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# CORNELL LAW QUARTERLY

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## THE HIGHWAYS AND SOME OF THE BYWAYS IN THE SALES AND BULK SALES ARTICLES OF THE UNIFORM COMMERCIAL CODE

*William E. Hogan*<sup>†</sup>

### I. INTRODUCTION

One hundred and four, or no less than one-quarter, of the Uniform Commercial Code sections are devoted to provisions governing the sale of goods. Only eleven sections, however, are devoted to bulk sales. Quantitatively article 2 is obviously the most significant in the Code. What of the qualitative changes made by the article?

Generally several comments can be made. First, the Code rules are drafted and formulated upon the premise that specific tests should be devised for solving specific problems. Thus the so-called "lump-sum" concept of title is no longer the test for a variety of different issues.<sup>1</sup> This approach of delineating issues for separate treatment contributes to the bulk of article 2, but it should also contribute to the more expeditious resolution of questions governed by the article. Neither the changes in language, nor the alterations in approach bring about revolutionary changes in results. An emphasis here and in other Code commen-

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<sup>1</sup> Under the pre-Code law problems involving risk of loss, right to the purchase price, tax liability, insurability, creditors' rights, rules of damages, choice of law and the availability of possessory remedies often turned on the question of property. Compare, Williston, "The Law of Sales in the Proposed Uniform Commercial Code," 63 Harv. L. Rev. 561 (1950), with Corbin, "The Uniform Commercial Code-Sales; Should It Be Enacted?", 59 Yale L.J. 821 (1950). One must take care in studying the voluminous literature commenting upon the Code, since the present version enacted in eighteen states dates from 1957 with some additional changes made in 1958. Unless otherwise indicated all references to the Code here are to the Uniform Commercial Code, 1958 Official Text with Comments (hereinafter cited as UCC with the appropriate section number, e.g., UCC § 2-401).

taries on novelty should not obscure the fact that there are relatively few major changes in legal results under article 2 of the Code.

Second, the Code provisions are drafted in light of the fact that parties to a typical sales transaction do not adjourn to a nearby lawyer's office for a closing ritual. In fact, the kind of formality usual in the real estate transaction would serve only to impede the movement of goods in commerce. The transactions here involved are fundamentally laymen's arrangements made in volume in the market place.<sup>2</sup> Lawyers enter only when catastrophe occurs. Recognition of this aspect of sales results in the Code's making some transactions legally effective, even when contrary to some traditional concepts of contract formation and performance.<sup>3</sup>

Third, the sales article recognizes that in many instances the legal consequences of conduct by a skilled business professional should be different from the consequences of the conduct by the casual buyer unfamiliar with the trade. In several situations under the Code, results differ when a merchant is involved, when the transaction is between merchants, or when the goods are purchased by a consumer for his personal, family or household use.<sup>4</sup>

When we turn to examine the bulk sales article of the Code, we find the kind of transaction where lawyers usually join in the preparation of the arrangements. The traditional formalities required of the parties to a bulk transfer not in the ordinary course of business are retained and clarified in a uniform statute.

Finally, each section of the entire Code is accompanied by the draftsmen's comments. Unfortunately, in some states, including New York, no general distribution of the Code with the official comments has yet been made by the publishers of the statutory collections. The comments are important not only to the specialist but also to the lawyer who deals only occasionally with a sales problem. Helpful explanations, insights into policy decisions, and the resolution of many issues which might be debated under the text are found in these comments.<sup>5</sup>

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<sup>2</sup> This point is ably developed by an experienced practitioner in Weeks, "The Illinois Uniform Commercial Code, Article 2-Sales," 50 Ill. B. J. 494, 495 (1962).

<sup>3</sup> Hawkland, Sales and Bulk Sales (Under the UCC) 2 (1958). Professor Hawkland's monograph is a helpful introductory guide to the Code. It is available from the Director of the Joint Committee on Continuing Legal Education, 133 South 36th Street, Philadelphia 4, Pennsylvania.

<sup>4</sup> Merchant is defined in UCC § 2-104, and the definition of consumer goods in UCC § 9-109 is incorporated into article 2 by UCC § 2-103(3). On the merchant provisions, see Note, 39 Geo. L.J. 130 (1950).

<sup>5</sup> Braucher, "Legislative History of the Uniform Commercial Code," 58 Colum. L. Rev. 798, 808 (1958). The legitimacy of using the comments concerned the New York Law Revision Commission, particularly when the conclusions seemed to go beyond the text of the statute. Pasley, "Panel Discussion On the Uniform Commercial Code," 12 Bus. Law. 49, 57-58 (1956).

Furthermore, by providing cross references and discussing the inter-relationship of the sections the comments also afford substantial help to the lawyer who comes to the Code for the first time.

This article is written for such a lawyer not only with the hope that the Code will be made less formidable but also with the prayer that enough red flags will be raised about some of the difficulties bound to arise in any statute of such breadth covering the dynamic field of merchandising. As a consequence, my treatment will be organized around a number of commercially important questions involving various parts of the Code's organization.

## II. WHEN ARE GOODS "DEFECTIVE" OR NONCONFORMING?

### A. *Express and Implied Warranties*

#### 1. The Creation of the Warranty

The attorney who is confronted with a telephone call from a television set manufacturer complaining about the quality of a recent shipment of cabinets has a basically different problem from the lawyer who receives a visit from a woman who has lost her hair because she used a strong hair dye. Nonetheless, lawyers strangely tend to classify these cases together.

We might think first in both these situations of the law of warranty. Did the seller make any misrepresentation of fact or any promise concerning the goods in question? How material was that statement? Did the buyer rely upon the statement? Was the statement by the seller merely sales talk, puffing, or a statement of value? These same questions must be asked under the Code.<sup>6</sup> In addition to the preservation of these old problems, the Code makes two kinds of alterations in the law in relation to the creation of an express warranty. First, warranties by description and warranties by sample are reclassified as express warranties.<sup>7</sup> At first blush this may not seem to be a striking innovation; perhaps it is not. The change avoids the confusion created by the prior classification of description warranties as expressed in some cases and as implied in others. Difficulties have arisen in interpreting contract provisions disclaiming implied warranties but not mentioning express warranties.<sup>8</sup>

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<sup>6</sup> UCC § 2-313 requires that the affirmation must "relate to the goods and become part of the basis of the bargain"; and limits liability for statements of value by precluding a warranty where the affirmation is "merely of value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods . . ." The Uniform Sales Act, more flatly stated that no "affirmation of value of the goods . . . shall be construed as a warranty." Uniform Sales Act § 12.

<sup>7</sup> Compare UCC § 2-313 and Uniform Sales Act §§ 12, 14, 16.

<sup>8</sup> In the most frequently cited case illustrating the problem, the court concluded that descriptive language listing a generator as "1-1420 KVA-1136 KW at 807" created an

The second important change in the law of express warranty relates to the timing of the representation. Statements made even after a contract has been formed may result in warranty liability under the Code rule abolishing the requirement of consideration for "agreements" modifying a sales contract.<sup>9</sup> Of course, some post-contractual claims by the seller will not result in an "agreement," but the Code rule should avoid some of the harsh aspects of the prior case law which failed to protect a buyer who reasonably relied upon post-contractual assurances of the seller.<sup>10</sup>

When we turn to the various implied warranties of quality, we have more changes in detail and policy. The question of the implied warranty of merchantability is dealt with in a single brief subsection of the Uniform Sales Act.<sup>11</sup> In the Code this warranty rises to the dignity of a separate section, covering probably five times as much of the statute book as the earlier Uniform Sales Act provision.<sup>12</sup> The major contribution of this expansion will probably be the establishment in section 2-314(2) of statutory criteria for determining whether or not the warranty of merchantability has been breached. These criteria are for the most part based upon cases in the pre-Code law.<sup>13</sup> Particularly worthy of comment are the provisions which treat the effect of labels and packages. By making claims on a label or container, the seller undertakes that these goods will conform to the claims. Even the retailer who sells goods packaged by another apparently makes this kind of warranty under the

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express warranty that the machine would develop 1136 KW of electricity which was not negated by a disclaimer clause covering implied warranties only. *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 190 F.2d 817 (3d Cir. 1951). The draftsman of the Uniform Sales Act suggested that the description warranty should be classified as express but that custom called such a warranty implied. 1 Williston, *Sales* § 223 (rev. ed. 1948). Prior to the Sales Act, some cases held language of description to be a warranty. Bogert, "Express Warranties in Sales of Goods," 33 *Yale L.J.* 14, 21 (1923).

<sup>9</sup> UCC § 2-209. Compare N.Y. Pers. Prop. Law § 33(2).

<sup>10</sup> New legal consideration was required by some courts for fixing warranty liability upon a seller for statements made subsequent to the sale. If the buyer had no color right to return the goods, then the seller's statements were not supported by sufficient consideration. See *Budrow v. Wheatcraft*, 115 Cal. App. 2d 517, 252 P.2d 637 (1st D. 1953). At least one court concluded that a representation at any time prior to delivery of the goods was effective to bind the seller. *Webster v. Hodgkins*, 25 N.H. 128 (1852). In UCC § 2-313, comment 7, consideration is said to be unnecessary in the case of subsequent assurances. Furthermore, the Code's use of the language "part of the basis of the bargain" in substitution of a reliance test may also be sufficient to eliminate any objection based on a lack of reliance by the buyer upon the subsequent statement. Prior statements by the seller both under the Code and the Sales Act may be made the basis of warranty liability if the affirmations relate to the goods, i.e., cover a series of transactions. See 1 Williston, *supra* note 8, § 210; Note, 19 *Fordham L. Rev.* 197 (1950); UCC § 2-313, comment 5. Compare *El Zarape Tortilla Factory, Inc. v. Plant Food Corp.*, 90 Cal. App. 2d 336, 203 P.2d 13 (1949).

<sup>11</sup> Uniform Sales Act § 15(2).

<sup>12</sup> UCC § 2-314.

<sup>13</sup> The Code standards are new in expression and change some results but some case support exists for each subsection of UCC § 2-314(2): Goods to be merchantable must be at least such as

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and

Code.<sup>14</sup> In addition, the seller also warrants the quality of the container itself.<sup>15</sup> Furthermore, the language of the Sales Act, providing that the warranty of merchantability only arises in a sale by description, has been abandoned. For the most part the courts frequently ignored this "description" test prior to the development of the Code.<sup>16</sup> One other question of rather ancient vintage is also settled. Under the merchantability provisions of the Code, the sale of food or drink to a consumer either on or off the premises is a sale within the meaning of the section.<sup>17</sup> This provision finally puts to rest the ancient distinction between "uttering" and "selling" food, long abandoned by many American courts.<sup>18</sup>

The other major implied warranty of quality is usually known as the "fitness" warranty. In section 2-315 the Code adopts the basic scheme of the prior law. The most important change will probably be the aban-

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- (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged, and labeled as the agreement may require; and
  - (f) conform to the promises or affirmations of fact made on the container or label if any.

Collins, "Warranties of Sale Under the Uniform Commercial Code," 42 Iowa L. Rev. 63, 70 (1956); Ezer, "The Impact of the Uniform Commercial Code on the California Law of Sales Warranties," 8 U.C.L.A. L. Rev. 281, 292-95 (1961). See Williston, Sales § 243 (rev. ed. 1948). The listing is not intended to be exhaustive. UCC § 2-314, comment 6.

<sup>14</sup> UCC § 2-314(2)(f) requires that the goods must "conform to the promises or affirmations of fact made on the container or label if any." No distinction is made when the immediate seller did not adopt or make the label claims himself.

<sup>15</sup> UCC § 2-314(2)(g). This question was not settled in the pre-Code law. Compare *Poplar v. Hochschild, Kohn & Co.*, 180 Md. 389, 24 A.2d 783 (1942) and *Torpey v. Red Owl Stores, Inc.*, 228 F.2d 117 (8th Cir. 1955) (doubt expressed that retailer bound by implied warranty as to jar containing fruit), with *Haller v. Rudmann*, 249 App. Div. 831, 292 N.Y. Supp. 586 (2d Dep't 1937) and *Sanchez-Lopez v. Fedco Food Corp.*, 27 Misc.2d 131, 211 N.Y.S.2d 953 (N.Y. City Ct. 1961) (both imposed warranty). With the exception of restaurant transactions the Code does not answer the question whether the transaction is a "sale" to which warranties attach. In *Hadley v. Hillcrest Dairy, Inc.*, 341 Mass. 624, 171 N.E.2d 293 (1961), the court imposed an implied warranty on a milk bottle in which a dairy sold milk even though there was no charge for the bottle and the customer was obliged to return the bottle. See also *Cooper v. Newman*, 11 N.Y.S. 2d 319 (N.Y. City Ct. 1939).

<sup>16</sup> Excellent analyses of the problem created by the description requirement may be found in Honnold, *Sales and Sales Financing* 78-82 (2d ed. 1962) and Ruud, "The Vendor's Responsibility For Quality in The Automated Retail Sale," 9 Kan. L. Rev. 139, 141-51 (1960).

<sup>17</sup> UCC § 2-314(1). It is probably not significant that such transfers are made "sales" only within the merchantability section, since most cases involving restaurant transactions treat facts which give rise to the merchantability as well as the fitness warranty. Quere whether the courts will be willing to give a broad meaning to the word "serving" in this section and open an avenue for imposing warranty obligations in the supermarket or self-service cases. Compare *Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N.E.2d 305 (1946). UCC § 2-313, comment 2, states that the warranty sections of the Code are not designed to disturb case development extending warranties to nonsales transactions. See Farnsworth, "Implied Warranties of Quality in Non-Sales Cases," 57 Colum. L. Rev. 653 (1957). Furthermore, UCC § 1-102, comment 1, approves application of the policies of the Code to transactions not included within the scope of the statute where reason and policy require the use of such principles.

<sup>18</sup> 1 Williston, *supra* note 8, § 242b; Vold, *Sales* § 94 (2d ed. 1959).

donment of the so-called "trade name" exception to the creation of the warranty. Under the Uniform Sales Act it was determined as a matter of law that when a trade name was employed by the buyer in a sale of a specified article, no warranty of fitness for a particular purpose could arise, since the buyer relied on the skill or judgment of the manufacturer and not upon his immediate seller.<sup>19</sup> The Code rejects this position. The question of reliance is, however, still open under the Code, and the use of a trade name will still be material in deciding that factual question.<sup>20</sup>

A less significant change is made in the rules governing the warranty of fitness. Under the Sales Act the buyer was required to "make known" his purpose to the seller,<sup>21</sup> while under the Code the seller is only required to have reason to know the buyer's purpose.<sup>22</sup> Although this change is not consistent with the language of the Uniform Sales Act, it is in accord, as are other alterations, with many court decisions.<sup>23</sup>

## 2. Limitations Upon Warranty Liability

In the pre-Code law the courts developed several important limitations upon warranty liability. Perhaps the most significant of these restrictions was the recognition of the contractual disclaimer under which the seller sought to escape some or all of his warranty obligations.<sup>24</sup> The Code makes a substantial alteration in the prior law. After starting with an

<sup>19</sup> Uniform Sales Act § 15(4). 1 Williston, *supra* note 8, § 2362. The presence of a trade name is not necessarily decisive if other facts show the reliance by the buyer. *Pabellon v. Grace Line, Inc.*, 191 F.2d 169 (2d Cir.), cert. denied, 342 U.S. 893 (1951); *Green Mountain Mushroom Co. v. Brown*, 117 Vt. 509, 95 A.2d 679 (1953); *Foley v. Liggett & Myers Tobacco Co.*, 136 Misc. 468, 241 N.Y. Supp. 233 (App. Term 2d Dep't 1930), *aff'd*, 232 App. Div. 822, 249 N.Y. Supp. 924 (2d Dep't 1931).

<sup>20</sup> UCC § 2-315, comment 5.

<sup>21</sup> Uniform Sales Act § 15(1).

<sup>22</sup> UCC § 2-315. Both UCC §§ 2-314 and 2-315 also omit the language in Uniform Sales Act § 15 that the merchantability and fitness warranties attach whether the seller be "the grower or manufacturer or not." UCC § 2-315, comment 4, states that the draftsmen did not intend to revive the older test that the seller must be a grower or manufacturer.

<sup>23</sup> Compare *Rinaldi v. Mohican Co.*, 225 N.Y. 70, 121 N.E. 471 (1918) (meat obviously for food), with *Standard Rice Co. v. P. R. Warren Co.*, 262 Mass. 261, 159 N.E. 508 (1927) (box buyer required to show that seller was informed of plan to use automatic filling machines).

<sup>24</sup> Uniform Sales Act § 71 permitted a right, duty or liability arising by implication of law to be negated or varied by express agreement. Although one might argue that at least express warranties do not arise "by implication of law" the courts permitted disclaimer. The high point may have been reached in *Shafer v. Reo Motors, Inc.*, 205 F.2d 685 (3d Cir. 1953), where a disclaimer clause covering all obligations or liabilities precluded negligence liability. While disclaimers in pre-Code law could in theory give the seller complete protection, the courts were frequently willing to give such clauses a narrow construction. *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927) (implied warranties not excluded by clause precluding warranties not written in contract); *S. F. Bowser & Co. v. McCormack*, 230 App. Div. 303, 243 N.Y. Supp. 442 (4th Dep't 1930). See note, 1939 Wis. L. Rev. 459. Later years have seen the development of a policy against some standard disclaimers. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), Note, 46 Cornell L.Q. 607 (1961) (quality disclaimer in standard automobile contract). See *Wilson v. Manhasset Ford, Inc.*, 27 Misc. 2d 154, 209 N.Y.S.2d 210 (Dist. Ct. Nassau County 1960) (disclaimer of title warranty contrary to public policy).

absolute prohibition upon disclaimers of the express warranties in the earlier drafts, the Code draftsmen moved to a rule providing that the disclaimer is inoperative if not consistent with any express warranty.<sup>25</sup> A court is first called upon to construe the two provisions as consistent with each other wherever such a construction is reasonable. Where the construction is not reasonable, then the disclaimer will apparently be inoperative.<sup>26</sup> The phrasing of the rule does not make for precision in predicting results; but it seems that one wishing to rid himself of liability for express warranty must structure his agreement to avoid the creation of any express warranty, *e.g.*, by placing an explicit disclaimer immediately following the language of description. Otherwise, the warranty will control.

In most cases even more must be done by a seller who wishes to rid himself of the liability for the breach of the merchantability and fitness warranties. To avoid both implied warranties, the disclaimer must be written, conspicuous, and expressed in somewhat specific language.<sup>27</sup> Less is required if only one of the implied warranties is to be disclaimed. The exclusion of a fitness warranty must be in writing and must also be conspicuous.<sup>28</sup> The merchantability warranty, on the other hand, may in the absence of a writing be orally disclaimed as long as merchantability is mentioned. If a writing is involved, the merchantability warranty must be mentioned, and the disclaimer must again be conspicuous. These rather technical limitations are then modified to a considerable degree by subparagraph (3) of section 2-316. All implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion and makes plain that there are no implied warranties.<sup>29</sup> This kind

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<sup>25</sup> UCC § 2-316(1) in the earlier drafts provided "If the agreement contains an express warranty, words disclaiming it are inoperative." Uniform Commercial Code, Text and Comments Ed. § 2-316 (Official Draft 1952). Apparently the draftsmen became convinced that this approach went too far particularly in sales between large merchants in protecting the buyer against improvidence. Braucher, "Article 2—Sales," Uniform Commercial Code in Massachusetts 99, 116 (1958). The change has not been popular with at least one commentator. Ezer, "The Impact of the Uniform Commercial Code on the California Law of Sales Warranties," 8 U.C.L.A. L. Rev. 281, 310 (1961). Compare Weeks, *supra* note 2, at 513-14. Note that the parol evidence rule, UCC § 2-202, discussed *infra* at note 35, and the unconscionable contract section of the Code, discussed *infra* at note 218, also may affect disclaimers.

<sup>26</sup> In *Alaska Pac. Salmon Co. v. Reynolds Metals Co.*, 163 F.2d 643 (2d Cir. 1947), the court interpreted written language as not creating an express warranty and at least one judge was moved to that conclusion by the presence of a disclaimer clause. *Id.* at n.12.

<sup>27</sup> UCC § 2-316(2).

<sup>28</sup> "Conspicuous" is defined in UCC § 1-201(10).

<sup>29</sup> The draftsmen took pains to state that the rules in subsection (2) operate "subject to subsection (3)" and that subsection (3) provisions are operative "notwithstanding subsection (2)." Consequently, it seems that the "as is" language need not be conspicuous. Compare Honnold, *supra* note 16, at 112. The warranty of title imposed by UCC § 2-312 is probably not affected by UCC § 2-316, since the warranty is not classified as express or



of language apparently may be oral in the case of either the fitness or the merchantability warranty. As a counseling matter, the seller may avoid difficult factual disputes if he drafts his agreement to meet the conspicuous and written requirements of subsection (2).<sup>30</sup>

The effect of a disclaimer by a manufacturer upon subsequent sales at wholesale and retail is an open question under the Code and under the pre-Code law.<sup>31</sup> Nothing in the Code plainly indicates that such a disclaimer is operative in subsequent sales. However, the standards for merchantability do make the retailer responsible for claims made on a label by the maker.<sup>32</sup> Consequently, it may be argued that if the label limits liability of the retailer because of language placed thereon by the manufacturer, then the retailer should be able to take advantage of that limitation. A final type of contractual disclaimer limits the remedies of the buyer for a breach of warranty. Section 2-719 validates provisions for remedies in addition to or in substitution for those provided in the Code. Furthermore, the section specifically authorizes a contractual term restricting the buyer's remedies to return of the goods and repayment of the price, or to repair and replacement of the goods.<sup>33</sup>

Another major means of avoiding warranty liability under pre-Code law is the parol evidence rule, which has been used to eliminate both express and implied warranty obligations.<sup>34</sup> Antecedent express warranties may still be excluded by the operation of the parol evidence rule, since section 2-316(1) specifically incorporates the parol evidence rule of the Code, section 2-202. Thus where a particular document is protected by the Code parol evidence rule, the buyer will not be able to introduce evidence of earlier conflicting affirmations of fact relating to the goods.<sup>35</sup> An entirely different matter arises when we deal with the

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implied and subsection (2) of UCC § 2-312 provides a special disclaimer rule. Compare *Wilson v. Manhasset Ford, Inc.*, 27 Misc. 2d 154, 209 N.Y.S.2d 210 (Dist. Ct. Nassau County 1960). Note that the title warranty expressly covers infringement claims.

<sup>30</sup> Another means of avoiding implied warranties of merchantability may arise from the rules for ascertaining intention in UCC § 2-317, where express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose. Note that this is merely a rule for ascertaining intent and that the courts are first asked to interpret warranties as consistent with each other and as cumulative. UCC § 2-317, comment 1.

<sup>31</sup> See *Marino v. Maytag Atlantic Co.*, 141 N.Y.S.2d 432 (N.Y. City Court 1955) (adoption by remote seller required).

<sup>32</sup> UCC § 2-314(1) (f).

<sup>33</sup> The different treatment will necessitate a determination in many cases of whether a particular clause falls into the disclaimer or modification of remedy categories. If the clause is in the latter group, UCC § 2-719 contains limitations on the clause: (1) to be the exclusive remedy the agreement must expressly so provide, (2) if the exclusive remedy stipulated fails "of its essential purpose," remedy may be had under the Code, and (3) limitation of damages for personal injuries in cases involving consumer goods is made *prima facie* unconscionable.

<sup>34</sup> See the discussion in Note, 53 *Colum. L. Rev.* 858 (1953).

<sup>35</sup> The Code parol evidence provisions in UCC § 2-202 will not prevent proof of consistent additional oral express warranties unless the writing is a complete and exclusive

warranties of merchantability and fitness. No reference to the parol evidence rule is made in the disclaimer section of the Code dealing with these warranties. In fact, exclusion depends upon the use of rather express language. This limitation will have the effect of preventing the parol evidence rule from operating as a kind of secret disclaimer of implied warranties.<sup>36</sup>

One of the most heavily litigated issues in the current law of sales, apart from the Code, is the question of privity.<sup>37</sup> Here the rules of law have been changing, not through the subtle process of erosion but rather by an obvious process of explosion. The original requirement limited law suits based upon any sales warranty to those between the original seller and the original buyer.<sup>38</sup> This "privity rule" has been lost in a series of cases stating exceptions, limitations, and a consumer-oriented view of the question.<sup>39</sup> The Code provision, startling a decade ago, now seems to be rather modest.<sup>40</sup> Under section 2-318 the seller's warranty covers personal injuries of any plaintiff who is in the family or the household of the buyer, or is a guest in his home, when it is reasonable to expect that such a person will come in contact with the goods.

The Code statement of the rule does not enlarge the class of defendants liable for breach of warranty. The question of whether a manufacturer or wholesaler is liable to a retail buyer is deliberately left unanswered by the Code. The comments make clear that the draftsmen did not intend

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statement of the terms of the agreement, or unless the writing explicitly negates any warranty and the writing is found to be a final statement of the terms as agreed upon.

<sup>36</sup> In *Dekofski v. Leite*, 336 Mass. 127, 142 N.E.2d 782 (1957), the court precluded parol evidence of the implied fitness warranty when the contract states that there were no understandings, warranties, or agreements not included in the written order; and in *S. F. Bowser & Co. v. Independent Dye House, Inc.*, 276 Mass. 289, 177 N.E. 268 (1931), implied warranties were excluded by an integrated contract stating that it covered "all agreements between the parties relevant to this transaction." See also *Valley Refrigeration Co. v. Lange Co.*, 242 Wis. 466, 8 N.W.2d 294 (1943).

<sup>37</sup> A recent collection of cases extends over 64 pages. Annot., 75 A.L.R.2d 39 (1961).

<sup>38</sup> See *Turner v. Edison Storage Battery Co.*, 248 N.Y. 73, 161 N.E. 423 (1928) (express warranties); *Chysky v. Drake Bros.*, 235 N.Y. 468, 139 N.E. 576 (1923) (implied warranties). The lower courts constantly sought to change or avoid the requirement. Note, 44 Cornell L.Q. 608 (1959).

<sup>39</sup> Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)," 69 Yale L.J. 1099 (1960). In New York in recent months the time-honored privity doctrine of *Chysky v. Drake Bros.*, 235 N.Y. 468, 139 N.E. 576 (1923) has been abandoned (1) in the food cases by extending the warranty protection to all members of the buyer's household, *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961), Note, 44 Cornell L.Q. 608 (1959), and (2) at least in cases of express claims by the manufacturer by permitting a suit by a remote business buyer against the manufacturer. *Randy Knitwear v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

<sup>40</sup> Originally the Code draftsmen proposed to abolish privity entirely in actions for breach of warranty to all so related to the buyer as to make it reasonable to expect that they would use, consume, or be affected by the goods. 1A U.L.A. § 42, Unif. Rev. Sales Act, § 42 (1948). See comment, 57 Yale L.J. 1389, 1404 (1948). This was said to be "too extreme in form" and "in conflict with important judicial authority in many states." Dierson, "Report on the Proposed Uniform Commercial Code," 6 Food Drug Cosm. L.J. 943, 946 (1951).

to limit the liability to the immediate seller alone; but no provision is made for several classes of third parties who might fall into the plaintiff group.<sup>41</sup> Thus the employee outside of the home, the hospital patient, the wife who eats (food purchased by) her husband at a drive-in, are not plainly protected by the privity rule of the Code. This does not mean, however, that such plaintiffs will not be able to recover either under a theory of negligence, of misrepresentation, or under the developing cases stating a "warranty" liability which is close to nonfault tort liability.<sup>42</sup>

One might say in summary that the Code rule qualifies a minimum group of plaintiffs for suits against the original seller of the goods. The maximum group of plaintiffs who will be eligible to bring such suits and the maximum group of defendants liable for quality defects will continue to be set by the pre-Code law and by the developing case materials in the field.

### B. *Risk of Loss*

A buyer who originally complained about the quality of a carload of television cabinets might discover that he has no cause of action at all even though the cabinets are entirely useless. The seller may successfully contend that the defect in the goods arose entirely after the risk of loss had passed to the buyer. For the most part the Uniform Sales Act placed the risk of loss upon the person who held the property in the goods.<sup>43</sup> In this area the Code changes our techniques more than the actual results. Rather specific rules are established for determining the answers to the risk-of-loss question. The Code tests are drafted to provide the lawyer with answers by reference to fact determinations, rather than by a reference to the abstract concept of "property in the goods."

Where neither party has breached the contract, the lawyer's first task under the Code rules covering risk is to determine whether the contract requires or authorizes the seller to ship the goods by carrier.<sup>44</sup> This question may be answered by referring to the agreement itself and then to the specific definitions of trade terms set forth in sections 2-319 through 2-325.<sup>45</sup> If under the contract the seller ships by carrier but has

<sup>41</sup> See UCC § 2-313, comment 2, and UCC § 2-318, comment 3. Compare Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961) (guest in car not within UCC § 2-318, but privity not necessary apart from Code).

<sup>42</sup> Compare the successive drafts of Restatement (Second), Torts § 402(a), first imposing strict liability without regard to privity upon the seller of food and then extending that liability to sellers of any product "for intimate bodily use" with a caveat that the Institute expresses no opinion as to whether the rule may apply to other products.

<sup>43</sup> Uniform Sales Act § 22. Of course, locating property in the goods was not always the decisive issue. When a security title was reserved or when one party was in default, the property test was not used. Uniform Sales Act § 22 and Uniform Conditional Sales Act § 27.

<sup>44</sup> UCC § 2-509.

<sup>45</sup> The Code sets forth definitions for a variety of trade contract terms, such as F.O.B. and F.A.S. (§ 2-319); C.I.F. and C. & F. (§ 2-320); "Ex Ship" (§ 2-322). Questions of

no duty to deliver the goods at a particular destination, the risk passes to the buyer when the goods are delivered to the carrier.<sup>46</sup> On the other hand, if the contract requires the seller to deliver the goods at a particular destination and the goods are there duly tendered, while in the possession of the carrier, the risk of loss passes to the buyer at the time of tender.<sup>47</sup> For example, if the contract provides for delivery F.O.B. cars at the seller's place of business, the goods will remain at the seller's risk until the goods are loaded on board the carrier.<sup>48</sup> If, on the other hand, the contract calls for shipment F.O.B. the place of destination, the risk of loss will remain on the seller until the goods reach the place of business of the buyer and are tendered to him.<sup>49</sup>

The second major Code rule on risk of loss controls the allocation of risk when a third party has control of the goods. Section 2-509 provides that the risk of loss will pass to the buyer on acknowledgment by the bailee of the buyer's right to possession. Once again title is irrelevant.<sup>50</sup>

The final major provision relating to risk of loss governs those cases which involve neither shipment by a carrier nor goods in the hands of a bailee. Under this catch-all rule the risk of loss will pass to the buyer at different times, depending upon whether or not the seller is a "merchant."<sup>51</sup> On the assumption that a merchant-seller will continue to insure goods in his possession even though they are subject to a contract with the buyer, the Code preserves the merchant's risk of loss until such time as the buyer actually receives the goods.<sup>52</sup> The nonmerchant-seller loses the risk of loss upon tender of delivery to the buyer. Since most cases will involve merchant-sellers, risk will generally fall upon the possessor

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risk can be minimized by use of the appropriate F.O.B. term, since the Code rejects classification of such terms as "price terms" unless there is agreement to the contrary. UCC § 2-319, comment 1.

<sup>46</sup> UCC § 2-509(1)(a). This approach should result in allocation of risk on much the same basis as under the presumptions of Uniform Sales Act § 19, rule 4(1) read with § 22, since property passed on appropriation by delivery to the carrier. *Badhwar v. Colorado Fuel & Iron Corp.*, 138 F. Supp. 595 (S.D.N.Y. 1955), *aff'd*, 245 F.2d 903 (2d Cir. 1957).

<sup>47</sup> UCC § 2-509(1)(b). This should make for results similar to those reached under rule 5 of Uniform Sales Act § 19.

<sup>48</sup> UCC § 2-319(1)(c) states that the duty of loading goods on board is placed upon the seller by use of the term F.O.B. vessel, car, or other vehicle. It is perhaps wise for the lawyer to clearly use the appropriate term here and to advise his clients of this rule. Otherwise, he will be forced to resort to trade usage to show that the seller had the duty to load on board.

<sup>49</sup> Under UCC § 2-320 the term C. & F. (cost and freight) has the same effect as a C.I.F. (cost, insurance and freight) term except that in the latter the seller must obtain insurance. See 2 Williston, *supra* note 8, § 280-C.

<sup>50</sup> Only in those cases involving a negotiable document of title can one still argue that "title" is relevant. In these instances UCC § 2-509(2)(a) passes the risk to the buyer upon receipt of the document.

<sup>51</sup> See note 4 *supra* and accompanying text.

<sup>52</sup> UCC § 2-103 defines "receipt" of goods as taking physical possession of the goods. UCC § 2-509, comment 3, reveals the insurance basis of the risk allocation.

of the goods rather than upon the person who has the property interest.<sup>53</sup>

The impact of insurance becomes even more apparent in the Code rule fixing risk of loss when there has been a breach by one of the parties. Basically the aggrieved party who is in control of the goods may treat the risk of loss as being upon the other party to the extent of any deficiency in his insurance coverage.<sup>54</sup> The comments indicate that deficiency here means such deficiency in coverage as exists without subrogation.<sup>55</sup>

### C. Cure

Lawyers are accustomed to view a transaction, at least in the beginning of their analysis, as a framework for a search for the person who committed the first breach. The Code will considerably alter this analysis. First, a seller who has delivered nonconforming goods which have been rejected by the buyer may notify the buyer of his intention to "cure" and then make a conforming delivery within the contract time.<sup>56</sup> The comments expand the effectiveness of this provision by indicating that the seller may have a second chance even when he has taken back the nonconforming goods and refunded the purchase price.<sup>57</sup> Such a case might also be handled as a mutual resolution of the dispute ending the seller's responsibility in the matter.<sup>58</sup> One other difficulty for the seller arises from the fact that he must promptly notify the buyer of his intention to cure. The requirement of seasonable notification must be read in light of the fact that after making a rejection the buyer may be faced with the commercial necessity of looking elsewhere for his supplies.

In subsection 2 of section 2-508, the seller's power to cure is further extended. This subsection is designed to protect the seller against what the comment calls a surprise rejection.<sup>59</sup> Thus the seller may have a

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<sup>53</sup> One caveat should be noted here. In a sale on approval, risk rests on the seller until the buyer accepts the goods. See UCC § 2-327.

<sup>54</sup> UCC § 2-510. Note also that under UCC § 2-501 the buyer obtains an insurable interest upon identification and the seller retains such an interest so long as he has title or a "security interest." UCC § 2-510(3) permits the seller to treat the risk as falling upon a defaulting buyer to the extent of any insurance deficiency "for a commercially reasonable time." An earlier version of the Code was criticized for not limiting the time during which the buyer has the risk. Williston, "The Law of Sales in the Proposed Uniform Commercial Code," 63 Harv. L. Rev. 561, 583 (1950). During that time period the seller should either dispose of the goods or revise his insurance program.

<sup>55</sup> UCC § 2-510, comment 3.

<sup>56</sup> UCC § 2-508(1). Compare *Lowinson v. Newman*, 201 App. Div. 266, 194 N.Y. Supp. 253 (1st Dep't 1922).

<sup>57</sup> UCC § 2-508, comment 1.

<sup>58</sup> Although UCC § 2-711 abandons any election doctrine whereby the buyer could be deprived of any remedy when the goods are returned and the price repaid, if the parties wish to end all obligations in this situation, nothing in the Code rejects such a result. The terms "termination" and "cancellation" have been deliberately avoided here, since they are given a special meaning in the statute. See UCC § 2-106.

<sup>59</sup> UCC § 2-508, comment 2. "Seasonably" is defined in UCC § 1-204 as at the agreed time or if no time is agreed at or within a reasonable time.

reasonable time even after the contract period to substitute conforming goods: (1) where there is a latent defect in the goods, or (2) where the defect is patent but of such a minor nature as to indicate that the goods would be acceptable with a price adjustment.<sup>60</sup> The section rejects the time-honored, and perhaps time-worn notion, that the proper way to assure effective results in commercial transactions is to require strict performance.<sup>61</sup> Under the Code a buyer who insists upon such strict performance must rely on a special term in his agreement or the fact that the seller knows as a commercial matter that strict performance is required. The documentary sale in an overseas transaction is an obvious example of the latter kind of case.<sup>62</sup>

### III. WHAT MAY THE DISAPPOINTED BUYER DO WHEN THE GOODS ARE NONCONFORMING?

#### A. *Self-help*

##### 1. Rejection in Whole or in Part: UCC 2-601

Apart from the special rule governing installment contracts,<sup>63</sup> the Code permits the buyer who receives nonconforming goods to reject those goods no matter how slightly they differ from the contract requirements. Of course, this power is reduced by the seller's power to cure under section 2-508.<sup>64</sup> Furthermore, as was the case under the prior law, the buyer is required to act promptly and to notify the seller of his rejection.<sup>65</sup> The passage of property in the goods is again made irrelevant under the Code rule.

Under the pre-Code law a seller who shipped goods to a buyer in a distant city was faced with a major problem. If the buyer rejected the goods properly, he had no further obligations in connection with the goods. This meant that the seller who had no representative in the buyer's city was faced with hiring a special agent to take care of

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<sup>60</sup> UCC § 2-508(2).

<sup>61</sup> For an interesting discussion of the use of "cure" in defective title cases, see Hawkland, "Curing an Improper Tender of Title to Chattels: Past, Present and Commercial Code," 46 Minn. L. Rev. 697, 722-23 (1962).

<sup>62</sup> UCC § 2-508, comment 2, lists several illustrations where the seller must strictly perform, e.g., conformity of documents in overseas shipments, or the sale of precision parts or chemicals for use in manufacture. Other amplifications in that comment state that the seller is to be held to rigid compliance if the buyer gives notice either explicitly or by a course of dealing involving rigorous inspection. The comment, nonetheless, suggests that a "no replacement" clause in a "form" contract, giving express notice that strict performance will be required, will not prevent the seller from showing that the clause is not consistent with trade usage or the prior dealings of the parties, and was not called to his attention.

<sup>63</sup> UCC § 2-612(2) limits rejection of an installment to situations where the "non-conformity substantially impairs the value of that installment." See also UCC § 2-504 where rejection is permitted only when "material delay or loss ensues" from the seller's failure to make an appropriate shipping contract or to give buyer notice.

<sup>64</sup> Honnold, "Buyer's Right of Rejection," 97 U. Pa. L. Rev. 457 (1949).

<sup>65</sup> UCC §§ 2-601, 2-602; Uniform Sales Act §§ 49, 50.

the goods. The Code changes this rule and requires a merchant buyer who rejects goods to take certain steps to preserve and protect the seller's interest. When the seller has no agent or place of business at the market of rejection, the merchant buyer must follow the seller's reasonable instructions with respect to the goods.<sup>66</sup> To protect the buyer in this situation, the Code also provides that the buyer may demand indemnity for his expenses and that a failure to supply such an indemnity makes the seller's instructions unreasonable.<sup>67</sup> Even in the absence of any instructions the merchant buyer must make a reasonable effort to sell the goods for the seller's account if the goods are perishable or threaten to decline in value speedily.<sup>68</sup> In any event the buyer is entitled to reimbursement for his reasonable expenses in caring for and selling the goods. Furthermore, the buyer is also assured a sales commission. Good faith action by the buyer under these provisions or in cases where the resale is optional protects him from liability for acceptance, for conversion, and for other damages.<sup>69</sup>

## 2. Revocation of Acceptance

Protecting the buyer from unintended acceptance when he carries out the instructions of the seller is important, particularly in light of the Code rules on revocation of acceptance.<sup>70</sup> The tests of when acceptance occurs under the Code are roughly the same as under the Uniform Sales Act.<sup>71</sup> The new statute does introduce a major change in testing when the buyer may revoke his acceptance, or in the language of the old order, "rescind." The Code requires that the nonconformity must substantially impair the value of the goods to the buyer, while the Uniform Sales Act permitted rescission for any breach of warranty.<sup>72</sup> Under the Code, revocation of acceptance is extended to cases where the buyer knew of

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<sup>66</sup> UCC § 2-603. Under the prior law the rejecting buyer had a duty to notify the seller, but he had no obligation to return the goods. Uniform Sales Act § 50. See 3 Williston, Sales § 497 (rev. ed. 1948). Compare the duty to return or offer to return when the buyer rescinds under Uniform Sales Act § 69(3). "Market" here probably is only a geological term meaning the area or region where rejection occurred. Note, 105 U. Pa. L. Rev. 837, 872-73 (1957).

<sup>67</sup> UCC § 2-603(1). Section 2-711(3) gives a rejecting buyer a security interest in the goods for payments made on the price and for any expenses reasonably incurred in inspection, receipt, transportation, care and custody.

<sup>68</sup> UCC § 2-603(1). The general Code approach here is not unlike that contained in the Perishable Agricultural Commodities Act, 46 Stat. 532, 7 U.S.C. § 499(b)(3), which forbids the dumping, discarding or destruction by a merchant without reasonable cause of covered goods.

<sup>69</sup> UCC §§ 2-603(2), 2-604.

<sup>70</sup> UCC § 2-608.

<sup>71</sup> Under both UCC § 2-606(1) and Uniform Sales Act § 48 acceptance occurs if after time for inspection the buyer signifies his acceptance, fails to effectively reject, or does any act inconsistent with the seller's ownership.

<sup>72</sup> UCC § 2-608(1), Uniform Sales Act § 69(1)(d).

the breach but had assurances that it would be cured. As was true under the prior law's rule for rescission, the buyer may not revoke when lack of knowledge of the defect is not excused. The buyer who seeks to exercise this form of self-help must act promptly, and he must notify the seller of the revocation of acceptance.<sup>73</sup>

### 3. Adequate Assurance of Performance

The buyer's action both after a rejection and after revocation of acceptance may bring into play the seller's power to cure. To avoid unfair results to the buyer in this situation, the Code provides in section 2-609 that the buyer has the right to demand in writing an adequate assurance of due performance.<sup>74</sup> The seller who fails to supply such assurance promptly may find that the buyer is excused from further performance. Moreover, a continued failure to provide such assurances may result in a breach of contract by the party from whom the assurances are demanded. In fact, a failure of thirty days' duration will automatically result in a repudiation of the contract.<sup>75</sup> This is a very risky business for the party who is asked to supply the assurances. For example, if the buyer receives defective goods, the seller may claim that the goods conform to the contract or that the seller has a right to cure. If the buyer demands assurances of due performance within a reasonable time, the period within which the seller must act to supply such assurances or be held liable for a breach of contract begins to run. The buyer may have reasonable grounds for insecurity as to the quality of the goods even in cases where the goods are actually not defective. In such a case the seller's only breach will be his failure to provide timely assurance.

#### B. *Legal Remedies of the Buyer*

In addition to the actions which he may take without judicial assistance, the buyer also has various bases for recovering damages under the Code. First, the repayment of the price does not automatically preclude recovery of damages by the buyer thereafter.<sup>76</sup> This puts to rest the

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<sup>73</sup> UCC § 2-608(2). The cited section also precludes revocation after any substantial change in condition of the goods which is not caused by their own defects. Apparently this preserves the principle developed under Uniform Sales Act § 69 for "rescission."

<sup>74</sup> UCC § 2-609 defines "reasonable grounds for insecurity" and "adequate assurance of due performance" only in a general way. In transactions between merchants both are tested according to "commercial standards" (subsection (2)), and past acceptance of an improper delivery or payment does not prejudice the aggrieved party's right to assurance for future performance (subsection (3)). The extensive comment may be helpful.

<sup>75</sup> UCC § 2-609(4). The use of the term "repudiation" is important, since comment 5 indicates that the repudiation can be retracted "under the section dealing with that problem." Only UCC § 2-611 seems relevant and that treats of anticipatory repudiation. Quære whether after thirty days has expired under UCC § 2-609(4) one can say that the repudiation is anticipatory.

<sup>76</sup> UCC § 2-711.



doctrine of election of remedies in the law of sales in much the same fashion as did the special amendment to N.Y. Pers. Prop. Law, section 150(1)(d) in New York.<sup>77</sup>

The Code rule abolishing election of remedies is set forth in section 2-711. This section also sets forth, in one place, an index of the buyer's various remedies upon breach by the seller. One of the most important of the buyer's remedies is contained in the section dealing with "cover," which gives the buyer the option of fixing his money recovery by making a new purchase in substitution of the goods due from the seller.<sup>78</sup> Once again comment 2 to section 2-712 seems to spell out the meaning of this definition of cover. The comment states that a replacement contract on credit or delivery terms differing from the contract in breach may qualify as a reasonable purchase. Furthermore, it is indicated in the same comment that a series of contracts for sales as well as a single contract may be made the basis for cover. By use of the "cover" concept, the Code permits the buyer to make a substitute contract and thus fix in advance of litigation the amount which he may recover as the difference between the contract price and the market value as determined by the second purchase price.<sup>79</sup> The disappointed buyer may thus insulate himself from the burden of showing that the market value which he selected adequately represented the true market.

Under the pre-Code law the buyer may avoid this kind of dispute by employing a liquidated damages provision. The Code in section 2-718 states some general rules as to the validity of such provisions. First, a term in an agreement fixing unreasonably large liquidated damages is void as a penalty. In testing the reasonableness of such a provision, the Code calls upon the court to assay whether or not the amount is reasonable in light of the anticipated or actual harm caused by the breach, the difficulty of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.<sup>80</sup> Apparently, this test permits the parties to claim that the clause is reasonable in light of their prospective judgment of the facts or in light of the harm in fact suffered by the buyer. No mention is made in the section of a clause in an agreement which may unreasonably underliquidate the damages. Comment No. 1 to section 2-718 once again illustrates the extent to which the draftsmen's comments may supplement the provisions of the statute. The comment

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<sup>77</sup> Braucher, "The Commission and the Law of Contracts," 40 Cornell L.Q. 696, 713 (1955); Patterson, "Improvements in the Law of Restitution," 40 Cornell L.Q. 667, 670 n.10 (1955).

<sup>78</sup> The buyer must act without unreasonable delay and in good faith. UCC § 2-712(1).

<sup>79</sup> UCC § 2-712(2).

<sup>80</sup> UCC § 2-718(1). See Macneil, "Power of Contract and Agreed Remedies," 47 Cornell L.Q. 495, 505 n.31 (1962).

states that an unreasonably small amount would be subject to the same criticism as an unreasonably large amount and might be stricken under the section on unconscionable contracts or clauses.<sup>81</sup>

The liability of a seller for consequential damages is covered by section 2-715. The Code does not require that the seller consciously accept the liability of an insurer for any particular harm. All that must be shown is that the loss could not reasonably be prevented by cover or otherwise and resulted from the buyer's general or particular requirements and needs which the seller should have anticipated at the time of the contracting.<sup>82</sup> In addition, injury to person or property proximately resulting from any breach of warranty is also compensable.<sup>83</sup> The latter rule will effect little change in the existing law.

If the buyer will not or cannot cover, he will be required to prove the market value of the goods in his attempt to recover any anticipated benefits from his bargain.<sup>84</sup> If the buyer has accepted the goods, the measure of damages in the case of a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.<sup>85</sup> This goes a bit beyond the prior law which generally used the time and place of the passage of property in setting the time and place for determining the loss.<sup>86</sup>

The Code rule is apparently based upon the premise that the measure of recovery should be related to the buyer's ability to procure comparable goods at his business location.<sup>87</sup> A similar policy underlies the rule for determining market price in cases of rejection after arrival or revocation of acceptance. Here again the Code utilizes the market at the place where the buyer received the goods or in the language of section 2-713 the market is fixed at the place of arrival. This rule is probably intended to parallel section 2-714 where the market is fixed as of the place for accepted goods.<sup>88</sup> In the remaining cases of nondelivery or repudiation

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<sup>81</sup> See Fritz, "Underliquidated' Damages as Limitation of Liability," 33 Texas L. Rev. 196 (1954).

<sup>82</sup> UCC § 2-715(2)(a).

<sup>83</sup> UCC § 2-715(2)(b). Comment 5 to the cited section explains that in cases where injury occurs after use of the goods without discovery of the defect, the statutory term "proximate" precludes recovery if the buyer unreasonably failed to discover the defect or used the goods when the defect was known.

<sup>84</sup> "Cover" is not mandatory, but failure to cover may cut down the buyer's ability to recover consequential damages. UCC § 2-715(2)(a).

<sup>85</sup> UCC § 2-714.

<sup>86</sup> Uniform Sales Act § 69(7) states the test in terms of value at the time of delivery to the buyer.

<sup>87</sup> UCC § 2-713, comment 1.

<sup>88</sup> Usually the "place of arrival" or the "place of acceptance" will be the same, but in some cases these two may well be different, e.g., where the buyer takes delivery at a railway siding and then brings the goods to his plant. As the distance between the

by the seller, the market price is fixed as of the place for tender.<sup>89</sup>

In one Code jurisdiction the special statute of limitations of section 2-725 apparently went unnoticed by the bar.<sup>90</sup> In order to prevent such an occurrence elsewhere it is appropriate to note here that the Code assimilates into the contract statute of limitations all warranty actions.<sup>91</sup> Any action for breach of a contract for sale must be commenced within four years after it has accrued. Under the Code the cause of action accrues at the time that the breach occurs and thus knowledge of the plaintiff is irrelevant. For warranty actions a rule stating that the breach occurs when tender is made may seem to have a harsh effect upon the running of the statute of limitations in actions based on breach of warranty of title. The buyer may not know about the defective title until the four-year period of limitations has passed. Nonetheless, the Code statutory period will run, and the buyer will be precluded from pursuing his immediate vendor on a warranty theory. The doctrine is based on the familiar notion that finality in commercial transactions is a desirable goal of the law.<sup>92</sup> Of course, where any warranty explicitly extends to future performance and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should be discovered.<sup>93</sup>

### C. Buyer's Notice and Preservation of Goods in Dispute

More is required of the buyer who rejects than of the buyer who revokes acceptance in connection with the question of notice. In both of these situations, however, the buyer is using a form of self-help, and he is required to send some kind of notice to the seller. In addition,

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siding and plant increases, the likelihood of a different market also increases. UCC § 2-714, comment 3, suggests further that the time and place of acceptance is determined as of the buyer's decision not to revoke where the buyer would be justified in revoking acceptance.

<sup>89</sup> UCC § 2-713(2). See UCC § 2-503 for the seller's duty in connection with tender. The Code liberalizes the rules of evidence on market quotations (UCC § 2-724; N.Y. Civ. Prac. Act § 375-a), permits a substitute market (UCC § 2-723(2)), and gives recognition to third party documents authorized by the contract (UCC § 1-202).

<sup>90</sup> Cunningham, "Statutes of Limitations in Confusion," 46 Mass. L.Q. 13 (1961). But see annotation to UCC § 2-725, Special Supplement to the Mass. Ann. Laws, containing Mass. Gen. Laws ch. 106 (1961).

<sup>91</sup> There is a two-step chain of reasoning here. The four-year period is stated for "an action for breach of any contract for sale," and the only explicit mention of the warranty occurs in defining the time of breach. Nonetheless it seems clear that the Code treats warranty liability as a breach of contract. See UCC § 2-711(1).

<sup>92</sup> UCC § 2-312, comment 2, states that the breach of warranty of good title is not one which extends to "future performance of the goods."

<sup>93</sup> Some difficulty may come from the requirement that the warranty must extend to future performance "explicitly." Note that the comment to UCC § 2-725 does not use the term. In one sense the implied warranties of merchantability and fitness "explicitly" extend to future performance under the Code standards. See UCC §§ 2-314, 2-315. Compare Ezer, *supra* note 25. See also, Citizens Utilities Co. v. American Locomotive Co., 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962).

under section 2-607 the buyer may be cut off from any remedy by failing to notify the seller of a breach within a reasonable time after he discovers or should have discovered the defect.<sup>94</sup> Thus, the Code requires a notice of the fact that the transaction is unsatisfactory and a notice of the buyer's choice is a self-help remedy. We shall shortly see that these notices may be combined.

Any claim for a defect which is ascertainable by reasonable inspection and which could have been cured by the seller may be lost to the rejecting buyer if he fails to state that defect in his notice.<sup>95</sup> Until the limits of the seller's right to cure are more completely worked out, it would seem advisable to counsel a buyer to state all of these patent defects at the time of rejection. The comment states that the section is not designed to penalize buyers for omissions in their statements but that the purpose is to protect a seller who is reasonably misled by the omission.<sup>96</sup>

In subsection (b) of section 2-605(1), the statute goes on to state a specialized rule which applies only to transactions between merchants. In these cases the seller may after rejection make a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.<sup>97</sup> The buyer who ignores this request in whole or in part will also lose his right to claim a particular patent defect. Comment 3 states that this special merchant's rule is aimed at situations where the time for cure has passed. The statute itself states no such limitations. Consequently, in transactions between merchants even before the time for cure has passed, the seller may be entitled to the benefits of both subsections of section 2-605(1).

The buyer who seeks to revoke his acceptance is not precluded from relying upon all defects which were discoverable at the time of acceptance. First, if the buyer reasonably assumed that the nonconformity would be cured or if his acceptance was induced by the seller's assurances of cure, the buyer may assert the defect even though it could be discovered. Of course, defects which were difficult to discover at the time of acceptance may be relied upon by the buyer when discovered.<sup>98</sup> In addition, the comments indicate that the notification of revocation may also be delayed for a considerable period of time because of the anticipated series of discussions in attempting to adjust the dispute.<sup>99</sup> This may also

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<sup>94</sup> UCC §§ 2-602, 2-605, 2-607, 2-608. Under UCC § 2-717 the buyer must also notify the seller if he plans to deduct a part of the price for any breach of the same contract. Uniform Sales Act § 69(1) permits such deduction only for a breach of warranty.

<sup>95</sup> UCC § 2-605.

<sup>96</sup> UCC § 2-605, comment 1.

<sup>97</sup> UCC § 2-605(1)(b).

<sup>98</sup> UCC § 2-608. Uniform Sales Act § 69(3) made no exception to the required notice of an election to rescind for breach of warranty.

<sup>99</sup> UCC § 2-608, comment 4.

be the explanation for the requirement for particularizing defects in the notice of rejection.

From the buyer's viewpoint the most disastrous aspect of a failure to send a notice is raised by section 2-607, which requires a notice of the breach. Here the careless buyer may be precluded not only from revoking his acceptance of the goods, but also from any remedy either by self-help or litigation.<sup>100</sup> In cases where the buyer seeks to revoke his acceptance, this notice of breach may be contained in the notice of revocation. Nonetheless, it is clear that this notice of breach can be separate and relatively simple in content. Comment 4 to section 2-607 indicates that the content of the notification need merely be sufficient to alert the seller that the transaction is still troublesome.

Although the statute itself fails to make any distinction here between the merchant class and the casual seller and buyer, the comment provides an interesting insight into the draftsmen's intent. It suggests that a court, when ascertaining the time of notification in a retail-consumer transaction, permit an extension of time to the buyer.<sup>101</sup> Further, the same comment suggests that in the merchant transaction the reasonable time is to be judged by applying commercial standards to a merchant buyer. Neither the definition of reasonable time in section 1-204 nor the language of section 2-607 itself explicitly suggests these distinctions.<sup>102</sup>

One novel provision of article 2 creates a right in either party to a dispute to notify the other that he wishes to inspect, test, and sample the goods, including those in the possession of the other party.<sup>103</sup> It is not certain under the Code what effect such a notice will have upon the party's underlying rights. There is a general statement in section 1-106 that all rights under the Code are granted remedies. If a buyer, however, is in full control of the goods in dispute and fails to comply with a request for inspection by the seller, there is nothing in the remedial sections

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<sup>100</sup> This is similar to the provisions of the Uniform Sales Act § 49 requiring the buyer to notify the seller of any breach within a reasonable time. Note that under UCC § 2-717 permitting the buyer to deduct damages from any part of the price still due under the same contract also requires a notice to the seller.

<sup>101</sup> UCC § 2-607, comment 4. In an otherwise unreported case a Massachusetts court indicated that in cases of breach of warranty injuring a beneficiary under UCC § 2-318, no notice need be sent by the beneficiary. UCC § 2-607, comment 5, seems opposed to this view. The case as reported only seems to hold that a brief notice which might be insufficient if sent by a buyer may be adequate if sent by the third party. The holding seems sensible since the third party would not know the details of the transaction. See *Menard v. Great Atl. & Pac. Tea Co.*, App. Div. Central D. Ct., Worcester, No. T-584, Note, 47 Mass. L.Q. 190 (1962). It has been argued that notice should not be required for a warranty liability imposed apart from the sales statutes. Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)," 69 Yale L.J. 1099 (1960).

<sup>102</sup> Of course the facts involved appropriately suggest the adoption of these standards through the test of "reasonableness."

<sup>103</sup> UCC § 2-515.

of the sales article which precludes the buyer from going forward with his own law suit.<sup>104</sup>

#### IV. WHAT MAY THE BUYER DO WHEN HE RECEIVES AN INADEQUATE QUANTITY?

Thus far we have concentrated upon the problems related to the seller's monetary liability and to the buyer's remedies when the goods do not meet contract standards of quality. Many cases involve the situation where a seller fails to deliver or to tender the agreed upon quantity of goods. If the seller has the goods, the buyer may wish to capture those goods specifically.

Under the prior law if title had passed to the buyer, he could seek one of the legal remedies based upon a right to possession of the goods.<sup>105</sup> Replevin under the Code will in one sense be expanded and in another sense cut down. The remedy is expanded because the buyer may be able to bring a replevin action without any reference to his property or title rights. This is so because the Code hinges the right to replevin, in part at least, upon whether or not the goods have been "identified" to the contract.<sup>106</sup> In general, identification of the goods to the contract may occur at an earlier point in time than the passage of property under the prior law.<sup>107</sup> The Code, however, also narrows the availability of replevin to promote cover. The remedy of replevin is limited to those situations where the buyer, after reasonable effort, is unable to effect cover or where the circumstances reasonably indicate that such effort will be unavailing.<sup>108</sup> Thus where cover is available, replevin will not be granted even in cases where the title rules of the pre-Code law would have granted a specific legal remedy to the buyer.

If the buyer fails in an attempt to use replevin, he may then seek equitable relief. Most courts have been reluctant to expand the remedy

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<sup>104</sup> UCC § 2-711.

<sup>105</sup> Uniform Sales Act § 66. No mention is made of an action of conversion or detention in the listing of the buyer's remedies in UCC § 2-711; but there is no evidence that such remedies are excluded. Note, 49 Ky. L.J. 270, 284 (1960).

<sup>106</sup> UCC § 2-716(3).

<sup>107</sup> UCC § 2-501 spells out the tests for identification "in the absence of explicit agreement." Compare Uniform Sales Act § 19 where rules of presumption operate "unless a different intention appears. . . ." Somewhat redundantly the Code provides that identification occurs when the contract is made if it is for goods already existing and identified. There is no requirement that the goods be in a deliverable state as under Uniform Sales Act § 19(1). See UCC § 2-105 as to fungible goods. As to future goods other than crops and "unborn young," identification occurs when the goods are "shipped, marked or otherwise designated by the seller as goods to which the contract refers." There is no requirement of an "appropriation" with the assent of the buyer. Uniform Sales Act § 19(4).

<sup>108</sup> UCC § 2-716(3). In one more situation of less general importance, this section authorizes replevin, i.e., where the goods have been shipped under reservation by the seller (UCC § 2-505) and the buyer has satisfied or tendered satisfaction of the seller's security interest.

of specific performance in the ordinary sale of goods.<sup>109</sup> One tool to effectuate this policy was perhaps inadvertently created in the Uniform Sales Act. Under section 68 of the Sales Act specific performance was permitted only when the seller breached a contract to deliver "specific or ascertained goods." Any contract involving future goods was thus subject to a claim that the statute, at least inferentially, prohibited any decree of specific performance.<sup>110</sup> The Code eliminates this statutory provision. Section 2-716 merely states that specific performance may be decreed where the goods are unique or "in other proper circumstances."<sup>111</sup>

Comment 2 seems to indicate that the Code plans to expand the availability of the specific equitable remedy. It suggests that a new concept of unique goods is introduced under the section. The availability of the remedy must be determined in light of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source are mentioned as the typical commercial situations for granting specific performance. Furthermore, the comments suggest that the inability to cover under the Code is strong evidence of a proper circumstance for specific performance. Does this mean that specific performance really involves the remedy for those cases where the goods are not identified and where the buyer's ability to cover is questionable? In other words, the presence of an ability to cover may well mean that specific performance is not available. It seems quite doubtful that specific performance would now be made available in situations where replevin is no longer available because of a policy designed to encourage cover.<sup>112</sup>

As an analogue of the pre-Code right of a defrauded seller to recapture goods sold and delivered to the buyer, the Code in section 2-502 permits the buyer to obtain identified goods from an insolvent seller.<sup>113</sup> The buyer who makes an advance payment may still capture identified goods if he

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<sup>109</sup> Note, 34 N.C.L. Rev. 551 (1956).

<sup>110</sup> See 3 Williston, *supra* note 66, at § 608. Lower courts in New York used this argument repeatedly to deny specific relief, e.g., *Blake v. Tyson Radio Hempstead Corp.*, 103 N.Y.S.2d 872 (Sup. Ct. Nassau County 1951); *Cohen v. Rosenstock Motors, Inc.*, 188 Misc. 426, 65 N.Y.S.2d 481 (Sup. Ct. Bronx County 1946); *Goodman v. Caplan, Inc.*, 188 Misc. 242, 65 N.Y.S.2d 576 (Sup. Ct. Kings County 1946). Compare *Doyle's Main Motors, Inc. v. Davis*, 118 N.Y.S.2d 867 (Sup. Ct. Monroe County 1953).

<sup>111</sup> It has been suggested that UCC § 2-716 will probably strengthen developments favorable to specific performance of output and requirement contracts. Van Hecke, "Changing Emphases In Specific Performance," 40 N.C.L. Rev. 1, 6-9 (1961). Compare the dissent in *N & L Fur Co. v. Petkanas*, 252 App. Div. 844, 299 N.Y. Supp. 901, 902 (1st Dep't 1937) and UCC § 2-306, comments 1, 2.

<sup>112</sup> Cover, or the procurement of substitute goods by the aggrieved buyer, is not mandatory; but the kind and amount of damages recoverable and the remedy of replevin both hinge on the question of cover. UCC § 2-712, comment 3.

<sup>113</sup> Insolvency is broadly defined in UCC § 1-201(23):

A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

discovers the seller's insolvency within ten days after receipt by the seller of the first installment of the price. In some circumstances the buyer may be the person who identifies the goods to the contract, and in this case the Code requires that the goods conform to the contract in order to protect the interests of third parties who have dealt with the seller. The effect in bankruptcy of this Code rule is problematical, but it will have application in the nonbankruptcy framework.<sup>114</sup>

An earlier version of the Code gave the financing buyer a security interest in the undelivered goods.<sup>115</sup> Since there was no public notice of any such interests, the provision was abandoned to prevent deception of other creditors. Under the present version of the Code the buyer who wishes to obtain a full-dress security interest must comply with the provisions of article 9.<sup>116</sup> To the extent that any security interest arises under article 2, however, the buyer is excused from complying with the formalities, filing requirements, and default rules of article 9.<sup>117</sup> The question may arise as to whether or not the buyer's right to obtain goods from an insolvent seller under section 2-502 is a security interest. It is clear that any right which the buyer acquires as a result of this special property interest is not a "security interest."<sup>118</sup>

## V. WHAT THE SELLER MAY DO WHEN THE BUYER BREACHES

### A. *Tender of Payment by the Buyer*

By now the reader may have obtained the impression that only sellers breach sales contracts. Obviously, buyers also fail to carry out their side of sales agreements, and the Code contains another series of interrelated rules to deal with this problem. In determining whether or not a particular buyer has wrongfully failed to pay, it will frequently be necessary for lawyers to examine the law of tender. It has been well said that tender is not a friendly business.<sup>119</sup> Frequently, a seller who wishes to force a buyer to breach a contract in a rising market may insist at the last moment upon legal tender. Sometimes this is not possible. The Code

<sup>114</sup> The bankruptcy question is ably discussed in Kennedy, "The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9," 14 Rutgers L. Rev. 518, 556 (1960). The section should have force in connection with the avoiding powers of an assignee for the benefit of creditors under such state laws as N.Y. Debt. and Cred. Law § 15.

<sup>115</sup> Uniform Commercial Code, Text and Comments Ed. § 9-204(6) (Official Draft 1952).

<sup>116</sup> It is important to note that the financing seller is given especially favorable treatment under article 9 if he obtains a purchase money security interest; but the security interest of the financing buyer is treated under the general provisions of the article. See Hogan, "Financing the Acquisition of New Goods Under the Uniform Commercial Code," 3 B.C. Ind. & Com. L. Rev. 115 (1962).

<sup>117</sup> UCC § 9-113.

<sup>118</sup> UCC § 1-120(37).

<sup>119</sup> Braucher & Sutherland, Commercial Transactions 58 (2d ed. 1958).



in section 2-511 makes tender of payment sufficient when it is made by any means or in any manner "current in the ordinary course of business." The seller is still permitted to insist upon legal tender, but he must demand such a tender and allow a reasonable time for the buyer to comply. It is not remiss at this point to indicate the similarity between the buyer's power to "cure," here expressed in terms of tender of payment, and the seller's power to cure under section 2-508 when the goods do not conform.<sup>120</sup> In both situations the Code approach encourages the completion of the deal by eliminating technical and commercially insignificant objections to continued performance. Another frequently discussed question relates to the effect of the use of a check upon the underlying debt.<sup>121</sup> The Code in section 2-511 in effect states that payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment. Thus upon dishonor the seller would have both his remedies on the check and his remedies under the sales article.<sup>122</sup>

### B. *The Seller's Right to Complete the Process of Manufacture*

One of the most vexing problems of the pre-Code law involved the seller who received a notice of repudiation from the buyer while the goods were in the process of being produced. The Sales Act provided that in such a situation the buyer should not be liable to the seller for "greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand."<sup>123</sup> Thus the seller was confronted with a dilemma. If he failed to go forward with the production, he disrupted his manufacturing schedule, and in some cases he would be forced to sell for salvage materials which might be more economically used in his regular production. Occasionally some buyers even suggested, at least in appellate arguments, that sellers might have a duty to go forward and finish the goods.<sup>124</sup> The seller's duty to mitigate damages did not go

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<sup>120</sup> See text accompanying note 56, *supra*.

<sup>121</sup> This problem must be kept distinct from the issues related to the rights of a bona fide purchaser for value from one who obtained the goods by tendering a subsequently dishonored check. UCC § 2-403(1)(b) protects the purchaser in this frequently discussed problem. Corman, "Cash Sales, Worthless Checks and the Bona Fide Purchaser," 10 Vand. L. Rev. 55 (1956); Vold, "Worthless Check Sales, Substantially Simultaneous and Conflicting Analogies," 1 Hastings L.J. 111 (1950); Note, 62 Yale L.J. 101 (1952).

<sup>122</sup> The general Code treatment of this question in UCC § 3-802 is in accord. Note that an opposite result is called for when the holder procures certification of the check. UCC § 3-802, comment 2; UCC § 3-411.

<sup>123</sup> Uniform Sales Act § 64(4).

<sup>124</sup> See *Snelling v. Dine*, 270 Mass. 501, 170 N.E. 403 (1930); *Roland & Whytock v. Rex Mfg. Co.*, 49 R.I. 168, 141 Atl. 310 (1928). See also *Estes v. Curtiss Aeroplane & Motor Corp.*, 191 App. Div. 719; 182 N.Y. Supp. 25 (4th Dep't 1920).

that far. The seller's real problem came when he elected to complete the goods in process.

Fundamentally, the breaching buyer had an opportunity to use limited hindsight against the seller in these situations.<sup>125</sup> The Code makes clear in subsection 2 of section 2-704 that the seller's conduct is to be judged under standards of reasonable commercial judgment at the time that he takes action. The comments indicate that the seller may complete manufacture of the goods subject to attack by the buyer who can show that the seller's conduct was not commercially reasonable.<sup>126</sup>

Another important feature of this remedy is the right to identify even after the notice of repudiation. If the seller has conforming goods in his possession and control at the time he learns of the breach, he may identify those goods to the contract.<sup>127</sup> In addition, goods which are unfinished may be completed and identified to the contract if "they have been demonstrably intended for the particular contract."<sup>128</sup> In the latter case the seller is only authorized to treat such future goods as the subject matter of a resale under section 2-706, while in the former case apparently all the remedies associated with identified goods are available.

### C. *The Seller's Action for the Price*

In the same fashion as the section dealing with the buyer's rights to capture the goods specifically, the Code treatment of the action for the price seems to be based upon a notion that it is commercially desirable to promote resale of goods where one party has failed to conform to his contract obligations. First, the seller is authorized to recover the price for accepted goods or for conforming goods lost or damaged within a commercially reasonable time after the risk has passed to the buyer.<sup>129</sup> This clearly substitutes the more easily ascertained test of acceptance for the pre-Code rules of property passage as a criterion for price recovery.<sup>130</sup>

Second, the seller may recover the contract price for identified goods only when he is unable to resell after reasonable effort.<sup>131</sup> Since, as we

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<sup>125</sup> Some courts expressed the rule rather harshly, e.g., *Zimmerman Radio Corp. v. Bronson & Townsend Co.*, 108 Conn. 632, 144 Atl. 301 (1929). Others indicated that a reasonable judgment by the seller would be safeguarded. *Buchman v. Millville Mfg. Co.*, 17 F.2d 983 (2d Cir. 1927).

<sup>126</sup> UCC 2-704, comment 2. Note that the section itself only refers to the completion of manufacture while comment indicates that the seller has the power to complete "manufacture or procurement of goods."

<sup>127</sup> UCC § 2-704(1)(a).

<sup>128</sup> UCC § 2-704(1)(b).

<sup>129</sup> UCC § 2-709(1).

<sup>130</sup> Uniform Sales Act § 63. Acceptance under the Code does not occur until the buyer has had a reasonable opportunity to inspect the goods so long as the buyer refrains from doing an act inconsistent with the seller's ownership. See UCC § 2-606.

<sup>131</sup> UCC § 2-709(2). In addition the seller need not make the effort to resell if "the

shall see below, the seller's right to resell goods in his possession is substantially enlarged under the Code, it is important to consider the problem which will arise when the seller sues for the price and is able to resell the goods prior to the collection of the judgment.<sup>132</sup> In such a case the seller may resell at any time prior to the actual collection of the judgment, and the buyer must be credited with the proceeds of the resale.<sup>133</sup>

The final avenue for price recovery by the seller rests in section 2-709(1)(a). If conforming goods are lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer, the seller may recover the price.<sup>134</sup>

#### D. *The Seller's Action for Damages*

Although the Code somewhat limits the seller's ability to recover the price, his power to resell the goods and thus fix his damages is increased. First, the Code permits such resale not only where the buyer has failed to make a required payment, but also where the breach was in the form of a wrongful rejection of the goods or a repudiation of the contract.<sup>135</sup> Second, the right to resell arises in all cases and not merely where the goods are perishable, or the right of resale is expressly reserved, or where the buyer has been in default an unreasonable time.<sup>136</sup>

While the Sales Act required only that a resale be made with "reasonable care and judgment," the Code states more specifically the standards for a resale: "in good faith and in commercially reasonable manner."<sup>137</sup> The resale may be by the unit or in parcels; it may be made by one or more contracts or by performing an already existing contract with a third person. The sale may be public or private; but if it is private, the buyer must in all cases be notified.<sup>138</sup> A public sale and its requirements are spelled out in even more detail.<sup>139</sup> Furthermore, the price obtained at such a resale will probably be enhanced by the greater protection extended to any good faith purchaser at such a sale. Under the Sales Act

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circumstances reasonably indicate that such effort will be unavailing." UCC § 2-709(1)(b). Compare Uniform Sales Act § 63(3), authorizing price recovery when the goods "cannot be resold for a reasonable price."

<sup>132</sup> See *D'Aprile v. Turner-Looker Co.*, 239 N.Y. 427, 147 N.E. 15 (1925).

<sup>133</sup> UCC § 2-709(2).

<sup>134</sup> UCC § 2-709(1)(b). The N.Y. Law Revision Commission had criticized the original section because no time limit was placed upon the seller's possession of the conforming goods at the buyer's risk. The Code now contains the reasonable time limit. 1956 N.Y. Leg. Doc. No. 65(A), p. 398.

<sup>135</sup> UCC §§ 2-706, 2-703. Compare, Uniform Sales Act § 60(1).

<sup>136</sup> Uniform Sales Act § 60.

<sup>137</sup> UCC § 2-706(1).

<sup>138</sup> In a public sale, notice to the buyer of the time and place of the sale is excused if the goods are perishable or threaten to decline in value speedily. UCC § 2-706(4).

<sup>139</sup> Compare UCC §§ 9-504(3), 7-210, 7-308.

the purchaser was only protected where the sale was made as authorized by the statute.<sup>140</sup> The Code protects the good faith purchaser even where the seller violates the requirements of the statute.<sup>141</sup>

The seller is not required to make the resale provided for in section 2-706. Recovery of the difference between the market price and the unpaid contract price is specifically permitted by section 2-708. Furthermore, if that measure of damages is inadequate to put the seller in as good a position as performance, then the measure of damages may be the profit which the seller would have made from full performance by the buyer.<sup>142</sup> In the latter case dealers in fixed price items will be able to recover, in the words of the comment, "the list price less cost to the dealer or list price less manufacturing costs to the manufacturer."<sup>143</sup> Incidental damages may be recovered by the seller either in the case of a resale or in the case where he attempts to use the market price as the measure of his recovery.<sup>144</sup>

A third avenue is open for measuring recovery by an aggrieved seller. The liquidated damages provisions of section 2-718 would clearly permit the seller to utilize such a clause so long as the damages were not unreasonably large.<sup>145</sup> That section also contains another limitation on the seller's ability to recoup. Provision is made for avoiding the forfeiture of a fairly large prior payment by a defaulting buyer. The generally callous attitude which the courts have displayed toward a plaintiff in default has been frequently criticized and, in New York, has been affected by a statutory enactment amending the Sales Act to permit the buyer to recapture a limited amount of any down payment notwithstanding his default.<sup>146</sup> The Code follows this same approach, permitting the seller to retain a fixed amount of the value of the total performance.<sup>147</sup> In addition, the buyer's right to recovery may be reduced further by the

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<sup>140</sup> Uniform Sales Act § 60(2).

<sup>141</sup> UCC § 2-706(5).

<sup>142</sup> UCC § 2-708(2). Note that the profit recovery specifically includes reasonable overhead. Compare the pre-Code approach denying any profit recovery for fixed price items in *Lenobel, Inc. v. Senif*, 252 App. Div. 533, 300 N.Y. Supp. 226 (2d Dep't 1937).

<sup>143</sup> UCC § 2-708, comment 2.

<sup>144</sup> UCC § 2-710. Under UCC § 1-106 neither penal nor consequential damages may be accrued unless specifically provided in the Code or some other rule of law.

<sup>145</sup> See text accompanying note 80, *supra* for a discussion of UCC § 2-718.

<sup>146</sup> N.Y. Pers. Prop. Law § 145-a. Compare *Bisner v. Mantell*, 197 Misc. 807, 95 N.Y.S.2d 793 (County Ct. Rensselaer County 1950). It has been generally held that § 44(1) of the Uniform Sales Act authorized a defaulting seller to recover for any partial deliveries less damages. See, *Corman, "Restitution for Benefits Conferred by Party in Default Under Sales Contract,"* 34 Texas L. Rev. 582 (1956).

<sup>147</sup> The Code differs from the New York statute in two respects: (1) The Code calls for retention by the seller in all cases of \$500 or 20% of the price, whichever is smaller, while N.Y. Pers. Prop. Law § 145-a permits retention of 20% of the price; (2) the Code requires the application of UCC § 2-706 on the conduct of a resale by a seller who was partially paid in goods.

seller's ability to recover damages and by the value of any benefits received by the buyer under the contract.<sup>148</sup> Thus some of the sting is taken out of the harsh rules dealing with the lay-away plan, but at the same time the Code rules should not encourage breaching buyers to start law suits to recapture small down payments.

#### E. *The Seller's Power to Control the Goods*

Section 2-703, the catalogue of the seller's remedies, permits the aggrieved seller, upon the buyer's default, to withhold delivery of the goods and to cancel any executory obligation under the contract. By extending the pre-Code principle of the seller's lien, the Code also permits the seller to stop delivery of goods in the possession of a carrier or any other bailee when the goods are in carload, truckload, planeload, or larger shipments of express or freight.<sup>149</sup> For smaller shipments the Code retains the requirement of the prior law that the buyer must be insolvent to permit recapture of goods in the hands of a carrier or other bailee.<sup>150</sup> The Code, in the insolvency situation, also permits the aggrieved seller to refuse delivery of goods in his control except for cash payments, including payment for goods previously delivered under the contract.<sup>151</sup> This provision protects the seller even where he had originally contracted for a credit transaction.

If a seller wishes to obtain even greater power over the goods, he may reserve a security interest, for example, by procuring a negotiable bill of lading covering the goods.<sup>152</sup> In addition, the seller may comply with the formalities of article 9 and retain a purchase money security interest which will entitle him to rather special protections under that article.<sup>153</sup>

Failing in this approach to the problem, the seller may be confronted by the problem of the buyer's insolvency after the buyer has received possession of the goods. In this event the prior law frequently permitted the seller to recapture the goods from the buyer even in the absence of an express security arrangement.<sup>154</sup> The basis for the recovery was usually the fraud of the buyer in purchasing goods on credit while he was insolvent. The requirements of a representation forming the basis of

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<sup>148</sup> If the seller is entitled to liquidated damages, that amount may be retained by the seller in lieu of the amount fixed by the statute. UCC § 2-718(2)(a).

<sup>149</sup> UCC § 2-705. Uniform Sales Act §§ 57, 58 did not authorize stoppage against any bailee.

<sup>150</sup> Uniform Sales Act § 57; UCC § 2-705 (1).

<sup>151</sup> UCC § 2-702(1). See also UCC §§ 2-703, 2-705.

<sup>152</sup> UCC § 2-505. See also UCC §§ 2-506, 2-707.

<sup>153</sup> The purchase-money security interest is treated with special favor by UCC § 9-302 (filing excused in certain cases), by UCC § 9-301 (delayed filing permitted), and by UCC § 9-312 (3) and (4) (special priority rules). See Hogan, *supra* note 116.

<sup>154</sup> 3 Williston, Sales §§ 636-37 (rev. ed. 1948).

this fraud were rather elastic.<sup>155</sup> Section 2-702 provides that the seller may recapture goods from a buyer who receives them on credit while insolvent if the seller demands the goods within ten days after the receipt by the buyer. No representation is required in this situation, but the ten-day period will prevent many sellers from utilizing the remedy provided in the prior law. The Code, therefore, further provides that if a misrepresentation of solvency has been made to the particular seller in writing within three months before delivery, the time limitation does not apply. The effect in bankruptcy of this Code approach is somewhat debatable.<sup>156</sup> Where proceedings devoted to the liquidation of an insolvent estate are conducted in a state court, the Code rule will of course have its full bite.<sup>157</sup> Although the Code usually does not adopt any notion of election of remedies, subsection 3 of section 2-702 specifically provides that successful reclamation excludes all other remedies with respect to the goods. Comment 3 indicates that this election rule is adopted because the right to reclaim the goods constitutes preferential treatment as against the buyer's other creditors.

## VI. THE RIGHTS OF THIRD PARTIES

### A. *Bona Fide Purchasers for Value*

#### 1. The Problem of Void and Voidable Titles

Under the Code and the Sales Act a seller with a voidable title has power to transfer complete title to a good faith purchaser for value.<sup>158</sup> Clarification is a major contribution of the Code in this area. Several troublesome cases under the pre-Code law are isolated in section 2-403(1), and the bona fide purchaser is protected in each of these cases. For example, whether a sale is a technical cash sale or whether the delivery was in exchange for a subsequently dishonored check, the first buyer obtains a sufficient capacity to transfer title to an innocent third party for value. In addition, the Code rejects any distinction based upon the criminal law test of larceny and embezzlement.<sup>159</sup>

<sup>155</sup> The misrepresentation might concern the buyer's credit status or his intent to pay. In *Matter of Meiselman*, 105 F.2d 995 (2d Cir. 1939); *Baldwin v. Childs*, 249 N.Y. 212, 163 N.E. 737 (1928); *Whitten v. Fitzwater*, 129 N.Y. 626, 29 N.E. 298 (1891); *Hotchkiss v. Third Nat'l Bank*, 127 N.Y. 329, 27 N.E. 1050 (1891).

<sup>156</sup> The effect of § 2-702 is ably discussed in Kennedy, *supra* note 114, at 556. See also 45 Cornell L.Q. 566 (1960). To avoid an interpretation that the section subjects the seller's claim to the rights of the trustee in bankruptcy, the Code has been amended in Illinois and New York to delete a rather ambiguous reference to lien creditors in UCC § 2-702(3). This change is designed to leave the question to non-Code law as in *Matter of Kravitz*, 278 F.2d 820 (3d Cir. 1960). See Hawkland, "The Relative Rights of Lien Creditors and Defrauded Sellers—Amending the Uniform Commercial Code to Conform to the *Kravitz Case*" 67 Com. L.J. 86 (1962).

<sup>157</sup> See for example N.Y. Debt. and Cred. Law § 15 (assignments for the benefit of creditors).

<sup>158</sup> UCC § 2-403(1) and Uniform Sales Act § 23.

<sup>159</sup> See *Phelps v. McQuade* 220 N.Y. 232, 115 N.E. 441 (1917). Compare *Stanton Motor*

## 2. The Seller Remaining in Possession of Sold Goods

One of the several avenues to legal safety open to a buyer who is duped into purchasing a third party's goods is contained in section 25 of the Uniform Sales Act. Under that rule a second buyer could prevail over an earlier buyer if he could show that he received and paid for the goods after the earlier purchaser had permitted the seller to continue to appear as the owner by leaving the goods in the seller's control. Articulating the standards for the application of the principle of apparent ownership in this framework proved to be quite difficult. Whether a subsequent mortgagee or pledgee would qualify as a member of the protected class was not specifically answered in the Uniform Sales Act.<sup>160</sup> In addition, the requirement that the second buyer must have paid for and received the goods before the first buyer took delivery left open the possibility of a commercially senseless race by the diligent to obtain delivery of the goods.

In section 2-403(2) and (3) the Code preserves and strengthens the principle of ostensible ownership. The protected class is clearly defined by limiting the group to "buyers in ordinary course of business." This term is an important concept in the Code and is defined in section 1-201(9). Subsequent secured creditors are clearly not protected by the Code rule. Furthermore, in order to qualify for the protection the innocent buyer must show that he purchased his goods from a seller who deals with goods of the kind sold.<sup>161</sup>

The Code settles another troublesome question by its concept definition of "buyer in ordinary course of business." The extensive use of the credit sale is recognized by the Code when a buyer is considered as in the ordinary course even if he purchases on secured or unsecured credit.

The major issue not resolved by the Code statement of the rule is whether the second buyer has a duty to take delivery before he can take precedence over the interest of the first buyer. Neither the operative provision of section 2-403, nor the definition of the protected buyer group, directly answers this question. In other situations where the same terminology is employed, the requirement of delivery to the second buyer has been imposed.<sup>162</sup>

The Code rules on retention of possession by the seller also create a new limitation. In order to take advantage of the protection afforded,

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Corp. v. Rosetti, 11 App. Div. 2d 296, 203 N.Y.S.2d 273 (3d Dep't 1960), with *Damis v. Barcia*, 266 App. Div. 698, 40 N.Y.S.2d 107 (3d Dep't 1943). See Weber, "The Extension of the Voidable Title Principle Under the Code," 49 Ky. L.J. 437, 468 n.90 (1961).

<sup>160</sup> See *McGann v. Capital Bank & Trust Co.*, 117 Vt. 179, 89 A.2d 123 (1952).

<sup>161</sup> UCC § 2-403(2) and UCC § 1-201(9).

<sup>162</sup> *United States v. Kerr Gifford & Co.*, 136 F. Supp. 771 (N.D. Idaho 1956).

the buyer must show that he has purchased from a "merchant." Thus, when a sale is made on a casual basis by one who has no regular course of dealings with the kind of property sold, the protections of the bona fide purchaser will not be found in the entrusting with possession rules of article 2.<sup>163</sup>

### 3. The Expansion of the Protection of Innocent Purchasers— Other Forms of Entrusting

The Code rule dealing with sellers remaining in possession of sold goods is merely one aspect of a larger policy decision in Article 2. One of the persistent struggles under prior law was the conflict between the "true owner" and the bona fide purchaser of property sold or transferred by an unauthorized vendor. To protect the owner is to recognize traditional property values; to protect the bona fide purchaser is to promote the transfer and flow of goods. The Factor's Act, the rules of agency dealing with ostensible ownership, and the various provisions of chattel security laws protecting purchasers where the goods are held for resale—indicate the law is moving toward a concept of negotiability of goods.<sup>164</sup> Simply put, the Code provides that any entrusting of possession to a merchant is sufficient to empower that merchant to sell the goods to a buyer in ordinary course of business.<sup>165</sup> Thus, the watch left with the jeweler and the car left with a dealer for repairs may be effectively, albeit illegally, sold by the dealer. Although the bald statement of the rule may be shocking at first blush, it clearly does not promote the activities of the criminal "fence." The dealer acquires only the power to transfer the interest of the person who initially entrusted the goods. Stolen property, therefore, will not move more freely because of the Code rule. The provision should be tested in light of the fact that it is practically impossible to recapture goods which have moved into the marketing system through a dishonest dealer.

Finally, there is practical impact upon the successful and efficient marketing of goods arising from a rule protecting innocent purchasers. Speed in each individual transaction is obviously obtained. To the extent that any buyer is aware of the law or of any risk of title, his fears should be allayed. Most people dealing in this fashion probably give little or no thought to the problem of title at all. At the crux of the

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<sup>163</sup> UCC § 2-403(1) dealing with voidable title will safeguard such purchasers.

<sup>164</sup> Gilmore, "The Commercial Doctrine of Good Faith Purchase," 63 Yale L.J. 1057 (1954).

<sup>165</sup> UCC § 2-403(2). See *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 111 N.E.2d 871 (1953) (applied N.J. law to protect bona fide purchaser from a dealer entrusted with possession when slight evidence of owner's responsibility for appearances of authority).



problem are two innocent parties—the entruster and the ultimate buyer, both of whom have been equally duped by the middleman, the dealer. Trying to solve this problem by resort to equitable maxims is a fruitless undertaking. We are really and truthfully engaged in determining which is the more important: the ownership rights of the entruster or the commercial expectations of the buyer and the buying group.<sup>166</sup> The Code votes for the protection of the buying group and in so doing avoids much of the difficulty inherent in the technical and troublesome distinctions of the prior law.

## B. *Creditors Under Article II*

### 1. Creditors of the Buyer

If the buyer becomes involved with a third person who obtains a judgment against him while the goods are in the possession of the seller, may that third person capture the goods and subject them to his judgment? A search of the specific rules which the Code substitutes for the property concept reveals no answers to this problem. At this point we must utilize the title provisions of the Code. These are set forth in UCC section 2-401. The presumptions which control in the absence of an explicit agreement are generally clearer and more simple than the tests under prior law. If the contract is a destination contract, title will not pass until the goods arrive at that point. If the contract is a shipment contract, title passes at the time and place of shipment. Where the goods are not to be moved and are identified at the time of contracting, title passes at the place and time of contracting except where documents of title are involved. In the latter case title will not pass until the delivery of the documents takes place. If the creditors' rights in this framework are to be tested by section 2-401(2), there should be little difficulty with the problem.

### 2. Creditors of the Seller Who Remains in Possession of Sold Goods

The Uniform Sales Act provided no rule for determining the rights of the seller's creditors to goods left in his possession. Actually, the question was left entirely to nonuniform state law.<sup>167</sup> This abdication of responsibility was due to the diverse state law on the question. In very general terms, the division was between those jurisdictions which held that any retention of possession by the seller was fraudulent as against the seller's creditors as a matter of law, and those jurisdictions

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<sup>166</sup> See Vold, *Law of Sales* 179-84 (2d ed. 1959).

<sup>167</sup> Uniform Sales Act § 26.

which held that the retention was evidence of fraud only.<sup>168</sup> One-half century later the Code develops little more in this connection. Again the matter is left to the state law of fraudulent conveyances.<sup>169</sup> The one exception permits a merchant-seller to retain the goods in the current course of trade for a commercially reasonable time.<sup>170</sup> The exception buries the possibility that a creditor of the seller could automatically reach the piano left to be tuned after purchase, the car left to be serviced after purchase, or the steam shovel which has not moved until sometime after purchase.<sup>171</sup>

### 3. Consignments

When a manufacturer places goods in the possession of a dealer for resale, he frequently uses the consignment device. The papers involved state that the supplier of the goods retains full ownership rights and that the dealer may retain part of the ultimate sale price as his commission. The consignment is a useful marketing tool to induce distributors to take on new products, but the rights of third parties dealing with the possessor of the goods constantly troubled the courts.<sup>172</sup> Bona fide purchasers from the dealer were safeguarded by the Factor's Act.<sup>173</sup> Creditors of the dealer, however, were frequently unable to attach or levy upon the goods, even when they relied on the dealer's apparent ownership.<sup>174</sup> Of course, if it could be established that the consignment merely masked a security transaction, the general creditors could reach the goods on the basis of a failure to record under a chattel mortgage or conditional sales act.<sup>175</sup>

Under the Code a bona fide purchaser will be protected by reason of the entrusting rule of section 2-403. When creditors assert claims against consigned goods, the Code calls for a determination of whether the transaction falls within the definition of "security interest."<sup>176</sup> If the parties intend to create a security interest in the consigned

<sup>168</sup> The complete spectrum of views is collected in 2 Williston, *supra* note 154, at §§ 353-404.

<sup>169</sup> A 1934 survey suggests that the enactment of the Uniform Fraudulent Conveyance Act did not affect this area, even though § 7 thereof provides: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law . . . is fraudulent . . ." MacLachlan, *Bankruptcy* 255 (1956).

<sup>170</sup> UCC § 2-402(2) and comment 2.

<sup>171</sup> Note, 104 U. Pa. L. Rev. 91, 97 (1955).

<sup>172</sup> One commentator implies that courts have demonstrated a hostility toward consignments because of the possible injury to creditors. Hawkland, "Consignment Selling Under the Uniform Commercial Code," 67 *Com. L.J.* 146, 147 (1962).

<sup>173</sup> See N.Y. Pers. Prop. Law, § 43.

<sup>174</sup> Hogan, "The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety," 38 *B.U.L. Rev.* 571, 575 (1958). *Annot.*, 63 *A.L.R.* 355 (1929).

<sup>175</sup> *Liebowitz v. Voiello*, 107 F.2d 914 (2d Cir. 1939); *Taylor v. Fram*, 252 Fed. 465 (2d Cir. 1918). See also 4 *Collier, Bankruptcy* 1089 n.19, 1095 n.28 (14th rev. ed. 1959).

<sup>176</sup> UCC § 1-201(37).

goods, article 9 of the Code will be brought into play, and the rights of third parties will be governed by the various rather specific rules in that area.<sup>177</sup> If the device is not initially classified as a security interest, section 2-326(3) will still require a certain amount of notoriety for the protection of creditors. If the bailee maintains a place of business in which he deals in the kind of goods consigned, under a name other than that of the supplier, this section requires compliance with standards designed to warn creditors of the bailee. First, if the jurisdiction has an appropriate sign-posting law, the supplier may protect his consignment by compliance with that statute. Second, the supplier may alternatively file under article 9 of the Code. Third, if the supplier has failed to comply with either of these relatively simple notice requirements, he may prevail against creditors by establishing that the bailee is generally known to his creditors as being substantially engaged in selling the goods of others.<sup>178</sup>

Of the three avenues filing under article 9 seems to be the most attractive and simple. Many jurisdictions have no sign-posting statute, and compliance with such requirements often means that the creditors do not know of the transaction.<sup>179</sup> From a counseling viewpoint the provision permitting the supplier to establish the bailee's reputation in the trade is filled with the risks of an adverse fact-finding in subsequent litigation. The only difficulty raised by an article 9 filing stems from the possibility that the fact of filing will be the basis of an argument that the transaction does fall within the ambit of the definition of security interest. Any statement filed under article 9 should, therefore, clearly indicate on its face that the filing is made to comply with section 2-326. Otherwise, the supplier may find that his rights are entirely governed by article 9, including the default rules of part 5.<sup>180</sup>

#### 4. The Creditor and Bulk Transfers Under Article 6

The bulk sales provisions of the Code bring uniformity to this area for the first time. The basic purpose is to protect creditors of a merchant

<sup>177</sup> For a brief introduction to article 9, see Coogan, "How to Create Security Interests Under the Code—And Why," 48 Cornell L.Q. 131 (1962).

<sup>178</sup> In the absence of any of the three factors, UCC § 2-326(3) makes the consignment a "sale or return" and thus subjects the goods to the claims of creditors. UCC 2-326(1) also adopts specific tests for determining whether a transaction is a sale or return (delivered primarily for resale), or a sale on approval (delivered primarily for use).

<sup>179</sup> Arizona, Mississippi, North Carolina, Virginia and West Virginia have such statutes. 3 CCH Condit. Sale—Chat. Mort. Rep. ¶ 6407 (under each state) (1962). The fact that trade credit may be extended without examination of the debtor's stock is apparently one element in the general repeal of sign posting requirements in the various factor's lien acts. See Moore & Kupfer "Factor's Liens and Accounts Receivable—Current Developments," 12 Bus. Law. 482 (1957).

<sup>180</sup> See UCC §§ 9-504 through 9-507 for the limitations placed upon the secured party in realizing upon the collateral.

who sells out his stock to anyone for any price, pockets the proceeds, and disappears.<sup>181</sup> The other major credit risk resulting from the debtor's dishonesty, the fraudulent conveyance, will continue to be governed by the Uniform Fraudulent Conveyance Act and the case law of the enacting state.<sup>182</sup> The bulk sales article merely provides creditors with notice of the transaction before it takes place. The creditors will then be able to determine in advance whether they should try to stop the transfer or avail themselves of remedies which could reach the proceeds of the transfer. The prior statutes are varied and somewhat confusing; the main effect of the Code will be to clarify this important area of commercial law.<sup>183</sup>

(a) *What Is a Bulk Transfer?* Isolating the kinds of transfers which come within the requirements of the statute will continue to involve a close reading of the statute and a study of the case law. Certain transactions are explicitly exempted from the requirements.<sup>184</sup> Others are expressly included for the first time. In all included cases there will be the problem of determining whether or not it is a bulk transfer out of the ordinary course of business.

Perhaps a more specific problem will help demonstrate the kind of transfer at which the Code aims.

If one supermarket in a national chain is located in a Code jurisdiction and that store is sold by the chain, section 6-102 seems to require compliance with the notice and inventory standards. Bulk transfer is defined as "any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory of an enterprise subject to this Article."<sup>185</sup>

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<sup>181</sup> UCC § 6-101, Comment 2. The Code repeals N.Y. Pers. Prop. Law § 44 (bulk sales), and N.Y. Lien Law § 230-a (bulk mortgages).

<sup>182</sup> See N.Y. Debt. and Cred. Law §§ 270-81.

<sup>183</sup> Billig, "Article 6—Order Out of Chaos; A Bulk Transfer Article Emerges," 1952 Wis. L. Rev. 312. One of the best brief discussions of the article is Horvitz & Wekstein, "Article 6: Bulk Transfers," 1957 Ann. Survey Mass. L. §§ 7.1-7.7. Hawkland, Sales and Bulk Sales Under the Uniform Commercial Code 164 (1958 ed.).

<sup>184</sup> Bulk transfers by auction sales are plainly subjected to the statute. UCC § 6-107. Eight classes of exceptions are listed in UCC § 6-103. Briefly summarized these exceptions fall into three categories: (1) Where creditors have other means of protection—security transfers, general assignments, sales by executors and other officers; (2) where creditors have no assertable interests—exempt property, transfers in settlement of a lien; and (3) where creditors have a substituted asset such as an assumption promise from the transferee. There may be a nonstatutory exception resulting from the use of documents of title to effect the transfer. See, *Exeter Mfg. Co. v. Glass-Craft Boats, Inc.*, 103 N.H. 385, 173 A.2d 791 (1961). The most strenuously debated exception is the omission of security transfers. See statement of Professor Bunn before the New York Law Revision Commission, 1954 N.Y. Law Rev. Comm'n Rep. 654.

<sup>185</sup> UCC § 6-102(1). Defining "in bulk" and "not in the ordinary course of the transferor's business" will continue to require a case-by-case determination. *Sternberg v. Rubenstein*, 305 N.Y. 235, 112 N.E.2d 210 (1953). *Annots.*, 33 A.L.R. 62 (1924); 36 A.L.R.2d 1141 (1954). The Code term "major part" is said to mean more than one-half of the transferor's total stock. See, Miller, "Bulk Sales Laws: Meaning to be Attached to the

In our problem case the enterprise subject to this Article will be the single store in the chain. Since all of the inventory of that store is to be sold and since this is apparently not a regular part of a supermarket's business, the necessary notices must be sent. Furthermore, the accompanying transfer of equipment in the store will be classified as part of the bulk transfer, since it will be made in connection with a bulk transfer of inventory.<sup>186</sup>

One feature of the definition of bulk transfer may prove to be troublesome. Enterprises subject to the article are those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell. Some readers may include in this category any and all manufacturers. It has been suggested that the "including" clause modifies only the introductory provision and thus covers only manufacturers who sell from stock, such as a bakery store with its own baking facilities.<sup>187</sup>

(b) *The Creditors Protected.* A second major question in the bulk sales area concerns the classification of particular creditors as within or without the group protected by the act. The operative section of article 6 makes a transfer in violation of the requirements "ineffective against any creditor of the transferor."<sup>188</sup> Creditor is broadly defined in section 1-201(12). Furthermore, section 6-109 specifies that the creditors protected are those "holding claims based on transactions or events occurring before the bulk transfer." The use of the word "claims" in this section may result in the inclusion of all creditors who have claims in tort or contract, liquidated or unliquidated, secured or unsecured, contingent or fixed, presently due or not.<sup>189</sup> Furthermore, comment 1 to that section specifically indicates that creditors with unliquidated claims are within the group protected. Another reason for concluding that the group is a broad one is the fact that under section 6-104 the required list of creditors must include persons who hold disputed claims.

In ascertaining which of the transferor's creditors may take advantage of the bulk sales provisions, the counselor will be faced with two

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Quantitative and Qualitative Requirements, Phrases of the Statutes," 1954 Wash. U.L.Q. 283, 313.

<sup>186</sup> UCC § 6-102(2). Compare N.Y. Pers. Prop. Law § 44 covering transfers "of fixtures, or merchandise and of fixtures." Under the Code a sale of equipment alone is never subject to the article. Miller, "Bulk Sales Laws: Property Included," 1954 Wash. U.L.Q. 132, 173.

<sup>187</sup> Hawkland, *supra* note 183, at 167. See also, Cation, "The Illinois Uniform Commercial Code: Article 6—Bulk Transfers," 50 Ill. B. J. 292 (1961).

<sup>188</sup> UCC § 6-104. See also UCC § 6-105, Annot., 85 A.L.R.2d 1211 (1962).

<sup>189</sup> Miller, "The Effect of the Bulk Sales Article on Existing Commercial Practices," 16 Law & Contemp. Prob. 267, 280 (1951). New York case law is *contra*, e.g., Wolfe v. Bellfair Hat Co. 47 N.Y.S.2d 908 (Sup. Ct. Kings County 1944).

questions of timing. Quite plainly, if a specific credit is extended after the required notice to creditors is given, the transfer may proceed without concern for that individual creditor.<sup>190</sup> In this connection the principal problem will be to determine whether the creditor became such before or after the notice.

Several difficult questions arise, however, in testing the status of creditors who hold claims based on transactions or events occurring "before the bulk transfer." What is meant by "before the bulk transfer"? Is the crucial time the time of possession, the time of payment, or the time the goods are identified under section 2-501?<sup>191</sup>

Another vexing problem deals with the creditor who holds a claim against the transferor and who is omitted from the compulsory list of creditors. This problem can become significant in the case of a wholly innocent omission or when the transferor is dishonest and deliberately claims that he has few or no creditors. The Code protects the transferee and specifically permits him to rely upon the representations of the transferor.<sup>192</sup> Once again the desirability of allowing transfers to go forward outweighs the value of protecting the omitted creditor. In no event is the rule designed to help the transferor escape so that some sanctions should be available against him. Money liability will be of little value if the transferor flees or is insolvent as a result of the sale.<sup>193</sup> Effective weapons in this situation are a criminal sanction against the misrepresenting transferor or the optional Code provision requiring the transferee to apply the proceeds of the sale to the debts.<sup>194</sup>

(c) *What Are the Requirements for Compliance?* Since the purpose of the bulk sale law is to enable existing creditors to take action in advance of a pending transfer, it is essential that those creditors be actually notified of the proposed transfer and of what is being sold. The first requirement is stated in section 6-104, dealing with the preparation of a list of creditors. This is a fairly formal business. For example, the list must be signed and sworn to or affirmed by the transferor or his agent.<sup>195</sup> The list must also contain the name and address of all creditors of the transferor with the amounts of their debts when known and the names of all persons who have disputed claims against the transferor.<sup>196</sup> No time

<sup>190</sup> UCC § 6-109(1).

<sup>191</sup> This issue will not often be of great significance as a practical matter since the requirements of the dispatch of the notice are more carefully worked out. See UCC § 6-105.

<sup>192</sup> UCC § 6-104(3).

<sup>193</sup> A creditor was unsuccessful in an attempt to assert liability for deceit against an officer of the corporate transferor who misrepresented the existence of creditors in *Cliftex Clothing Co. v. DiSanto*, 88 R.I. 338, 148 A.2d 273 (1959).

<sup>194</sup> See N.Y. Sess. Laws 1962, ch. 552, § 37, adding § 940-b of the Penal Law. Optional § 6-106 of the Code provides for a duty to account for the proceeds of the sale.

<sup>195</sup> UCC § 6-104(2).

<sup>196</sup> UCC § 6-104(2). In New York this section was modified to permit the inclusion of

is specified for the preparation of the list. Nonetheless, because section 6-105 requires that the notice to creditors must be dispatched at least ten days before the transferee takes possession of the goods or pays for them, the transferor should assure himself that the list is prepared at least ten days before such transfer of possession or payment.

In addition to the list of creditors the parties must also prepare a schedule sufficient to identify the property transferred.<sup>197</sup> Both the list of creditors and the schedule of the property must be preserved for six months following the transfer.<sup>198</sup> Alternatively those papers may be filed in a public office.<sup>199</sup> The Code is also silent as to the time when the schedule of property must be prepared. Since the purpose of the Code rules is to inform other creditors of the fact of the transfer, it is preferable, perhaps mandatory, to prepare the schedule in advance of the transfer. The Code requirement that the description need only be sufficient to identify the property will permit the inclusion of detailed provisions for changes in the goods during the interval prior to the transfer.<sup>200</sup> For example, if a stock of merchandise is being held by a retail store which is open for business, that stock will be constantly changing. The Code description requirement allows something less than an exact inventory of the stock. The schedule might anticipate the changes in terms of the materials or items to be sold in the ordinary course of business during the gap period.

After the preparation of the list of creditors and the schedule, the transferor will normally send notices as required by the act. Great care should be taken to avoid part payment prior to compliance with the statute. Section 6-105 of the Code specifies that the notice must be sent ten days before transfer of possession or payment. Two forms of notice are allowed by the Code.<sup>201</sup> The long form seems to be the safest, since

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the indenture trustee in lieu of all debenture or bond holders. N.Y. Sess. Laws 1962, ch. 553, § 6-104(2) (effective Sept. 27, 1964). Cf. UCC § 6-107(3) (notice to all persons "known to the transferee to hold or assert claims against the transferor").

<sup>197</sup> UCC § 6-104 (1)(b).

<sup>198</sup> UCC § 6-104(1)(c).

<sup>199</sup> In New York the optional filing may be in the Department of State, N.Y. Sess. Laws 1962, ch. 553, § 6-104(1)(c) (effective September 27, 1964). UCC § 6-101, comment 3, suggests that the availability of such information may help to upset fraudulent conveyances.

<sup>200</sup> UCC § 6-104(1)(b). Compare UCC § 9-110 providing that a description of collateral in a security agreement is sufficient "if it reasonably identifies what is described."

<sup>201</sup> UCC § 6-107. If the transferor's debts are to be paid in full as they fall due as a result of the transaction the short form requires only a statement that the bulk transfer is about to be made, the names and addresses of the transferor and the transferee, all other business names and addresses of the transferor within the three years preceding the transfer, and an assertion that the transferor's debts are to be paid in full. The long form requires in addition (a) the location and general description of the property and the estimated total of the transferor's debts; (b) the address where the schedule of property and the list of creditors may be inspected; (c) whether the transfer is to pay existing debts, and, if so, the amount of the debt and the identity of the creditor; (d) whether the transfer is for

use of the short form may involve litigation as to whether the transferor doubted that the debts of the transferee would be paid in full as they fell due. Comment 2 indicates that the short form is designed to facilitate honest and solvent transactions. This is a laudable goal, but in some cases the use of the short form will be the avenue for later claims that the transactions were neither honest nor solvent.

Registered mail is the method of dispatch called for by the Code.<sup>202</sup> Connecticut, Michigan, and New York have all modified the statute to permit mailing of the notice by certified mail.<sup>203</sup> Other states may have accomplished the same result in their general construction laws.<sup>204</sup> In any event the certified mail, developed after the drafting of the Code, should be a proper means of sending any notice.

(d) *Defective Transfers and Limitations of Actions.* When a transferor fails to comply with the requirements of the article, the transfer is made ineffective against creditors of the transferor.<sup>205</sup> The specific remedial techniques open to the attacking creditors are left by the Code to the existing law of the enacting jurisdiction. Nonetheless, comment 2 to section 6-104 indicates an intent on the part of the draftsman to permit creditors to "disregard the transfer and levy on the goods as still belonging to the transferor, or a receiver representing them can take them by whatever procedure the local law provides."

The Code supplies a statutory period for such assaults on the transfer. Section 6-111 states a rather short six months' limitation as the basis for planning the transaction without complying with the formal requirements. For example, payment may be kept in escrow for the six month period of limitation.<sup>206</sup>

(e) *The Optional Applications of the Proceeds Rule.* In five jurisdictions the optional provision of the Code requiring the transferee to assure that the consideration is applied so far as necessary to pay the debts of the transferor has been adopted.<sup>207</sup> The section has some

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new consideration and, if so, the amount thereof and the time and place of payment. An optional section 6-107(2) (e) is for use only where the Code requires the transferee to apply the proceeds and was not adopted in New York.

<sup>202</sup> UCC § 6-107(3).

<sup>203</sup> Uniform Commercial Code (Unif. Laws Ann.) § 6-107, Action in Adopting States.

<sup>204</sup> See *Pacific Discount Co. v. Jackson*, 37 N.J. 169, 179 A.2d 745 (1962) (certified mail authorized in notice of resale under conditional sale contract).

<sup>205</sup> UCC §§ 6-104(1), 6-105.

<sup>206</sup> The question of the applicable statute of limitations in New York has not been settled, but it appears that the ten year period in N.Y. Civ. Prac. Act § 53 governs. Hogan & Penney, "Annotations of the Uniform Commercial Code to the Statutory and Decisional Law of New York State," N.Y. Annotations to Uniform Commercial Code and Report of Commission on Uniform Commercial Code 185 (N.Y. Comm'n on Uniform State Laws, 1961).

<sup>207</sup> Alaska, Kentucky, New Jersey, Oklahoma and Pennsylvania, Uniform Commercial Code (Unif. Laws Ann.) § 6-106 Actions in adopting states.



precedent in prior statutory law and has the advantage of providing a considerable sanction upon transfers which violate the article.<sup>208</sup> It has, however, the disadvantage of adding an obstacle to a legitimate bulk transfer. The inclusion of the optional provision will thus depend upon which of these two commercial values is considered the more important.<sup>209</sup>

## VII. THE EFFECT OF AND FORMATION OF AGREEMENTS UNDER ARTICLE 2 SALES

### A. *Freedom to Modify Code Rules*

The reader who has been disturbed by any rule of law described in the preceding portions of this article is obviously concerned about the ability of the parties to vary Code rules in their agreement. As a very general proposition the Code, with a few exceptions, validates agreements which vary the provisions of any article.

Limitations upon this power come from two sources: The general treatment of agreements in article 1, and the specific limitations in particular sections of the Code.

All parties to a Code-covered transaction have a duty of "good faith." This duty may not be disclaimed by agreement.<sup>210</sup> For the merchant under article 2, the duty of good faith will require the observance of reasonable commercial standards of fair dealing.<sup>211</sup> Another limitation upon agreements varying the Code arises in those areas where the Code imposes a duty of diligence, reasonableness, and care.<sup>212</sup> Even here the standards by which such duties are to be measured may be established by the agreement of the parties so long as these standards are not manifestly unreasonable.<sup>213</sup> A final indication of the Code's espousal of freedom of contract is the interpretive rule that where a particular Code section is silent on the question of variation by agreement, alterations within the limitations previously set forth are effective.<sup>214</sup> Some

<sup>208</sup> 3 Williston, Sales § 643 (rev. ed. 1948); Billig, "Bulk Sales Laws: A Study in Economic Adjustment," 77 U. Pa. L. Rev. 72 (1928). Weintraub & Levin, "Bulk Sales Law and Adequate Protection of Creditors," 65 Harv. L. Rev. 418, 420 (1952).

<sup>209</sup> Starr, Study and Report upon the Uniform Commercial Code by the Connecticut Temporary Commission on the Uniform Commercial Code 37 (1959).

<sup>210</sup> UCC § 1-102(3). The general duty of good faith is imposed by UCC § 1-203; UCC § 1-201(19) defines good faith as honesty in fact. Obviously the courts will be required to spell out this duty. See Braucher, "The Legislative History of the Uniform Commercial Code," 58 Colum. L. Rev. 798, 813 (1958); Note, 23 U. Pitt. L. Rev. 198 (1961).

<sup>211</sup> UCC § 2-103(1)(b). Note, 39 Geo. L.J. 130 (1950).

<sup>212</sup> UCC § 1-102(3). Generally on variation see Bunn, "Freedom of Contract Under the Uniform Commercial Code," 2 B.C. Ind. & Com. L. Rev. 59 (1960).

<sup>213</sup> UCC § 1-102(3).

<sup>214</sup> UCC § 1-102(4). One more "freedom of agreement" section is UCC § 1-105 permitting agreement as to "choice of law" if there is a "reasonable relation" between the transaction and the state or nation chosen. See Cullen, "Conflicts of Laws Problems Under the Commercial Code," 48 Ky. L.J. 333 (1960).

variations by agreement are explicitly limited or prohibited by the terms of a section within article 2. These are few in number: (1) agreement upon the rules of damage recovery must meet the standards of reasonableness set forth for liquidated damages in section 2-718; (2) alteration of the remedial structure of article 2 must take into account the fact that consequential damages may be limited or excluded as long as the limitation or exclusion is not unconscionable; (3) limitation of consequential damages or personal injuries in the case of consumer goods is made *prima facie* unconscionable;<sup>215</sup> (4) the parties are not completely free to vary the statute of limitations provided in the Code, since section 2-725 permits the parties to reduce the period of limitation to not less than one year and prohibits them from extending the period; and (5) the privity rule of section 2-316 may not be avoided by a particular provision in the agreement directed exclusively to altering that rule. It is noteworthy, however, that all warranty liability may be disclaimed.

In keeping with the policy decision in article 9 that a person owed a sum of money should be free to assign that sum as security,<sup>216</sup> article 2 provides in section 2-210 that a right to damages for breach of contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise. In limiting the power of the original parties to the transaction to affect the privity rule or the assignability of underlying claims, the Code is probably grasping for a general proposition that any rule affecting third parties shall not be substantially altered by the agreement of the original parties. This was once an explicit provision in article 1, but it was rejected at the time of the Law Revision Commission proceedings as an obvious principle.<sup>217</sup> Consequently, an agreement between a person entrusting goods to a dealer and the dealer that the protective rule of section 2-403 will not operate to safeguard any subsequent buyer in ordinary course will most probably be entirely ineffective.

One overriding limitation upon the power of the parties to provide the effective rules of law in their agreement is contained in section 2-302 governing unconscionable contracts or contract provisions. This is the most widely discussed provision in article 2.<sup>218</sup> When a court finds as a

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<sup>215</sup> UCC § 2-719(3). "Prima facie" is not a defined term. See UCC § 1-201(31) for "presumption" or "presumed."

<sup>216</sup> UCC § 9-318.

<sup>217</sup> Uniform Commercial Code, Text and Comments Ed. § 1-102(3)(b) (1952). N.Y. 1956 Law Rev. Comm'n Rep. 357 recommended deletion of former subsection as "accomplishing nothing."

<sup>218</sup> Stevens, "A Plea for the Extension of Equitable Remedies and Principles, 41 Cornell L.Q. 351, 358 (1956); 58 Dick. L. Rev. 161 (1954); 45 Iowa L. Rev. 843 (1960); 18 U. Chi. L. Rev. 146 (1950); Notes, 109 U. Pa. L. Rev. 401 (1961); 45 Va. L. Rev. 583

matter of law that a contract or any clause thereof was unconscionable at the time it was made, the court may refuse to enforce the contract; may enforce the remainder of the contract without the offending clause; or may so limit the application of the offending clause as to avoid an unconscionable result. Two important points are made in the comment to this section. First, it is the draftmen's intent to grant courts the explicit power to police contracts in order to excise unconscionable clauses.<sup>219</sup> A suggestion is made that in the past such policing has been accomplished by strained construction of language, by manipulation of the rules of offer and acceptance, or by determining that a particular clause is contrary to public policy or to the dominant purpose of the contract. Secondly, the draftmen's intent is to prevent oppression by unfair surprise and not to disturb allocation of risks because of superior bargaining power.<sup>220</sup>

The principal impact of the section may well be the containment of the court's willingness to strike down or tinker with the agreement of the parties. Before the court can proceed under the section the parties must be afforded a reasonable opportunity to present evidence as to its commercial settings, purpose and effect to aid the court in making the determination. Since the questions will be questions of law, a body of precedents will develop, and the results under the section will become more predictable. Furthermore, parties will not be surprised by a declaration in a judicial opinion that a court finds that the clause in question is against public policy. The question must be raised in the initial proceedings, and evidence must be presented to determine whether or not the clause in issue is offensive in light of its commercial setting, purpose, and effect. The most carefully thought out comments on section 2-302 suggests that it should operate only in those situations where the parties have not really had an opportunity to bargain over a particular clause.<sup>221</sup> Where bargaining has occurred and the overwhelming bargaining power of one of the parties has resulted in the inclusion of the clause then perhaps the section should not operate to destroy that agreement. Those who fear the application of the section should be reminded of the fact that the Code has been in effect in Pennsylvania since 1954 and in Massachusetts since 1958 and that no reported litigation has arisen

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(1959). Comment has ranged from approval of the extension of equitable concepts to rejection of the section as unworkable. Compare Stevens, *supra*, with King, "Suggested Changes in the Uniform Commercial Code-Sales," 33 Ore. L. Rev. 113, 115 (1954)

<sup>219</sup> UCC § 2-302, comment 1.

<sup>220</sup> *Ibid.* See also, 1955 N.Y. Law Rev. Comm'n Rep. 655.

<sup>221</sup> Note, 109 U. Pa. L. Rev. 401 (1961).

involving the section.<sup>222</sup> Furthermore, there is ample historical precedent for this kind of policing of agreements in the civil law.<sup>223</sup>

### B. Freedom to Make Effective Contracts

Unlike the Uniform Sales Act the Code provides specific rules for solving a number of contractual problems in the sales area. As a general statement it can be said that these rules are formulated to effectuate the reasonable expectations of the parties to a commercial transaction.<sup>224</sup> The problems are attacked on three bases.

First, there is a substantial alteration in the statute of frauds governing sales transactions. The memorandum required by the Code statute of frauds is much less formal than that called for by the prior law. All material terms of an agreement need not be in writing. The Code requires only that the memorandum "indicate that a contract for sale has been made between the parties."<sup>225</sup> A writing is not insufficient because it omits or incorrectly states an agreed upon term; but, as a new limitation, the contract is not enforceable beyond the quantity shown in the writing.<sup>226</sup> Between merchants the requirement of a memorandum is even further eased. The statute is satisfied if written confirmation is received and not objected to within ten days; but the confirmation must be sufficient to bind the sender.<sup>227</sup>

Various exceptions to the statute of frauds were recognized in prior law. The Code continues those exceptions with some modifications. For example, if goods are to be specially manufactured for a buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller substantially commences their manufacture or arranges for their procurement, the statute is satisfied.<sup>228</sup> The Code does not limit the exception to special manufacture by the "seller." Case law under the prior law was ambiguous on this point.<sup>229</sup> The limitation

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<sup>222</sup> In a pre-Code case the New Jersey court did utilize the section in invalidating a standard automobile warranty disclaimer of implied warranties. *Henningsen v. Bloomfield Motors, Inc.* 32 N.J. 358, 161 A.2d 69 (1960), 46 Cornell L.Q. 607, 615 (1961).

<sup>223</sup> Schlesinger, "Uniform Commercial Code in Light of Comparative Law," 1 *Inter-Am. L. Rev.* 11, 32 (1959).

<sup>224</sup> UCC § 2-207, comment 2.

<sup>225</sup> UCC § 2-201(1) (where price \$500 or more). In 1960 New York modified the Sales Act to require that the memorandum need only "indicate that a contract for sale has been made between the parties." N.Y. Pers. Prop. Law § 85. Compare Uniform Sales Act § 4. Both the New York modification and the Code treat goods separately from choses in action. UCC § 2-105, N.Y. Pers. Prop. Law § 85-a. See UCC §§ 1-206, 8-319, 9-203, 90302. Note, 70 *Yale L.J.* 603 (1961).

<sup>226</sup> UCC § 2-201(1). Accord, N.Y. Pers. Prop. Law § 85.

<sup>227</sup> UCC § 2-201(2). Compare *Carter, Macy Co. v. Matthews*, 220 App. Div. 679, 222 N.Y. Supp. 472 (1st Dep't 1927), aff'd 247 N.Y. 532, 161 N.E. 171 (1928). See *Harry Rubin & Sons v. Consolidated Pipe Co.*, 396 Pa. 506, 153 A.2d 472 (1959).

<sup>228</sup> UCC § 2-201(3)(a).

<sup>229</sup> Compare *E. G. Lumber Co. v. New York Bondstone Corp.*, 15 Misc. 2d 985, 179

upon the exception requiring a substantial beginning of manufacture or commitments for their procurements is new.<sup>230</sup> Another exception dealing with the payment and receipt of the goods subject to an oral contract is also preserved in the Code. But the exception only operates to the extent of the quantity of goods received and accepted.<sup>231</sup> Finally the Code gives effect to admissions in court.<sup>232</sup> And again the exception only operates to the extent of the quantity admitted in the judicial proceedings.

In another troubled area of contract formation, the rules governing offer and acceptance, the Code makes an effective assault. The Code in the unilateral contract situation makes a nonconforming shipment both an acceptance and a breach.<sup>233</sup> The use of this rule, although it seems logically inconsistent, avoids a serious problem in the prior law. By using the "unilateral contract trick" a seller could ship nonconforming goods in response to the buyer's offer for a unilateral contract. When the buyer received the defective goods and objected that seller was in breach, the seller could claim that no contract had ever been formed.<sup>234</sup> Under the Code, if the seller communicates to the buyer that the nonconforming goods are offered only as an accommodation to the buyer, no contract obligation will be formed.<sup>235</sup>

Another attack upon the formal requirements of the prior law in the formation of contracts occurs when the "mirror image" rule is abolished. In section 2-207 the Code provides that an acceptance containing additional or different terms is nonetheless effective as an acceptance.<sup>236</sup> The additional terms are to be construed as proposals for addition to the contract. Again the Code states a special rule for merchants. These additional terms become part of the contract between merchants unless the offer expressly limits acceptance to the terms of the offer; the additional terms materially alter the offer; or notification of objection

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N.Y.S.2d 45 (2d Dep't 1958), with *Rosette Pennington, Inc. v. Hayes*, 10 Misc. 2d 999, 170 N.Y.S.2d 216 (1st Dep't 1957). The 1960 amendment to N.Y. Pers. Prop. Law § 85 is in accord with the Code.

<sup>230</sup> Compare Uniform Sales Act § 4, with UCC § 2-201(3).

<sup>231</sup> UCC § 2-201(3)(b).

<sup>232</sup> UCC § 2-201(3)(c).

<sup>233</sup> UCC § 2-206(1)(b).

<sup>234</sup> *Hawkland*, supra note 183, at p. 6; Note, 105 U. Pa. L. Rev. 837, 849 (1957).

<sup>235</sup> UCC § 2-206(1)(b).

<sup>236</sup> N.Y. Pers. Prop. Law § 84-a was added in 1960 to permit enforcement of a contract based upon an acceptance which "states additional or different terms which do not materially vary the terms of the offer unless the acceptance is expressly made conditional . . ." The Code makes the acceptance effective regardless of the materiality of the variation. See Note, 46 Cornell L.Q. 308 (1961). In *Roto-Lith Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962), the court failed to give effect to the operation of UCC § 2-207(1) and incorrectly incorporated a test of materiality of the varying provision. See Notes, 3 B.C. Ind. & Comm. L. Rev. 573 (1962); 105 U. Pa. L. Rev. 837, 853 (1957).

to such terms has already been given or is given within a reasonable time after notice of them is received.<sup>237</sup> Both the offeror and the acceptor can thus specifically control the consequences of their actions. The acceptor can specifically make his acceptance effective only upon assent to the additional or different terms. The offeror, on the other hand, may even avoid the special rule for merchants either by expressly limiting his acceptance or by notifying the acceptor of his objection to the additional terms. It is noteworthy that only additional terms are made proposals for addition to the contract.<sup>238</sup> As a counseling question the lawyer planning a sales transaction of a complicated type or drafting the forms for a series of sales will still be in control of the legal consequences of his actions. Offers may still be expressly conditioned to limit acceptance to their terms. Acceptances may also be expressly conditioned and thus they will then become counteroffers. Finally, the question may be left to be resolved by the Code.

The third major assault by the Code upon the technical difficulties of contract law concerns the doctrine of consideration. Under section 2-209 there is no longer a need for consideration in an agreement modifying an existing sales contract. In substitution for the requirement of consideration the parties to the original agreement may specify that modification or rescission must be by a signed writing.<sup>239</sup> This permits the parties to avoid the difficulties inherent in oral proof of contract modifications, but the Code limits the effect of this rule in situations involving a merchant and a nonmerchant. If a form is supplied by the merchant, the particular provision requiring a signed writing for modification must be separately signed by the nonmerchant.<sup>240</sup> This requirement is designed to prevent surprise to a consumer.<sup>241</sup>

Finally, various provisions in article 2 permit the parties to make somewhat indefinite agreements and make those agreements enforceable. For example, in section 2-305 the parties may sell goods at a price to be agreed upon in the future, and in section 2-306 output and requirement contracts are validated. In addition, in section 2-311 details of performance may be filled in by one of the other parties without running the risk of having the contract invalidated for indefiniteness.<sup>242</sup>

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<sup>237</sup> UCC § 2-207(2).

<sup>238</sup> Compare subsection (1) and (2) of UCC § 2-207.

<sup>239</sup> The inroads upon the consideration doctrine in the Code are ably summarized in Patterson, "An Apology For Consideration," 58 Colum. L. Rev. 930, 947 (1958). See UCC §§1-207, 2-205, 2-207, 5-105. Compare N.Y. Pers. Prop. Law § 33(2).

<sup>240</sup> UCC § 2-209(2). Substantially in accord, N.Y. Pers. Prop. Law § 33(2).

<sup>241</sup> UCC § 2-209, comment 3.

<sup>242</sup> See generally, Note, 23 U. Chi. L. Rev. 499 (1956).

## VIII. CONCLUSION

At the beginning we established as our goal the communication of the basic policy and approach of articles 2 and 6 of the Code, as well as an elaboration of some of the techniques of the Code. A word seems in order here on the overall effect of article 2 of the Code. I suggest that experience in the states where the Code has been in effect for substantial periods of time shows both that articles 2 and 6 are workable. The cases produced under the Code both in Pennsylvania and in Massachusetts have caused little difficulty for the courts and have for the most part been predictable to anyone reasonably familiar with the Code. Only on rare occasions when a court strains to get back to the pre-Code rules of law, does the judicial approach to the Court become unsatisfactory. The bar has a special obligation to acquaint the bench with the details of the application of the Code to their particular problems. No less is the obligation of the court to attempt to discern rationally the policies of the Code and to apply the statute in an efficacious fashion.

All answers to all problems are contained neither in the Code nor the pre-Code law. The Code does provide more solutions, more clearly expressed and more in keeping with present needs.