranties is the inclusion of "remedial promises."[20] This addition was not intended to create any new rights,[21] but to clarify the relationship between the remedial promise and the statute of limitations.[22] As recognized by the drafters of the amendments, sellers have long made, and expect to comply with, remedial promises. The amendments were intended neither to encourage nor discourage this practice by sellers. What was intended by this addition was to provide a means to determine the limitations period for a remedial promise.[23]

To understand these proposed changes, one must appreciate that courts have long had difficulty determining the appropriate limitation period for remedial promises, in part due to the confusion of whether a remedial promise is a separate

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19. The need for shipping terms in a statute for the sale of goods has not been shown to be necessary. For example, neither the United Nations Convention on Contracts for the International Sale of Good nor the English Sale of Goods Act contain shipping terms. *See* U.N. CONF. ON CONT. FOR THE INT'L SALE OF GOODS, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 (1980); *see also* Sale of Goods Act (1979) c. 54 (U.K.).

20. A remedial promise, as defined in Amended § 2-103, is "a promise by the seller to repair or replace goods or to refund. . .upon the happening of a specified event," which distinguishes these promises about the seller's performance from promises about the performance of the goods. U.C.C. § 2-103(1)(n) (amended 2005) (withdrawn 2011).

21. Remedial promises have long been recognized in the law. *See* Magnuson Moss Warranty-Federal Trade Commission Improvements Act, 15 U.S.C. § 2301(6)(B) (2006).

22. The problem can be explained by looking at Nationwide Ins. Co. v. GMC, 625 A.2d 1172 (Pa. 1993). In this case, the majority held that the remedial promise given to the buyer by General Motors was not an independent contractual obligation to repair but was an express warranty under Article 2 of the UCC. *See id.* at 1174–75. Having determined Article 2 governed the remedial promise, the court noted the statute of limitations, as provided by § 2- 725, was four years from the time the buyer received the goods. *See id.* at 1175. Because this created the anomaly that the statute of limitations was running even though neither the need to remedy the defect nor the failure to remedy the defect had occurred, the court read the language of the promise to include a promise of future performance, thereby extending the limitation period. *See id.* As pointed out by the defendant, General Motors, the language in the agreement was not language normally interpreted as creating a guarantee of future performance. *See id.* at 1176 & n.7. It may well have been the court knew this but chose to read the language in a way that forced the result of extending the statute of limitations. One basis the majority used for finding the remedial promise is an express warranty was that the language of the agreement used the term warranty to describe the remedial promise. *See id.* at 1177. However, as set out in a dissent, this was language forced upon the seller by the federal Magnuson–Moss legislation and was intended to denote a federal Magnuson–Moss "warranty," (the language the federal Act uses for remedial promises) and not as a UCC express warranty. *See id.* at 1180–81 (Zappala, J., dissenting).

23. U.C.C. § 2-103(1)(n) & preliminary official comment (9) (amended 2005) (withdrawn 2011).

contractual obligation from the contract for sale or whether it is an Article 2 express warranty. Since a breach of the remedial promise would appear to occur when the obligation to remedy the defect has arisen, it makes sense to begin the limitation period at that time. Yet, under § 2-725, if the remedial promise is considered part of the Article 2 warranty and remedy scheme, the limitation period begins to run when the tender of delivery is made. This point in time, though, has no real connection to the actual breach of the remedial promise.

Courts have responded to this problem in three ways. First, they have found that the four-year statute of limitations runs from the time the goods are tendered, irrespective of when the remedial promise is not met.[24] Second, some courts have treated the remedial promise as a separate contractual obligation, with the statute of limitations beginning when the remedial promise is not met.[25] A third line of cases has used a creative interpretation of the language of the remedial promise to find that it provides for "future performance" and therefore extends the beginning of the limitation period.[26]

To avoid these disparate interpretations and results, the amendments set out a two-step process to harmonize and rationalize the statute of limitations for remedial promises. First, the amendments make a remedial promise an express warranty under Article 2.[27] This removes the question of whether a remedial promise should be treated as a separate contractual obligation. Second, the amendments change the statute of limitations to provide that the limitation period for a remedial promise begins "when the remedial promise is not performed when performance is due."[28]

Because the amendments to the express warranty provisions were designed to clear up nonuniformity in the cases, the failure to adopt these provisions has resulted in the continued nonuniformity and inconsistent interpretation of warranty language. But the purpose of these proposed changes to the sections on express warranties and statute of limitations was an attempt to force by statute a result that could have (and often were) correctly found by case law. What the PEB could do is provide guidance on the means to distinguish remedial promises from Article 2 remedy limitations, and by doing so unravel the statute of limitations problems that tangle up some courts and let sellers avoid the obligations they clearly have undertaken to remediate defective products.

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24. *See*, *e.g.*, Tittle v. Steel City Oldsmobile GMC Truck, Inc., 544 So.2d 883, 891 (Ala. 1989).

25. *See*, *e.g.*, Brown v. GMC, 14 So.3d 104, 113 (Ala. 2009).

26. *See*, *e.g.*, Docteroff v. Barra Corp. of Am., Inc., 659 A.2d 948, 954–55 (N.J. Super. Ct. App. Div. 1995); R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 823–24 (8th Cir. 1983). There are, of course, some express warranties that do promise future performance, and therefore do invoke the extended limitation period. *See* Joswick v. Chesapeake Mobile Homes, Inc., 765 A.2d 90, 96–97 (Md. 2001). The cases that concerned the drafting committee were those where the language of the express warranty does not expressly promise future performance. *See*, e.g., Nationwide Ins. Co. v. GMC, 625 A.2d at 1175–76 (Pa. 1993).

27. U.C.C. § 2-313(4) (amended 2003) (withdrawn 2011).

28. U.C.C. § 2-725(2)(c) (amended 2003) (withdrawn 2011).

IV. PROPOSED CHANGES PREEMPTED BY SUBSEQUENT WORK BY THE ULC AND ALI

A. Electronic Contracting

The amendments provided for electronic contracting, at least to the extent that it provided for the electronic equivalents of writings and signatures and attribution rules for these electronic equivalences.[29] These provisions were hardly exceptional at the time the amendments were drafted and are wholly unnecessary today because the application of the Uniform Electronic Transactions Act (UETA),[30] which has been adopted in forty-nine jurisdictions, provides essentially the same rules.[31]

To the extent there are further changes necessary to accommodate Article 2 to modern electronic commercial practice, there is presently a new joint ULC/ALI committee studying the entire UCC to determine what effect emerging technologies may have on the Code.[32] The work of that committee is likely to address any technology issues that might otherwise warrant commentary by the PEB.

V. PROPOSALS TO THE BLACK LETTER STATUTE WHERE THE COURTS USUALLY GET IT CORRECT

A. Warranties of Title and Noninfringement

The amendments moved from the comments into the black-letter text the proviso that the warranty of title is breached if it "unreasonably expose[s] the buyer to litigation . . . because of any colorable claim to or interest in the goods."[33] This not only conforms the text to the comments,[34] but also states what

29. The term "writing" was changed to "record" throughout the article. U.C.C., *prefatory note* (amended 2003) (withdrawn 2011). *See* U.C.C. § 2-103(m) (amended 2003) (withdrawn 2011). The definitions of sign and conspicuous were changed to accommodate electronic communications, and new definitions for electronic, electronic agent, and electronic record were added. U.C.C. § 2-103(b), (f), (g), (h), (m), (p), accompanying cmts. (amended 2003) (withdrawn 2011). Consistent with what has become universal principles of electronic contracting, the amendments also provide substantive rules to govern electronic transactions. The amendments also provided that a record, signature, or contract could not be denied legal effect and enforceability merely because it is electronic in form. U.C.C. § 2-211(1) (amended 2003) (withdrawn 2011). Also consistent with the Uniform Electronic Transaction Act (UETA), the amendments provided an attribution rule. U.C.C. § 2-212 & cmt. 1 (amended 2003) (withdrawn 2011).

30. Uniform Electronic Transaction Act, cmt. 2 (1999).

31. UNIF. ELEC. TRANSACTIONS ACT (UNIF. LAW COMM'N 1999).

32. *See Uniform Commercial Code and Emerging Technologies Committee*, UNIFORM L. COMMISSION (2019), https://www.uniformlaws.org/committees/community-home?CommunityKey=afffb337-d599-4456-9436-a52aa5d9dcc2.

33. U.C.C. § 2-312(1)(a) (amended 2003) (withdrawn 2011).

34. U.C.C. § 2-312, cmt. 1 (1962).

had long been recognized by the courts.[35] Because this result is already in the comments, and as the courts have generally accepted this comment as correct, there would appear to be no reason to provide for this by PEB commentary.[36]

The amendments also clarified that not only can the warranty of title be disclaimed, but the warranty against infringement can be disclaimed as well. This would have made explicit what is already available to the parties under general freedom of contract. It would be a useful clarification of the obvious, but unnecessary as PEB commentary.

B. Cure

The amendments make a series of clarifying changes to § 2-508 on the seller's right to cure. What would have appeared to be a total revision of the section would have done little other than make explicit results that were already part of Article 2.[37] The amendments clarified that the right to cure would not be limited to rejections of the goods, but also, in appropriate circumstances, when there was a revocation of acceptance. This, however, should have been obvious from § 2-608(3).[38]

The amendments also explicitly provided that the right to cure under § 2-612 in installment contracts would be governed by § 2-508.[39] This has caused some confusion in the cases, as it is not explicit in the text.[40] Yet a close reading of the Code would have brought this conclusion. The amendments also provided explicitly that the seller would have to perform in good faith,[41] but this requirement should never have been in doubt, irrespective of this amendment.[42] The amendments also specifically provided that the cure must be of conforming goods and

35. *See, e.g.*, Colton v. Decker, 540 N.W.2d 172, 176 (S.D. 1995).

36. Although I suggest that given the current acceptance by the courts, PEB commentary is not necessary, there probably is another reason to eschew PEB commentary on this point. The black letter text actually contradicts the commentary. It is not clear that the PEB could give guidance to suggest courts should ignore the black letter text in favor of the conflicting comments. This choice, I suggest, is properly and best left to the courts.

37. The amendments did provide one limitation on the right to cure when there has been a revocation of acceptance; the revisions limit this right to non-consumer contracts. See U.C.C. § 2-508 & cmt. 2 (amended 2003) (withdrawn 2011). This apparent victory for consumers could be easily contracted around by sellers, and therefore would not have operated as a limitation to sellers unless the sellers did not change their form agreements to accommodate this.

38. U.C.C. § 2-608(3) (amended 2003) (withdrawn 2011) ("A buyer that so revokes has the same rights and duties with regard to the goods involved as if the buyer had rejected them.").

39. U.C.C. § 2-508(1)–(2) (amended 2003) (withdrawn 2011) (cure); U.C.C. § 2-612(1)–(3) (amended 2003) (withdrawn 2011) (installment contracts).

40. *See, e.g.*, Midwest Mobile Diagnostic Imaging, L.L.C. v. Dynamics Corp. of Am., 965 F. Supp. 1003, 1011 & n.6 (W.D. Mich. 1997).

41. U.C.C. § 2-508(1) (amended 2003) (withdrawn 2011).

42. U.C.C. § 1-304 (imposing an obligation of good faith on all contracts under the UCC).

must be at the seller's expense.[43] But as with all of the clarifications in the amended section on cure, all of these points should be obvious from Article 2, and therefore probably do not warrant clarification by PEB commentary.

VI. CLARIFYING CHANGES IN THE REVISIONS THAT WILL GO UNNOTICED AND NEEDS NO COMMENTARY

The amendments defined "repudiation."[44] The meaning of this term has never been in doubt, and the absence of this revision will go unnoticed.

The amendments provided a comprehensive index of seller and buyer remedies in §§ 2-703 and 2-711.[45] This could be a useful tool to provide a quick list of the available remedies, but it neither created nor eliminated any existing remedies. The absence of this revision will also go unnoticed.

VII. PROPOSALS TO THE BLACK LETTER STATUTE WHERE COMMENTARY COULD ACHIEVE THE SAME RESULT

A. Clarifying Changes in the Revisions on Performance and Breach

As for performance and breach, the amendments made a series of clarifications to the Code. Amended § 2-612 on installment contracts would have provided that the test is whether the value of that installment to the buyer is substantially impaired.[46] This is a clarification of less than clear language to provide for the clear intent of this section. As this change was not intended to change the result of the existing language, this clarification could easily be provided for by PEB commentary.

The amendments also expressly provided that a buyer's *reasonable* use of the goods post-rejection or post-revocation of acceptance is not an acceptance of the goods, but that the buyer may be "obligated to the seller for the value of the use to the buyer."[47] This change reflected what was considered by the drafting committee both as the correct result and the rule that most courts had adopted. Since this proposed rule did not create or negate any existing obligations, but merely provided guidance on interpretation, this rule could be the basis for PEB commentary.

Amended § 2-615 was changed to note that the seller may have an excuse under the doctrine of impracticability not only for delay in delivery or non-delivery, but also for delay in performance or non-performance. This change recognizes that delivery might not be the only obligation that a seller has and may

43. U.C.C. § 2-508(1) (amended 2003) (withdrawn 2011).
44. U.C.C. § 2-610(2) cmt. 2 (amended 2003) (withdrawn 2011).
45. U.C.C. §§ 2-703, 2-711 (amended 2003) (withdrawn 2011).
46. U.C.C. § 2-612(2) (amended 2003) (withdrawn 2011).
47. U.C.C. § 2-608(4)(b) (amended 2003) (withdrawn 2011).

be unable to meet.[48] This expands the scope of a seller's defense of impracticability, and therefore is a substantive change to the statute that would generally not be achievable by PEB commentary. One might, however, approach this issue by noting that the common law would provide for this expansive use of the doctrine of impracticability,[49] and that the Code was not intended to limit the use of the common law in this area.[50]

Not all proposed changes for the sections on performance and breach could be achieved by PEB commentary. For example, §§ 2-602, 2-603 and 2-604 provide a notice requirement and obligations on a buyer that rightfully rejects goods. The amendments would have extended these obligations to a buyer that wrongfully, as well as rightfully, rejected goods as long as the rejection was effective. These changes are consistent with the underlying policy of party obligations in the Code. Irrespective of the reason for and the rightfulness of a rejection, a seller is entitled to the knowledge that the buyer has rejected the goods. In addition, the reasons for placing a duty on the buyer to handle the goods on behalf of the seller are equally applicable, whether the rejection has been rightful or not. Although this has long been assumed the correct result under Article 2, it is not clear that this does not impose different obligations that can be achieved without statutory amendment.

B. Remedies

Amended § 2-702 explicitly pointed out that a good faith purchaser must give value.[51] This simply imports the common law requirement of having to give value to have the protection of a good faith purchaser. Likewise, § 2-507(2) was rewritten to make certain what is intended in the section is a right of reclamation if the buyer does not pay for the goods.[52] The amendments also expressly provided what was already implicit: the seller's failure to resell in accord with § 2-706 does not bar other remedies.[53] All of these points are consistent with the present law and could easily be explained and clarified by PEB commentary.

The amendments also specify that non-consumer parties can contract for specific performance.[54] But this is something that the courts have begun to acknowledge the parties could do by contract irrespective of the Code. This line of cases could also be affirmed by PEB commentary.

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48. U.C.C. § 2-615(a) (amended 2003) (withdrawn 2011).

49. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

50. This is analogous to the court's using the doctrine of frustration of purpose in Article 2 cases although the frustration is not provided for in the Code. *See, e.g.*, Northern Indiana Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 277–78 (7th Cir. 1986).

51. U.C.C. § 2-702(3) (amended 2003) (withdrawn 2011).

52. U.C.C. § 2-507(2) (amended 2003) (withdrawn 2011).

53. U.C.C. § 2-706(7) (amended 2003) (withdrawn 2011).

54. U.C.C. § 2-716(1) (amended 2003) (withdrawn 2011).

VIII. WHERE THE AMENDMENTS WOULD HAVE CHANGED THE RESULT AND CANNOT BE RESOLVED BY PEB COMMENTARY

A. Battle of the Forms

Probably the most significant proposed change to Article 2 was the total overhaul of § 2-207 on the battle of the forms.[55] The proposed section is stark in its analytical approach. Those terms that the parties have agreed upon, either expressly or by implication, are part of the agreement. No other terms are. The result of this is that the parties are only bound where there has been assent.

This contrasts greatly from either the common law or existing § 2-207—both of which tend to force one party's terms on the other party.[56] Moreover, because of the inconsistencies in the official comments,[57] as well as differing court interpretations of the section,[58] the current § 2-207 can be a nightmare to negotiate through. This was the one section where the amendments truly were a major improvement from the existing law. It is interesting that the amendment of this section was contentious.[59] I have never understood whether this was based on real objections or whether it was just a reason to attack the amendments as a whole. Irrespective, there does not seem to be any way one could use PEB commentary to attempt to re-write the language and results of § 2-207.

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55. U.C.C. § 2-207 (amended 2003) (withdrawn 2011) provided:

If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, subject to Section 2-202, are:

(a) terms that appear in the records of both parties;

(b) terms, whether in a record or not, to which both parties agree; and

(c) terms supplied or incorporated under any provision of this Act.

56. *See* Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code*, 49 BUS. LAW. 1053, 1055, 1062 (1994).

57. *See id*. at 1059–60 & n.37.

58. *See id*. at 1060 & n.41.

59. The National Association of Manufacturers complained that the amendment to § 2-207 "creates confusion in contract formation." Press Release, Nat'l Ass'n of Mfrs., *supra* note 1. The UCC Committee of the California State Bar responded to this rather astounding claim by noting that:

Under [e]xisting UCC [section] 2-207 there is a deference to the first writing. Amended UCC [section] 2-207 treats the varying terms on an evenhanded basis, removing this artificial deference to one writing over another. Elimination of the arbitrary battle of the forms rule under [e]xisting UCC [section] 2-207 is a beneficial change. Existing UCC [section] 2-207 has spawned expensive litigation over the years due to its lack of clarity. Amended UCC [section] 2-207 will eliminate unfair advantage, provide more clarity, and should lead to less litigation.

Analysis by the UCC Committee of the State Bar of California Business Law Section of the NAM Industry Concerns About the UCC Article 2 Revisions, *supra* note 1, at 4 (footnotes omitted).

B. Statute of Frauds

The amendments raised the requirements for the statute of frauds from $500 to $5,000. The $500 amount in the current Article 2 comes from the 1906 version of the Uniform Sales Act,[60] and the drafters felt that 100 years of inflation justified this change. Certainly, this change would have had some impact on the enforceability of contracts, but whether that impact would have been significant is not clear. Given that parties routinely reduce non-electronic contracts to paper along with the generous exceptions to the rule provided for under paragraphs two and three of UCC § 2-201, the statute of frauds has not been a major source of problems under the Code. Moreover, to the extent that the business world is rapidly moving toward electronic contracting, the statute of frauds will likely have less significance in the future. Thus, the lack of this amendment will be a loss, but not a significant one. It is certainly, however, not a change that can be made without a change to the statute itself. The dollar amount of the statute of frauds is not a candidate for PEB commentary.

Another proposed change to the statute of frauds was a pure policy choice. The question of whether an action in promissory estoppel is subject to the statute of frauds is neither clear from the text of the existing Code, nor the cases. Although many courts have determined that the statute of frauds does not apply because the statute only applies to contract actions, a substantial number of courts have extended its reach to promissory estoppel cases. Usually, these decisions have been ostensibly based on a textual reading of the statute. The justification of applying the statute of frauds has been based on the first clause of § 2-201, which provides "[e]xcept as otherwise provided in this section . . . ." It is therefore argued that all exceptions to the application of the statute of frauds are contained in the section.[61] The contrary argument has been statutorily gleaned from § 1-103(b), which provides that the Code does not displace principles of estoppel.[62] The drafters concluded that the statute of frauds should not be a bar to promissory estoppel cases, and in doing so consciously overruled the line of cases that provided for this. Although this clear direction is lost without the enactment of the amendments, this is an issue that could be resolved by PEB commentary.

60. UNIF. SALES ACT OF 1906 § 4(1) (amended 1948), reprinted in JOHN BARKER WAITE, THE LAW OF SALES 288–89 (1921). The original Statute of Frauds applied to the sale of goods for £10 or more. *See Statute of Frauds*, 29 Car. 2, c. 3, § 16 (Eng.) (1677).

61. *See*, *e.g.*, Futch v. James River–Norwalk, Inc., 722 F. Supp. 1395, 1402 (S.D. Miss. 1989); Renfroe v. Ladd, 701 S.W.2d 148, 149–50 (Ky. Ct. App. 1985); Golden Plains Feedlot, Inc. v. Great W. Sugar Co., 588 F. Supp. 985, 992–93 (D.S.D. 1984); Lige Dickson Co. v. Union Oil Co. of Cal., 635 P.2d 103, 106–07 (Wash. 1981) (certified question from the Ninth Circuit United States Court of Appeals).

62. U.C.C. § 1-103(b); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 139(1) & cmt. b (1981) (providing authority for the application of estoppel principles to the statute of frauds).

C. Parol Evidence Rule

One issue that was debated at some length is the evidentiary effect of a merger clause. Endless discussions ensued about the various but contradictory merits of adopting either a rule that merger clauses are mere presumptions or that they should be treated as conclusive. The discussions brought much heat and very little light. The committee took the enlightened view that the Code should not answer this question, and that it should (as it had in the past) be left to the sound discretion of the courts. This is a sound decision and one that could not be amplified in any useful way by PEB commentary.

D. Express Warranties & Non-Privity Buyers

The amendments proposed major changes to the law of express warranties. The purpose of these changes was to accomplish two goals: to bring the disparate rules that govern non-privity into uniformity and to handle the question of the statute of limitations for remedial promises. As discussed above, the issue of the statute of limitations with remedial promises might be resolved with PEB commentary. This is not the case for the rights of non-privity buyers.

Article 2, by its terms, limits claims to sellers and buyers that are in privity of contract.[63] Although § 2-318 provides some claims by third party beneficiaries,[64] it does not provide for direct actions against non-privity sellers. Irrespective, a significant number of courts have provided for actions by buyers against non-privity sellers or manufacturers. Court vary in how they provide for the non-privity claims. Some courts use (or misuse) § 2-318, and some courts simply allow direct action claims. There is no consistency among the courts on how far to extend non-privity claims. Some courts allow claims for both express and implied warranties,[65] while other courts limit the claims to either express[66] or implied[67] warranties. Moreover, the non-privity claim may be limited to the types of damages the buyer seeks.[68]

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63. U.C.C. § 2-106(1).

64. U.C.C. § 2-318.

65. For example, Delaware does not require privity for either express or implied warranties. Guinan v. A.I. DuPont Hospital for Children, 597 F. Supp. 2d 485 (E.D. Pa. 2009).

66. This is the law in California, New York, Indiana, and Florida. *See* Grossman v. Schell & Kampeter, Inc., 98 U.C.C. Rep. Serv. 2d (CBC) 419 (E.D. Cal. 2019); Cummings v. FCA U.S. LLC, 401 F. Supp. 3d 288 (N.D.N.Y. 2019); Mahoney v. Endo Health Solutions, Inc., 90 U.C.C. Rep. Serv. 2d 135 (S.D.N.Y. July 20, 2016); Jackson v. Eddy's LI RV Ctr., Inc., 845 F. Supp. 2d 523 (E.D.N.Y. 2012); Lautzenhiser v. Coloplast A/S, 78 U.C.C. Rep. Serv. 2d 712 (S.D. Ind. Sept. 29, 2012); Jovine v. Abbott Labs., Inc., 795 F. Supp. 2d 1331 (S.D. Fla. 2011). New York allows non-privity implied warranty claims if the damages are for personal injury. Bristol Vill., Inc. v. Louisiana-Pacific Corp., 916 F. Supp. 2d 357 (W.D.N.Y. Dec. 31, 2012); Cereo v. Takigawa Kogyo Co., 676 N.Y.S.2d 364, 365–66 (N.Y. App. Div. 1998).

67. Montich v. Miele USA, Inc., 849 F. Supp. 2d 439, 453–54 (D.N.J. 2012). New Jersey law permits a remote purchaser in the chain of commerce to recover under an implied warranty. *See* Nelson v. Xacta 3000 Inc., 71 U.C.C. Rep. Serv. 2d (CBC) 729 (D.N.J. May 12, 2010).

68. For example, Vermont allows non-privity actions for personal injury but not for purely economic

For express warranties, the revisions attempted to clear up the inconsistent treatment of non-privity claims by providing for non-privity claims in two circumstances. First, this would occur when the warranty was contained "in a record packaged with or accompanying the goods".[69] In other words, this obligation would be created by the non-privity seller when the terms were in a record contained with the goods—the "warranty in the box."

Second, the non-privity express warranty would run to the buyer if the express warranty was made "in an advertisement or a similar communication to the public," and the remote purchaser purchases the goods "with knowledge of and with the expectation that the goods will conform to the [express warranty]."[70] In other words, this obligation would arise from advertisements to users when the user is aware of the advertisement and has reason to believe the seller is actually promising something.

Because the revisions attempted to achieve by statute what courts had done (albeit inconsistently) by case law, PEB commentary alone would not be able to replicate the suggested revisions. Moreover, although the proposed revisions were seller friendly,[71] this part of the revisions received substantial objections by industry. With that level of opposition, any attempt to provide clarity in PEB commentary would likely be viewed as non-neutral.

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losses. H. Hirschmann, LTD. v. Green Mt. Glass, LLC, 90 U.C.C. Rep. Serv. 2d 328 (D. Vt. 2016). Michigan law recognizes the availability of an implied warranty claim against a remote seller or manufacturer for economic loss. *See* Sullivan Indus., Inc. v. Double Seal Glass Co., 192 Mich. App. 333, 341–45 (1991) (remote manufacturer of sealant used in production of doors and windows subject to claim of implied warranty under UCC).

69. U.C.C. § 2-313A(3) (amended 2003) (withdrawn 2011).

70. U.C.C. § 2-313B(3) (amended 2003) (withdrawn 2011).

71. By statutorily limiting non-privity express warranty-type obligations to those contained in the packaging of the goods or made by advertisements, the drafters attempted to achieve both logically coherent results as well as national uniformity in the application for non-privity express warranties by providing only for those claims that non-privity sellers should necessarily be responsible for, as the claims are based on information that the sellers specifically provide for the targeted users.

The drafters thought it fair and reasonable to allow non-privity buyers to have a claim based on their reasonable expectations for several reasons: (1) the express obligations are directed toward specific users, (2) the content and the ability to exclude these obligations are fully within the power of the non-privity seller, and (3) non-privity buyers' expectations are created by the sellers with the intent to target the buyers who rely on this information. *See* U.C.C. §§ 2-313A (5) (a), 2-313B (5) (a) (amended 2003) (withdrawn 2011).

Given that the obligations created in the amended §§ 2-313A and 2-313B do not increase the obligations non-privity sellers already have, combined with the express right to limit these obligations, the drafters thought that manufacturers would be in support of these changes. This was not the case:

> The new rule is a major change that conflicts with the direction of most recent court and legislative action. It creates liability for public communications, even though the communication was not a part of the agreement and even if it did not cause personal injury. The rule may be unconstitutional under the First Amendment. In any event, this is a contract statute and should deal with contracts. This rule is a huge step backward that invites class action litigation and is outside the domain of a commercial contract law. See Nat'l Ass'n of Mfrs., Industry Concerns About Final Article 2 Revisions (2005) (on file with author).

E. Implied Warranties

A proposed official comment to amended § 2-314 provided, "[w]hen recovery is sought for injury to person or property, whether goods are merchantable is to be determined by applicable state products liability law."[72] This comment, which was a holdover from the 1999 revisions, was a response to the line of cases, such as *Denny v. Ford Motor Co.,* that holds that the standard for merchantability under Article 2 was based on a different standard than what constituted defectiveness under tort law.[73]

Note that the comment only suggests using the same contract and tort standard for personal injury and property damages, but not for other harms. If there were a principled analytical basis for conflating the two standards, then there would be no reason to limit this to the type of damages suffered. The comment was never intended to be an objective policy choice, but a political compromise to appease detractors of the revisions. Whether the comment would have been followed by courts that would have otherwise followed the *Denny* analysis will never be known. This proposed comment will thankfully simply be lost in history.

Although *Denny* is obviously correct, the standard of "defective products" in tort law is not the same standard as "merchantability" in Article 2. As noted above, courts are divided on this issue.[74] Although I would have a personal preference for PEB commentary to affirm the *Denny* line of cases, it is unlikely that such a contentious issue is appropriate for the PEB to undertake.

F. Warranty Disclaimers

The substantive proposed revisions to § 2-316 on warranty disclaimers and modifications were limited to changes in the language necessary to create a safe harbor disclaimer.[75] The intent was to make the language of disclaimers more

72. U.C.C. § 2-314 cmt. 7 (amended 2003) (withdrawn 2011). State products liability law means tort products liability law. Since products liability law includes breach of warranty actions under the U.C.C., if the comment was read to include both contract and tort claims, it would be meaningless.

73. *See* Denny v. Ford Motor Co., 662 N.E.2d 730, 736 (N.Y. 1995); Castro v. QVC Network, Inc., 139 F.3d 114, 118 & n.7 (2d Cir. 1998). *But see, e.g.,* Morrison's Cafeteria v. Haddox, 431 So.2d 969, 973 (Ala. 1983) (holding the standards for merchantability and defective product in tort are the same) (citing Matthews v. Campbell Soup Co., 380 F. Supp. 1061 (S.D. Tex. 1974)).

74. *See supra* note 73.

75. Under the amendments, to disclaim the implied warranty of merchantability in a consumer contract, the disclaimer would need to be in a record, be conspicuous, and include the following language: "The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract." U.C.C. § 2-316(2) (amended 2003) (withdrawn 2011). To disclaim the implied warranty of fitness for a particular purpose in a consumer contract, the disclaimer must be in a record, be conspicuous, and use the following language: "The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in this contract." Id. A consumer contract was defined as a "contract between a merchant seller and a consumer." U.C.C. § 2-103(1)(d) (amended 2003) (withdrawn 2011). Consumer is defined as an individual who buys or contracts to buy goods "primarily for personal, family, or household purposes." U.C.C. § 2-103(1)(c) (amended 2003) (withdrawn 2011).

readily understandable. Enactment of these changes would require changes in many form contracts, and therefore places a burden on sellers to make the changes. The amendments would not, however, have increased or decreased the seller's responsibility.[76] Language requirements for statutory compliance cannot be changed by commentary. The revisions to the section on warranty disclaimers is not appropriate for the list of possible issues for PEB commentary.

G. Remedies

The amendments made a series of changes in the remedies provisions. As discussed above, the result of some of the changes could be accomplished by PEB commentary and are not contentious. However, other proposed changes, although reflecting current business practices, were based on statutory requirements of compliance, and therefore could not be accommodated by explanatory commentary.[77]

Proposing a new substantive framework for seller's damages, amended § 2-710 provided for seller consequential damages in a non-consumer contract. This minor change required a change in the language of the section, a result that could not be accommodated by commentary, although courts often reach this result on the current Code. Courts have been inclined to read the absence of consequential damages in § 2-710 as the intent of the drafters to affirmatively exclude them;[78] the bulk of consequential damages that a seller would suffer is lost profits, for which § 2-708(2) already provides an adequate measure of damages.[79] Moreover, the courts have been apt to find what are in effect a seller's consequential damages as incidental damages, and therefore have allowed these damages to sneak in the back door.[80] This is also a risk that parties can easily eliminate by contract.

The amendments also changed § 2-713—as to the time to measure the buyer's damages—from the time the buyer learned of the breach to the time of ten-

76. *Compare* U.C.C. § 2-316(2) (requiring conspicuous language to exclude or modify the implied warranty of merchantability), *with* U.C.C. § 2-316(2) (amended 2003) (withdrawn 2011) (requiring inclusion of the statement: "The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract").

77. Thus, for example, the time to demand reclamation of goods under amended § 2-702 is changed from "ten days" to "a reasonable time." *See* U.C.C. § 2-702(2) & cmt. 2 (amended 2003) (withdrawn 2011). This provides the needed flexibility for a seller who does not discover the buyer's insolvency until after the ten-day period. The amendments also broaden the ability of a seller under § 2-705 to stop delivery by eliminating the requirement that goods be by the "carload, truckload, planeload or larger shipments of express or freight." *Compare* U.C.C. § 2-705(1) (amended 2003) (withdrawn 2011), *with* U.C.C. § 2-705(1). This change recognized the different modes of delivery that are currently used.

78. *See, e.g.*, Nobs Chem., U.S.A., Inc. v. Koppers Co., 616 F.2d 212, 216 (5th Cir. 1980); Petroleo Brasileiro, S.A., Petrobras v. Am. Oil Corp., 372 F. Supp. 503, 508 (E.D.N.Y. 1974).

79. U.C.C. § 2-708(2).

80. *See, e.g.*, N. Am. Foreign Trading Corp. v. Direct Mail Specialist, 697 F. Supp. 163, 166 n.2 (S.D.N.Y. 1988).

der.[81] This change reflects the recognition of the oddity of the current law.[82] The current standard suggests three problems. First, unlike the question of when tender was supposed to occur, determining when a buyer "learns of a breach" creates a difficult evidentiary question. Second, with no explanation, this section differs from the seller's concomitant provision, which is based on the time tender was to occur; this latter standard being consistent with the common law.[83] Third, the amendments properly recognize the underlying basis for measuring damages based on the time and place where the goods are to be tendered, as this reflects the *ex ante* bargain the parties made. As a contractual purist, I think this change is an improvement in the law. The current § 2-713, however, has not really caused problems, and certainly the current stature cannot be ignored by inconsistent PEB commentary.

H. Statute of Limitations

The current provision on statute of limitations suffers one major drawback—it is inflexible. It attempts to handle multiple questions with what is primarily a single standard. Subject to the parties' ability to alter the limitation period either by limiting it to one year[84] or by extending it with the seller's promise of future performance,[85] the limitation period is four years from the time the goods are tendered to the buyer.[86] The amendments addressed some of the perceived failures of the current law by providing different limitation periods for a variety of different types of breach. Specifically, the amendments provided specific accrual rules for breach by repudiation,[87] breach of a remedial promise,[88] breach of the

81. *Compare* U.C.C. § 2-713(1) (stating that the market price for damages is determined "when the buyer learned of the breach"), *with* U.C.C. § 2-713(1) (amended 2003) (withdrawn 2011) (stating that the market price for damages is evaluated no later than at the time for tender).

82. It could well have been that the drafters of the current text assumed that by measuring damages at the time the buyer learned of the breach, the most common situation where the breach would occur is in the case of an anticipatory repudiation. If this is the case, it seems that the drafters were assuming that an anticipatory repudiation should be the default position instead of an exception to the general rule. Recognizing this, and assuming that an anticipatory repudiation is the exception and not the rule, the amendments provide a special damage rule for buyers where there is an anticipatory repudiation: measure the market price of goods in the case of an anticipatory repudiation "at the expiration of a commercially reasonable time after the buyer learned of the repudiation." U.C.C. § 2-713(1)(b) (amended 2003) (withdrawn 2011). There was a concomitant change in the rules for sellers: damages for goods in the case of an anticipatory repudiation are measured "at the expiration of a commercially reasonable time after the seller learned of the repudiation." U.C.C. § 2-708(1)(b) (amended 2003) (withdrawn 2011). The contrary provision in § 2-723 was deleted. U.C.C. § 2-723 (amended 2003) (withdrawn 2011).

83. *Compare* U.C.C. § 2-708(1)(a) (amended 2003) (withdrawn 2011) (seller's damages are measured at the time of tender),
with U.C.C. § 2-713(1)(a) (amended 2003) (withdrawn 2011) (buyer's damages are measured at the time buyer learns of the breach).

84. U.C.C. § 2-725(1).

85. U.C.C. § 2-725(2).

86. U.C.C. § 2-725(1).

87. U.C.C. § 2-725(2)(b) (amended 2003) (withdrawn 2011).

warranty of title and non-infringement,[89] and breach of a non-privity obligation.[90] While all of these changes are improvements in the law, none of these specific situations have caused serious problems in the cases, with the exception of remedial promises.[91]

The amendments also provided that the limitation period cannot be reduced from less than the default period of four years in a consumer contract.[92] This apparent consumer protection change actually would have very little practical impact on buyer's rights, as the seller is still able to restrict the time of any express or implied warranty and therefore not increase the time risk for the goods. As with the other amendments in the limitation periods, the lack of this change is not likely to have serious consequences. Thus, most of the proposed changes to the statute of limitations, although useful and not subject to a workaround by the PEB, were only useful clarifications for a minority of cases but whose absence is not a major loss.[93]

IX. CONCLUSION

It is too early to predict whether the PEB will actually address any of the issues posed by the proposed revisions to Article 2. The first step has been taken; the PEB is studying the proposed revisions for possible commentary. Whether this actually moves to the next step of articulating specific issues is yet to be seen. If the PEB does move forward, I suggest that several of the issues I have addressed in this article may be the basis for that commentary.

88. U.C.C. § 2-725(2)(c) (amended 2003) (withdrawn 2011).

89. U.C.C. § 2-725(3)(d) (amended 2003) (withdrawn 2011).

90. U.C.C. § 2-725(3)(c) (amended 2003) (withdrawn 2011).

91. As discussed above, the statute of limitations for remedial promises might be resolved by PEB commentary that provides guidance on the distinction between U.C.C. obligations and remedial promises as free-standing contractual obligations not subject to Article 2's statute of limitations. *Supra* Section III.C.

92. U.C.C. § 2-725(1) (amended 2003) (withdrawn 2011).

93. The one change that could have had an impact was the propose extension of the statute of limitations when the when the time of discover was after the time of tender. The limitation period of four years from the time of tender assumes that the breach occurs when the goods are tendered. It has long been questioned whether the limitation period should begin then, even if it is unreasonable for the buyer to discover the breach at that time. The amendments responded to this by providing that the limitation period could also be "one year after the breach was or should have been discovered, but no longer than five years after the right of action accrued." U.C.C. § 2-725(1) (amended 2003) (withdrawn 2011). This was a compromise. It provided some relief for the buyer who does not discover the breach until after delivery, but also set some limit (five years) on the amount of time a seller would have to be concerned about litigation on goods after the sale. Although an improvement over existing law, the loss of this extension of the four-year period is not likely to be a source of problems in many cases.

Some Issues on the Law of Direct Damages (U.S. and U.K.)

Victor Goldberg*

When a contract is breached, both U.S. and U.K. law provide that the non-breaching party should be made whole. The Uniform Commercial Code ("UCC") provides that "[t]he remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."[1] The English version, going back to *Robinson v. Harman*, is "that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."[2] I propose a general principle that should guide implementation—the contract is an asset and the problem is one of determining the change in value of that asset at the time of the breach.

In the simplest case—i.e., the breach of a contract for the sale of a commodity in a thick market—the change in the value of the asset is simply the contract-market differential; the contract-as-asset notion does not add much. It becomes more useful as we move away from that extreme—e.g., imperfect substitutes, future deliveries, or long-term contracts. Thus, for example, it makes little sense to talk of the contract-market differential if the buyer repudiated a 20-year take-or-pay contract in the third year.

Two caveats. First, I am referring only to direct damages: what are the damages if one of the parties does not go through with the transaction? Consequential damages and breach of warranty raise different questions.[3] Second, the damage rule should be viewed as the price of the option to terminate.

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1. U.C.C. § 1-305 (AM. LAW INST. & UNIF. LAW COMM'N 2001).

2. (1848) 154 Eng. Rep. 363.

3. For my analyses of consequential damages, *see* VICTOR GOLDBERG, RETHINKING CONTRACT LAW AND CONTRACT DESIGN 87–133 (Edward Elgar Publishing Ltd. 2015) *and* VICTOR GOLDBERG, RETHINKING THE LAW OF CONTRACT DAMAGES 165–227 (Edward Elgar Publishing Ltd. 2019). In both countries, courts have blurred the line between direct and consequential damages. *See* GOLDBERG, RETHINKING THE LAW OF CONTRACT DAMAGES, *supra* at 165–98.