

Amended U.C.C. Article 2 as Code Commentary

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INTRODUCTION

Has it really been twenty-two years since Geoffrey C. Hazard, then director of the American Law Institute, asked Professors Charles W. Mooney and Richard E. Speidel to investigate the need to update Article 2 of the Uniform Commercial Code (U.C.C.)?¹ As a result of their preliminary study, the Permanent Editorial Board for the Uniform Commercial Code (PEB), with the approval of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI), appointed a nine member “Study Group” to recommend whether Article 2 should be revised and, if so, the direction in which the revision process might proceed.²

Since then, much has happened. The Study Group completed a 245-page preliminary report in the fall of 1990 identifying “major problems of practical importance” in the interpretation and application of Article 2,³ and an Executive Summary of the Preliminary Report was submitted to the PEB in the spring of 1991.⁴ In that same year, the NCCUSL and the ALI authorized the creation of the Article 2 Drafting Committee (the “Committee”) and the appointment of Professor Speidel as its Reporter. Over the course of the next 11 years, the Committee issued a series of drafts.⁵ There was an aborted attempt to reconfigure Article 2 into a central hub of general principles with parts or spokes devoted separately to the special incidents of sales of goods

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1. U.C.C. Article 2 (2008). Following their investigation, Professors Mooney and Speidel submitted a memorandum to the PEB. See Memorandum from Richard E. Speidel and Charles W. Mooney, Jr., Proposal for a Preliminary Study On a Possible Project for the Revision of Article 2, Uniform Commercial Code, (Nov. 23, 1987). The memorandum's stated purposes were “to identify various areas of inquiry for the proposed Preliminary Study on the Revision of U.C.C. Article 2,” and to “provide a useful agenda, for the work of an Article 2 study group.” *Id.* at 1. The Code, in one form or another, is the law in all fifty states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. This Article cites to sections in “current” Article 2 as U.C.C. § (2008), and to sections in “amended” Article 2 as U.C.C. § (2003).

2. The Study Group began its work in the spring of 1988. Professor Speidel was selected to serve as Project Director. See Richard E. Speidel, *Committee Studies Revising U.C.C. Article 2*, 8 BUS. LAW. UPDATE 3 (1988).

3. See Permanent Editorial Board for the Uniform Commercial Code, *PEB Study Group Uniform Commercial Code Article 2, Preliminary Report* (1990).

4. *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (1991).

5. Drafts can be found on the website maintained by the University of Pennsylvania, available at <http://www.law.upenn.edu/library/u1c/u1c.htm>.

on one hand and computer information transactions on the other.⁶ Drafts were read at the 1996 and 1997 annual meetings of the NCCUSL. Professor Speidel and the Associate Reporter, Linda J. Rusch,⁷ resigned in protest at the 1999 annual meeting of the NCCUSL following a decision by the NCCUSL's leadership to postpone a scheduled reading of the final draft until July 2000.⁸ The Committee was reconstituted with a new Reporter and Chair,⁹ and the revision project was downgraded to a series of amendments. Finally, Amended Article 2 received final approval at both the 2002 annual meeting of the NCCUSL and the 2003 annual meeting of the ALI, thereby bringing down the curtain on a long drafting project that has frustrated many and has probably satisfied no one.

The story told above might have predicted the ultimate fate of Amended Article 2 once it went to the states for enactment. After all, there was no reason to believe that the persistent opposition of "strong sellers" that threatened to derail the drafting project from its inception would suddenly evaporate once even a watered-down final draft was approved by the NCCUSL and the ALI.¹⁰ Thus, it should surprise no one who is familiar with this story to learn that currently there have been no state adoptions.¹¹ Hence the conclusion that even though the basic features of commercial activity may now operate in a radically different environment, the core content of Article 2 has remained largely unchanged since the promulgation of the *1957 Official Text of the Code*. Some of the more obvious environmental changes include the common law development of a theory of strict products liability that overlaps the U.C.C., the enactment of federal and state consumer protection legislation, and the growing use of electronic methods of contracting.¹² Thus, when one also considers the vast number of judicial opinions that have revealed weaknesses in the current statutory structure, it would not be unreasonable to conclude that Article 2 may be in need of revision. The problem, of course, with recommending such a course of action is that it will not happen anytime soon. The reality is that one decade-long battle to win approval of a new Article 2 is probably enough for the foreseeable future, and as a

6. See Marion W. Benfiel, Jr. & Peter A. Alces, *Reinventing the Wheel*, 35 WM. & MARY L. REV. 1405 (1994) and Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337 (1994).

7. Professor Rusch served as Associate Reporter from 1996-1999.

8. See Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 611 (2001).

9. The new Reporter was Professor Henry Gabriel, and Professor William H. Henning took over as Chair.

10. See Speidel, *supra* note 2, at 618 (asserting that "strong sellers opposed the revision and, it appears, threatened to oppose it when proposed for enactment by the states").

11. It should be noted that Oklahoma recently cherry picked two provisions from Amended Article 2 when it amended section 2-105 to specifically exclude information from the definition of goods, and section 2-106 to add that "contract for sale" for purposes of Article 2 "does not include a license of information." See 12A OKLA. STAT. tit. 12A §§ 2-105(1) and 2-106(1) (2008).

12. See Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and "Merchant/Consumers" Through Default Provisions*, 30 J. MARSHALL L. REV. 39, 78 (1996).

consequence, it is highly unlikely that the NCCUSL and the ALI leadership would be anxious to again take a drafting approach to ward off whatever threat of statutory obsolescence may currently exist. What is needed then is a different strategy to help keep Article 2 responsive to twenty-first century commercial practices and guide courts toward the best results.

In this short article, I suggest what is a valuable, if partial, corrective to the actual difficulties arising in the application of a statute that has not been subjected to significant changes for more than five decades. I begin in Part I by summarizing one of the sources from which information as to the proper application of Article 2 may be derived, and suggest that another appropriate source should be Amended Article 2. Part II will illustrate the soundness of the suggestion by applying Amended Article 2 to four issues, in order to conclude that specific outcomes can be predicated on its provisions.

I. AMENDED ARTICLE 2 AS CODE COMMENTARY

The commentary to the U.C.C. prepared by the PEB provides an opportunity to explore the application of Amended Article 2 in a context where a U.C.C. provision or sales issue has not proven to be without difficulties of one sort or another. This Part outlines the origins and purposes of the U.C.C. Commentary (the “Commentary”) and compares the extent to which Amended Article 2 also provides information about the correct interpretation of the U.C.C. It demonstrates that there is no jurisprudential reason (or political reason for that matter), why Amended Article 2 cannot perform the same role as the Commentary.

A. PERMANENT EDITORIAL BOARD COMMENTARY TO THE CODE¹³

From its inception, the U.C.C. was perceived by its drafters to be a “semi-permanent and infrequently amended piece of legislation.”¹⁴ There would be no need, or so the drafters thought, to subject the U.C.C. to the reviser's pen to keep it reflective of evolving social and economic conditions. Rather, this job was seen as properly belonging within the bailiwick of an enlightened judiciary, suitably armed with the tools of change provided by the drafters.¹⁵ To assist the courts in this endeavor, the ALI and the NCCUSL

13. This brief account of the PEB and the method by which its commentaries are developed is drawn, in part, from Peter A. Alces & David Frisch, *Commenting on “Purpose” in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 454-57 (1997).

14. U.C.C. § 1-103 cmt. 1 (2008).

15. The view that the judiciary would bear the principle responsibility for the accommodation of commercial law to existing economic and social realities is confirmed by the Code's own internal rules of statutory construction contained in section 1-103. In particular, subsection (a) provides:

(a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are:

- (1) to simplify, clarify, and modernize the law governing commercial transactions;
- (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and

wisely established an Editorial Board that eventually evolved into the PEB.¹⁶ The original function of the PEB has been described as follows:

[T]o assist in attaining and maintaining uniformity in state statutes governing commercial transactions by (1) discouraging non-uniform amendments to the Code by the states, and (2) approving and promulgating amendments to the Code when experience has demonstrated a provision is unworkable or otherwise requires amendment; when court decisions have rendered the correct interpretation of a provision doubtful; when new practices have rendered a provision obsolete or new provisions desirable; and when amendments would lead to wider acceptance of the Code.¹⁷

More particularly, the PEB has been authorized by the ALI and the NCCUSL to issue supplemental commentary on the U.C.C. to reflect the correct resolution of thorny U.C.C. issues.¹⁸ The PEB responded to this grant of authority by adopting a "Resolution on Purposes, Standards and Procedures for PEB Commentary to the U.C.C."¹⁹ As a concrete confirmation of the important role that the commentaries are intended to play, consider the following excerpt from the enabling resolution:

The process by which *PEB Commentary* is prepared and issued by the PEB should be flexible, but usually should include:

- a. periodic publication of the topics under consideration by the PEB with a request for comment by interested persons by a stated date as to whether any listed topic should be deleted or a related topic added and as to the appropriate resolution of the issues presented by the topics under consideration;

(3) to make uniform the law among the various jurisdictions. U.C.C. § 1-103(a)(1)-(3) (2008). Comment 1 to this section states that its purpose is "to make it possible for the law embodied in the Uniform Commercial Code to be applied by the courts in the light of unforeseen and new circumstances and practices." *Id.* Notwithstanding this intent, the U.C.C. has continued to thrive as the primary source of commercial law only because of the willingness of the NCCUSL and the ALI to revise and refine its provisions when necessary.

16. See, *Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board with Respect to the Uniform Commercial Code*, (July 31, 1986, and amended January 18, 1998). The Board is currently composed of twelve individuals. One is the Director of the ALI, and another is the Executive Director of the NCCUSL. The remaining ten members are drawn equally from the NCCUSL and the ALI. *Id.*

17. *Id.*

18. *Id.* (The PEB may accomplish the functions assigned to it by "preparing and publishing supplemental Comments or Annotations to the Uniform Commercial Code and other articulations as appropriate to reflect the correct interpretations of the Code and issuing the same in a manner and at times best calculated to advance the uniformity and orderly development of commercial law . . .").

19. Permanent Editorial, Resolution on Purposes, Standards and Procedures for PEB Commentary to the U.C.C. (March 14, 1987).

- b. selection of one or more appropriate advisers, who are not members of the PEB, to review any comments submitted by interested persons and other relevant materials and to prepare a tentative adviser's draft of the proposed PEB Commentary;
- c. publication of the adviser's draft of the PEB Commentary, after supervisory review of the PEB, soliciting comments by interested persons by a stated date on the substance and style of the work;
- d. approval by the PEB of the substance and style of the PEB Commentary as finally submitted by the adviser(s) and comments submitted by interested persons or, when warranted, the withdrawal of the proposal with the reasons for withdrawal stated; and
- e. periodic publication of such *PEB Commentary* as is approved by the PEB on a regular schedule.²⁰

This process of commentary preparation is crucial because it creates a particularly favorable environment for the development of an effective source from which information as to the commercial dynamic and the U.C.C.'s reaction to it can be derived. Indeed, the process is remarkably similar to the uniform law process that produces amendments and revisions of the U.C.C.²¹ Expertise matters.²² Broad participation matters.²³ The question is not whether the Commentaries are perfect, but whether the PEB is better at resolving an issue than a judge with perhaps little or no commercial experience. No reason exists to assume that a judge is the better choice between the two.

Although courts have no obligation to follow the Commentary, they should do so unless there is some evidence that the analysis is somehow flawed. In other words, a court should offer some reason for believing that the conclusion is wrong, rather than simply disparaging its evolution.²⁴ When arguing for the application of the Commentary, one is tempted to argue that they are synonymous to the Official Comments that follow each U.C.C. section.²⁵ It is evident that “[t]he courts take to the Official Com-

20. *Id.* at § 2.

21. *See infra* notes 40–46 and accompanying text.

22. *See Alces & Frisch, supra* note 13, at 455 (observing that the PEB is composed of leading commercial law authorities).

23. *See Agreement, supra* note 16.

24. *See In re Rebel Rents, Inc.*, 307 B.R. 171, 187 (C.D. Cal. 2004) (the court refused to adopt Commentary No. 9 because Commentaries are not binding and the statutory language was clear).

25. The purposes of the individual comments are explained in the introductory comment to the U.C.C.: “To aid in uniform construction of this [c]omment and those which follow the text of each section set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.” General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute, U.C.C. § 1 (2008). Moreover, the word “purposes” can be found in the heading of each comment. In this vein, Professor Skilton lists several reasons why courts should pay particular attention to the comments:

ments like ducks to water, even though the legislatures did not enact the Official Comments.”²⁶ More importantly, the Commentary improves upon the Official Comments in one critical respect. Whereas the Commentary results from a participatory process, no invitation is extended to interested parties to comment on the Official Comments.²⁷ From this perspective, it would seem that if courts are fond of the Official Comments, they should absolutely love the Commentary.²⁸

To illustrate the persuasive power of the Commentary, let us consider how they might be used to address specific instances of judicial misinterpretations. Consider, for example, the very first Commentary published. This Commentary was a response to the use of sections 2-507(2) and 2-511(3) by so-called cash sellers to support the right to reclaim goods from a buyer who has paid with a check that is later dishonored.²⁹ Despite the seeming clarity of the U.C.C. on this right of reclamation, one major issue remained unresolved. It was still unclear whether the seller was required to make a demand that the buyer return the goods within ten days after their receipt. Placing this requirement in the context of reclamation generally, one could assert that a ten day demand requirement should be a mandatory rule, since section 2-702(2) contains such a rule pertaining to reclaiming credit sellers.³⁰

A particular reason for making use of the comments is that they may be viewed as part of the legislative history of the Code. This view gives the comments a special dignity. A more general reason is that they express opinions on meaning and purpose of text and were written by men who supposedly either participated in the drafting of the sections involved or were close to those who did.

Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 602-03. In recent years, the party primarily responsible for the comments has been the reporter for the particular drafting project. See E. Allen Farnsworth Et Al., CASES AND MATERIALS ON COMMERCIAL LAW 11 (5th ed. 1993) (“The practice in recent years has been for the [r]eporter (i.e., principal drafter) to draft [o]fficial [c]omments after the sponsors have approved the text. These [c]omments are subject only to the approval of the chair of the [D]rafting [C]ommittee”). Because the comments are prepared by those who were involved in the creation of the statutory text, I reject analogizing their use to Amended Article 2. See also Alces & Frisch, *supra* note 13, at 436-41.

26. James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE § 4, at 12 (3d ed. 1988).

27. See E. Allen Farnsworth, Et Al., *supra* note 25.

28. Notwithstanding what should be the persuasive force of the Commentaries, a search for (PEB “PERMANENT EDITORIAL BOARD” “P.E.B.”) W/3 COMMENTARY in WESTLAW’s UCC-CS database has found 32 reported cases that have cited a Commentary with approval. This is a mere 7 more than was found by Professor Maggs in 2002. See Gregory E. Maggs, *Patterns of Drafting Errors in the Uniform Commercial Code and How Courts Should Respond to Them*, 2002 U. ILL. L. REV. 81, 89. Why so few? I agree with the two reasons offered by Professor Maggs. First, the number of existing Commentaries is relatively small. To date, the PEB has issued only fifteen. Second, judges and attorneys may be unaware that such a source of authority exists. *Id.*

29. Even though payment is by check, the transaction is considered to be a cash sale because no credit is extended. See *In re Samuels & Co.*, 526 F.2d 1238, 1241 (5th Cir. 1976). In such cases, section 2-507(2) provides that “[w]here payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or depose of them is conditional upon making the payment due.” U.C.C. § 2-507(2) (2008). Under section 2-511(3), “payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.” U.C.C. § 2-511(3) (2008).

30. Section 2-702(2) states in relevant part:

Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of

Here, the question becomes whether a correspondence should be maintained between the two rights of reclamation. Indeed, there was this unexplained assertion in original comment 3 to section 2-507: “The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.” Thus, the case for correspondence seems stronger, but by no means compelling. After all, the comment is not part of the statutory text, and therefore, courts should hesitate before relying on an Official Comment that goes beyond or simply does not fit the black letter.³¹ Notwithstanding this cautionary note, however, several courts have required cash sellers to make demand within ten days.³²

However, there is one argument which—if accepted—might be taken as a justification for treating cash sellers differently from credit sellers. This argument is that because of the dynamics of the check collection process, the seller/payee will often not learn that the check has been dishonored until more than ten days after the goods were delivered.³³ To address this concern, the PEB amended comment 3 by deleting the reference to a ten day limitation, and substituting in its place, the explicit statement that “there is no specific time limit for a cash seller to exercise the right of reclamation.”³⁴ Several courts have thus far embraced this Commentary.³⁵

It is clear that there are potential benefits to be gained from the Commentary. The task for the PEB is to take an appropriate approach to the Commentaries to ensure that such gains are realized. It is one thing to justify the

solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply.

U.C.C. § 2-702(2) (2008).

31. See Alces & Frisch, *supra* note 13, at 440 (suggesting that by following cmt. 3 “on a matter that does not appear in the statutory text, courts risk carrying out policies that cannot be tied to any legislative judgment”).

32. See, e.g., *Szabo v. Vinton Motors, Inc.*, 630 F.2d 1 (1st Cir. 1980). The court held: [t]hat the ten day limitation period contained in [c]omment 3 provides a more certain guide for conducting commercial transactions than the common law yardstick of “reasonableness,” and that it will encourage cash sellers to make prompt presentment. Any extension of the ten day limitation based on the realities of the commercial banking world is for the legislature, not for this court. *Szabo*, 630 F.2d at 4. Even before the PEB stepped into to fray, the First Circuit’s opinion had its critics. See, e.g., Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV. 993, 1015 (1995) (noting that “the First Circuit announced the curious view that the comment merited weight and should only be changed by legislation, even though the comment itself has never been enacted”).

33. As the Eighth Circuit put it, a ten day rule “would tend to coerce the cash seller who reasonably expects the buyer to tender payment at delivery to go through the cautious motions of a credit seller dealing with an economically unstable buyer. This we are not prepared to do” *Burk v. Emmick*, 637 F.2d 1172, 1176 (8th Cir. 1980).

34. PEB Commentary on the Uniform Commercial Code: Commentary No. 1, at 4 (1990).

35. See *Florida East Coast Properties, Inc. v. Best Contract Furnishings, Inc.*, 593 So. 2d 560 (3d Dist App. Ct. 1992); *Continental Grain Co. v. Heritage Bank*, 548 N.W.2d 507 (S.D. 1996); *In re Edgerton*, 186 B.R. 143 (M.D. Fla. 1995). Query whether the First Circuit would, if presented with the same issue today, reach a different conclusion. To persist in its view would mean that the Commentary—to the extent it influences case outcomes—would be a source of non-uniformity. Nevertheless, judicial reliance upon the Commentary is justified. Maintaining uniformity provides a weak justification for an approach that is not in accord with commercial reality.

use of Commentary generally, however, it is quite another to select the topics to be covered and craft the Commentary itself. This article next looks at the process that led to the promulgation of Amended Article 2. Faced with such a process, courts may find it advantageous to look to its provisions even though it has not been enacted by the states.

B. AMENDED ARTICLE 2

Putting aside misplaced notions that the work product produced by the NCCUSL and the ALI is fatally flawed because the process lacks the checks and balances provided by public legislatures,³⁶ state enactment of the U.C.C. and its revisions and amendments traditionally has been justified on the grounds that the uniform law process is more than adequate to produce a fair and balanced statute that reflects contemporary business practices.³⁷ What is it about this process, then, that might provide assurance that Amended Article 2 is better than the current statute?

Amended Article 2 provides a simple case for analysis. First, it should be noted that each member of the Committee was either an experienced commercial law practitioner or scholar.³⁸ Interestingly, five members of the Committee are currently members of the PEB, and one is an emeritus member.³⁹ Clearly, the argument that the Commentaries deserve judicial recognition because of the expertise of the PEB members, should apply with equal force to Amended Article 2.

As one turns from expertise to participation, a more compelling justification for applying Amended Article 2 emerges. A key feature for distinguishing between the promulgation of the Commentaries and the U.C.C. revision process is the degree to which proposed changes to the U.C.C. are vetted. First, the American Bar Association (ABA) is asked to appoint an advisor to the Committee.⁴⁰ The advisor's function is to report on the progress of the project to interested members of the ABA and to convey any comments received to the Committee.

36. This contention is most forcefully set out by Professors Robert E. Scott and Alan Schwartz. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994). Professor Alces and I have argued elsewhere that their indictment of the private legislative system is unwarranted. See Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217 (1996).

37. I do not mean to suggest that the process is perfect and cannot be improved because it can. What I do mean to suggest is that, with all its virtues and all its flaws, the statutory results are at least as good as anything produced by a public legislature.

38. The final members of the Committee were: Boris Auerbach, Chair; Marion Benfield, Jr., Amelia H. Boss, Neil B. Cohen, Byron D. Sher, James J. White, Henry Deeb Gabriel, Jr., Reporter; Linda J. Rusch, Associate Reporter from 1996-99, and Richard E. Speidel, Reporter from 1991-99.

39. The current PEB members are: Boris Auerbach, Amelia H. Boss, Neil B. Cohen, Linda J. Rusch, and James J. White. The emeritus member is Marion W. Benfield.

40. See Fred Miller, *The View From Experience*, 52 HASTINGS L.J. 621, 626 (2001).

Second, the Committee attempts to identify those constituencies which might have an interest in the project and invites their participation. Notices of meetings and drafts are sent to all those who wish to be on the mailing list, and those who would like to attend the meetings may do so. In any event, comments may be submitted the old fashioned way by writing or submitting suggestions electronically on a website created by the NCCUSL.⁴¹ Moreover, all attendees at meetings are urged to participate.⁴²

Third, the act has to be approved by both the NCCUSL and the ALI.⁴³ In the case of the NCCUSL, this means that the act must be read, word by word, to the full Conference, sitting as a Committee of the Whole, at no less than two successive annual meetings.⁴⁴ After the act is presented and debated, it is put to a vote and must be approved by a majority of individual commissioners and a majority of the states.⁴⁵ It must also be separately passed by the ALI Council and win the approval of the ALI general membership at an annual meeting.⁴⁶

The contrast between the PEB Commentaries and proposed changes to the U.C.C. is quite stark. To be sure, production of the former involves a participatory process that ensures a certain level of scrutiny by interested persons. The latter, however, involves a process that is far more democratic and inclusive, wherein the affected constituencies attempt to reach a consensual compromise through active participation and careful deliberations under the watchful eyes of the sponsoring organizations. What then might be the reasons for Amended Article 2 not having been enacted by the states? Although difficult to infer, let me mention two possibilities. One is the political impulse towards legislative inactivity precipitated by the ill-fated revision effort. Another may be the continuing saga of information and software contracting. Let me explain.

When the Article 2 revision project began, the NCCUSL and the ALI decided to incorporate software transactions into the general scope of Article 2 by means of a so-called hub and spoke structure.⁴⁷ The efficacy of this

41. *Id.* at 625-26.

42. *Id.* at 626.

43. The act will also be presented to the ABA House of Delegates for its endorsement. *See* HANDBOOK OF THE NCCUSL 511 (1991).

44. *Id.*

45. *Id.*

46. *See* Miller, *supra* note 40, at 626. Commenting on the enactment process for Article 4A, Carlyle Ring has observed that:

From its earliest days, the practice of the NCCUSL has been to read word-by-word every section of the draft and to discuss the draft section-by-section at a minimum of two annual meetings. For instance, Article 4A was read at three annual meetings, consuming substantial floor time with questions, comments, and motions from the floor on specific elements. Similarly, at the annual meeting of the ALI in 1989, the draft was considered by the full membership of the ALI for their input, questions, and critiques.

Carlyle C. Ring, *The UCC Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287, 298 (1994).

47. Linda Rusch explains:

The discussion resulted in the eventual development of a hub and spoke concept whereby general contracting principles would be placed in a hub and provisions particular to each type of transac-

structure was hotly contested, and in 1995, the leadership of both organizations abandoned the idea. Instead, their next codification effort was to treat software transactions in a new Article 2B of the U.C.C. Article 2B would have governed all contracts for the sale, licensing, development, distribution, maintenance, documentation, and support of computer software. After the Committee completed its work, however, the ALI withdrew its support of Article 2B, preventing it from ever becoming part of the U.C.C. The NCCUSL then transformed Article 2B into a free-standing statute called the Uniform Computer Information Transactions Act (UCITA).⁴⁸ Since its inception, the UCITA has endured heated criticism from a number of consumer, business, and governmental groups.⁴⁹ Consequently, Virginia⁵⁰ and Maryland⁵¹ have enacted this legislation, leaving two competing bodies of contract law that might govern software contracts in all other states, the common law⁵² and Article 2 of the U.C.C.⁵³

If Amended Article 2 had merely deleted information transactions from its scope, that alone might not have been enough to create any real controversy and make states reluctant to enact the proposed law.⁵⁴ The drafters, however, took the additional step of addressing in a comment the difficult question of what law governs those transactions in goods containing computer information (i.e., smart goods). The Official Comment that follows Amended section 2-103 states that “the sale of 'smart goods' such as an automobile is a transaction in goods fully within this article even though the automobile

tion would be placed in a separate spoke. The drafting committee contemplated a spoke for sales of goods, a spoke for leases, and a spoke for software licenses with the possibility of additional spokes being added later on.

Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never-Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1686 (1999).

48. For a brief history of Article 2B and the reasons why the project was transformed into UCITA, see Fred H. Miller & Carlyle C. Ring, *Article 2B's New Uniform: A Free-Standing Computer Information Transactions Act*, U.C.C. BULL., June 1999, at 1, 2-4.

49. See, Nim Razook, *The Politics and Promise of UCITA*, 36 CREIGHTON L. REV. 643 (2003).

50. VA. CODE ANN. §§ 59.1—501.1 (West through 2008 spec. sess.).

51. MD. CODE ANN., COM. LAW § 22-101 (West through 2008 reg. sess.).

52. In a non-statutory effort to clarify and unify the law of software transactions, the ALI is currently in the process of producing what it calls the “Principles of the Law of Software Contracts.” As explained in its introduction, “[c]ourts can apply the Principles as definitive rules, as a 'gloss' on the common law or UCC Article 2, or not at all, as they see fit.” THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS 3 (tent. drft. no. 1 2008)(non-statutory effort to clarify and unify the law of software transactions).

53. Article 2 applies to “transactions in goods.” U.C.C. § 2-102 (2008), but “unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods,” U.C.C. § 2-106(1). Indeed, the title of Article 2 is “Sales” and the definition of “goods” assumes a sale: “goods” is defined as all things . . . which are movable at the time of identification to the contract for sale . . .” § 2-105(1). The question that follows is whether the purchase of software is a transaction in goods when most such transactions take the form of a license (i.e., there is no “passing of title from the seller to the buyer for a price.” § 2-106(1)). Many courts have held that it is. Amended section 2-105, however, specifically excludes information from the definition of goods and amended section 2-106 adds that “contract for sale” for purposes of Article 2 “does not include a license of information.”

54. If, for example, a court were of the opinion that Article 2 should be applied to software or information contracts, it could always do so by analogy.

contains many computer programs.”⁵⁵ Then, later in that same comment, we are told:

When a transaction includes both the sale of goods and the transfer of rights in information, it is up to the courts to determine whether the transaction is entirely within or outside of this article, or whether or to what extent this article should be applied to a portion of the transaction.⁵⁶

Just what is it that makes an automobile subject to Article 2? Is it because the goods portion of the transaction predominates? What if the jurisdiction uses the “gravamen test” for determining the applicability of Article 2 and the gravamen of the action involves the software? If an automobile is an easy case, what about VCRs, DVDs, television sets, Palm Pilots, digital cameras, video game consoles and a host of kitchen appliances that rely on software? Does the method of delivering software matter? For example, would software in an automobile be covered if it were purchased separately and then loaded into, or electronically transmitted to the automobile?⁵⁷

Given the ambiguity unintentionally created by the combination of text and comments, and the inevitable linkage between goods and software, it is not surprising that states already weary from their recent battles with UCITA's supporters and detractors, would hesitate to once again confront the issues generated by new economy products. Still, despite its perceived shortcomings as legislation, Amended Article 2 is to be praised for at least attempting to shepherd sales law into the twenty-first century. What is most remarkable about the body of case law since 2003 is the complete absence of opinions that can fairly be characterized as relying on Amended Article 2.

Let us assume that Amended Article 2 should function in a manner similar to the PEB Commentaries in affording guidance in interpreting and resolving issues under the existing U.C.C.⁵⁸ If this conclusion is generally correct,

55. U.C.C. § 2-103 cmt. 7 (2008).

56. *Id.*

57. In those jurisdictions that choose to take their source of law cue from the new PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, a predominant purpose test would be applied. Section 1.07(a) states: “These Principles apply to the transfer of software embedded in goods if a reasonable transferor would believe the transferor's predominant purpose for engaging in the transfer is to obtain the software.” Even the Reporters admit that the application of this test “creates a line-drawing challenge.” § 1.07(a) cmt. d.

58. U.C.C. (2008). Specifically, the Commentaries are intended to help carry out the U.C.C.'s purposes and policies:

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

it points to a specific thesis about the relationship between the current and Amended Article 2; when a provision in Amended Article 2 is not in clear conflict with a provision in the current Article 2, the courts should apply the latter unless a reason is offered that might well explain why the new provision should be ignored. This article will now provide several useful examples of issues that might today be resolved by application of Amended Article 2.

II. AMENDED ARTICLE 2 APPLIED: SOME EXAMPLES

The purpose of this part is to illustrate, in a general but suggestive manner, the proposition that Amended Article 2 can be a useful resource for effectuating the Code's purposes and policies.

A. EXAMPLE 1: THE SCOPE OF ARTICLE 2

A useful example comes from the problem of foreign exchange transactions.⁵⁹ The defining characteristic of these transactions is an agreement to exchange one currency for another at an agreed exchange rate on an agreed date.⁶⁰ The market for these trades is one of the largest in the world. In April 2007, the total reported gross turnover was reported to be in excess of \$3.2 trillion.⁶¹ Since then, trading volume has grown an estimated 41 percent.⁶² A market of this magnitude requires a source of law that is both clearly defined and appropriate for the needs of its participants.

Although several courts have held that these contracts are within the scope of Article 2,⁶³ that conclusion is far from obvious. The essential question is whether "goods" are being purchased and sold. Current section 2-105(1) expressly excludes the following from the definition of "goods": (1) money in which the price is to be paid; (2) investment securities covered by Article 8; and (3) things in action. Notice that money is only excluded if it is the

the Bankruptcy Code and various federal and state consumer protection statutes) and general principles of law and equity pursuant to U.C.C. § 1-103; or (6) to otherwise improve the operation of the U.C.C.

PEB RESOLUTION, *supra* note 19, at § 1(b).

59. Other examples suggest themselves. As noted earlier, the definition of goods was amended to exclude "information." This simple tweak of the definition could provide sufficiently clear guidance to courts when presented with pure software transactions. Unfortunately, this change does little to clarify the application of Article 2 when software is associated with goods. *See Id.* Amended Article 2 also may be helpful in sorting out the relationship between current Article 2 and other laws such as state certificate of title statutes. *See* U.C.C. § 2-108 (2003).

60. *See* Raj Bahla, *A Pragmatic Strategy for the Scope of Sales Law, the Statute of Frauds, and the Global Currency Bazaar*, 72 DENV. U. L. REV. 1 (1994) (providing an overview of foreign exchange transactions).

61. Bank for International Settlements Triennial Central Bank Survey (December 2007), available at www.bis.org/pub/rpfxfo7t.pdf.

62. Annual FX Poll (May 2008), available at www.euromoneyfix.com.

63. *See e.g.*, *United Equities Co. v. First Nat'l City Bank*, 383 N.Y.S.2d 6 (N.Y. App. Div. 1976), *aff'd*, 395 N.Y.S.2d 640 (N.Y. 1977); *Sabounndjian v. Bank Audi (USA)*, 556 N.Y.S.2d 258 (N.Y. App. Div. 1990); *Koreag v. Refco F/X Assoc., Inc.*, 961 F.2d 341 (2d Cir. 1992).

medium of payment, not when it is being treated as a commodity. Thus, if a coin collector was to purchase foreign coins for their numismatic value, it would be a transaction in goods and fall squarely within the scope of Article 2. Likewise, a foreign exchange transaction can be viewed as a barter transaction in which each party is both buyer and seller, and the two currencies are no more than commodities. Consequently, if the money is the object rather than the medium of exchange, an argument can be made that Article 2 applies.⁶⁴

Such reasoning, however, may not be correct. To see why, consider the fact that it is not usual for the participants in a foreign exchange to take actual physical delivery of currency. Instead, funds are transferred from one bank account to another. That is, it is more accurate to describe these transactions as an electronic exchange of bank credits and debits.⁶⁵ This commercial reality suggests that what, in fact, each participant acquires is a claim against its bank equal to the value of the foreign currency credit. As such, this “thing in action” would be expressly excluded from Article 2’s scope.⁶⁶ Although this possibility has been suggested by commentators and pre-U.C.C. courts, it has been largely overlooked by post-U.C.C. courts.⁶⁷

The interesting point about the scope issue is that if Article 2 applies to exchange transactions, it will hinder rather than facilitate these deals, because a number of its current provisions fail to accommodate practices in the exchange market. Of special significance for present purposes is that the customary practice of traders is to negotiate and reach agreement over the telephone. Typically, these conversations are taped, and very often the parties will exchange written confirmations of the transaction.⁶⁸ The standard transactional model in this industry has been described as one in which verbal agreements suffice because of a high level of trust among participants with continuing commercial relationships.⁶⁹ In such a setting, we find nor-

64. See *Koreag*, 961 F.2d 341.

65. Using as his example a dollar-yen exchange contract in which Citibank buys yen and pays dollars, and DBS buys dollars and pays yen, Professor Bhala explains:

A 120 million debit in yen is entered electronically to the bank account of DBS, and a corresponding credit is entered to Citibank’s account. A debit of \$1,153,846.15 is made to Citibank’s account and a credit for that amount is made to the bank account of DBS.

Bhala, *supra* note 60, at 15.

66. See U.C.C. § 2-105(1) (2008). Although the term “thing in action” is not defined, it is likely that the drafters intended for the term to be synonymous with a “chose in action”, meaning a cause of action for the recovery of money. See generally, Alphonse M. Squillante, *Commercial Code Review*, 76 COM. L.J. 42 (1971).

67. See e.g., Bhala, *supra* note 60, at 17 (“The rationale in two pre-U.C.C. cases seems to contemplate the distinction between physical currency and things in action.”); Michael Latham Manire, *Foreign Exchange Sales and the Law of Contracts: A Case for Analogy to the Uniform Commercial Code*, 35 VAND. L. REV. 1173, 1192 n.138 (“Several early cases characterized foreign exchange transactions as sales of choses in action.”).

68. For a good description of the contract formation process, see Bhala, *supra* note 60, at 8-11.

69. See *Id.* at 28 (observing that “[t]rust among participants in the foreign exchange market is high” and “[t]he participants repeatedly deal with one another”).

mative criticism of the Article 2 statute of frauds,⁷⁰ parol evidence rule, and section 2-207, the “battle of the forms” provision.⁷¹ Despite the fact that the application of some Article 2 provisions might provide little or no benefit in the currency exchange setting while harming the certainty of these transactions, there are other provisions that might be in harmony with the practices in this market. This suggests the application of Article 2 by analogy whenever appropriate. Excluding the exchange transaction from the scope of Article 2 would permit this strategy.

I propose that courts faced with the issue of whether Article 2 covers exchange contracts should follow the lead of Amended Article 2. The new definition of goods explicitly excludes “foreign exchange transactions,” which anticipate the delivery of currency “through funds transfer, book entry accounting, or other form of payment order, or other agreed means to transfer a credit balance.”⁷² However, Article 2 will apply where “one or both parties is obligated to make physical delivery” of coins, legal tender, banknotes or the like.⁷³

B. EXAMPLE 2: OBLIGATIONS TO REMOTE PURCHASERS

Current Article 2 does not by its own terms, address warranties made directly to remote (non-privy) purchasers. Amended sections 2-313A and 2-313B can be relied upon to fill this gap by providing a statutory framework for courts to follow.⁷⁴ Section 2-313A creates warranty-type liability, called an obligation, where the seller, typically the manufacturer, authorizes a third party, usually the retailer, to deliver the warranty to the purchaser at the time the goods are purchased.⁷⁵ Amended section 2-313B creates an obligation

70. The statute of frauds problem has, for the most part, been alleviated in recent years by federal and state statutes that would allow the tape of the conversation to substitute for the section 2-201 writing requirement. See *Electronic Signatures in Global and National Commerce (ESIGN)*, 15 U.S.C.S. §§ 7001—7031 (2000); *Uniform Electronic Transactions Act* (1999).

71. See e.g., Bhala, *supra* note 60, at 25-51.

72. A foreign exchange transaction is defined as:

A transaction in which one party agrees to deliver a quantity of a specified money of unit or account in consideration of the other party's agreement to deliver another quantity of money or unit of account either currently or at a future date, and in which delivery is to be made through funds transfer, book entry accounting, or other form of payment order, or other agreed means to transfer a credit balance. The term includes a transaction of this type involving multiple moneys and spot, forward, option, or other products derived from underlying moneys and any combination of these transactions. The term does not include a transaction involving multiple moneys in which one or both of the parties is obligated to make physical delivery, at the time of contracting or in the future, of banknotes, coins, or other form of legal tender or specie.

U.C.C. § 2-103(1)(I) (2003).

73. *Id.*

74. The application of both sections is limited to “new goods and goods sold or leased as new goods in a transaction of purchase in the normal chain of distribution.” Amended U.C.C. §§ 2-313A(2) and 2-313B(2) (2003). For helpful discussions of how these cases have been resolved in the past, see Donald F. Clifford, *Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 WASH. U.L.Q. 413 (1997); Curtis R. Reitz, *Manufacturer's Warranties of Consumer Goods*, 75 WASH. U.L.Q. 357 (1997).

75. Amended U.C.C. § 2-313A (2003).

when the seller makes a representation, including advertisements, to the general public, and the remote purchaser buys the goods with knowledge of that representation.⁷⁶

To test whether courts should be guided by these two sections, it is necessary to recognize the policy justification for the continuing erosion of the privity doctrine, a trend that began long before the U.C.C. was originally drafted. Not only does eliminating a privity requirement produce a result perceived as just, it also serves the instrumentalist goal of encouraging remote sellers to respond with safer and better products.⁷⁷ This is especially true if the remote seller has actually taken steps to communicate with the remote purchaser.⁷⁸ Even if one rejects this instrumentalist vision of dynamic efficiency, a fairness theorist might defend the framework of Amended sections 2-313A and 2-313B, on the basis that the continued recognition of a privity requirement, even in economic loss cases, unfairly limits a manufacturer's responsibility for defective products, especially in light of the heavy influence of advertising on buyer preferences in the modern marketplace. Applying these sections would at least give buyers the opportunity to shift their present loss to the party at fault. Even if these sections do not change what most courts are already doing,⁷⁹ one would expect to see greater legal clarity if they were used to channel judicial decision-making.

C. *EXAMPLE 3: BUYER'S USE OF GOODS FOLLOWING REJECTION OR REVOCATION OF ACCEPTANCE*

An issue that has troubled courts is, whether a buyer who continues to use goods after a rightful rejection or justifiable revocation of acceptance has then reaccepted the goods under section 2-606(1)(c).⁸⁰ The better reasoned cases have held that continued use does not, as a matter of law, bar either rejection or revocation. The question for the trier of fact to decide is whether the use was reasonable.⁸¹ Certainly relevant in this regard, is whether the

76. Amended U.C.C. § 2-313B (2003).

77. See Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void*, 67 B.U. L. REV. 9, 35-57 (1987).

78. Barkley Clark and Christopher Smith state the policy justification succinctly:

[I]t makes policy sense to ignore vertical privity as a defense where a manufacturer makes an express warranty (normally in writing) that is intended to follow the product into the hands of the ultimate purchaser, though several links removed in the chain of distribution. If affirmations of fact or promises are made regarding the goods, to whom are they beamed if not the retail purchaser.

Barkley Clark & Christopher Smith, *THE LAW OF PRODUCT WARRANTIES* 10.02[1] (1984).

79. See e.g., *Randy Knitwear, Inc. v. Am. Cyanamid Co.*, 181 N.E.2d 399, 402-03 (N.Y. 1962) (notwithstanding the absence of privity between the manufacturer and consumer, the consumer may maintain a breach of warranty action for economic loss based on public advertising and on labels which accompanied the goods).

80. Acceptance occurs when the buyer "does any act inconsistent with the seller's ownership . . ." U.C.C. § 2-606(1)(c)(2008). Also prohibited is post-rejection or revocation "exercise of ownership" by the buyer. U.C.C. § 2-602(2)(a) (2008).

81. See e.g., *CPC Int'l, Inc. v. Techni-Chem, Inc.*, 660 F. Supp. 1509, 1515 (N.D. Ill. 1987) (citing *Fablok Mills, Inc. v. Cocker Mach. & Foundry Co.*, 310 A.2d 491, 494 (N.J. Super. Ct. App. Div. 1973))

non-use of the goods would increase the buyer's damages.⁸² Another factor to be considered is whether the buyer is obligated to compensate the seller for the value of her use of the goods, before or following rejection, or an effective revocation of acceptance or for both periods. Most courts would support such an award.⁸³ The more difficult question, however, is how to measure that compensation. Although an adequate starting point, fair rental value should not be dispositive, especially where the goods were in some way defective.⁸⁴

In the sense of generating uniform decisions, Amended Article 2 can play a significant role. Amended section 2-608(4) permits use of the goods that is reasonable, although the buyer must pay for that use in an appropriate case. Even if all courts were to take this approach, some questions remain. For example, aside from the fact that neither the statutory text nor the comments give guidance on when compensation would or would not be appropriate, Amended section 2-608(4) does not address the important question of whether the seller is entitled to compensation for use that occurred before the buyer rejected or revoked. This could be a significant amount, especially where the buyer has used the goods

D. EXAMPLE 4: REMEDIAL PROMISES

The case of *Tittle v. Steel City Oldsmobile GMC Truck, Inc.* is an example of the type of judicial reasoning that attention to Amended Article 2 would

(the court aligned itself with those cases that "stress that 'avoidance of an absolute rule against continued use is counseled by the overriding requirement of reasonableness which permeates' the Uniform Commercial Code"). *But See Fiat Auto U.S.A., Inc. v. Hollums*, 363 S.E.2d 312 (Ga. Ct. App. 1987) (the court ignored the buyer's contention that his conduct was necessary to cut his losses and held that he had reaccepted the car as a matter of law).

82. For an example of a balancing of interest analysis, see *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*, 449 N.E.2d 1289, (Ohio 1983). After giving notice of revocation of acceptance, the buyer drove the automobile for an additional 23,000 miles. The court stated:

[T]he trier of fact should pose and divine the answers to the following queries: (1) Upon being apprised of the buyer's revocation of his acceptance, what instructions, if any, did the seller tender the buyer concerning return of the now rejected goods? (2) Did the buyer's business needs or personal circumstances compel the continued use? (3) During the period of such use, did the seller persist in assuring the buyer that all nonconformities would be cured or that provisions would otherwise be made to recompense the latter for the dissatisfaction and inconvenience which the defects caused him? (4) Did the seller act in good faith? (5) Was the seller unduly prejudiced by the buyer's continued use?

Id. at 1293.

83. *See, e.g., Lawrence v. Modern Mobile Homes, Inc.*, 562 S.W.2d 729 (Mo. Ct. App. 1978) (seller entitled to a setoff for reasonable value of buyer's continued use after revocation); *Erling v. Homera, Inc.*, 298 N.W.2d 478 (N.D. 1980) (seller entitled to setoff for ascertainable use value from time of purchase to date of hearing on remand less interest on purchase price); *Jorgenson v. Pressnall*, 545 P.2d 1382 (Or. 1976) (seller rightfully awarded offset for rental of mobile home during buyer's occupancy). Not all courts have read the Code as supporting an award of compensation to the seller for the value of the buyer's use of the goods prior to their return to the seller. *See, e.g., Barco Auto Leasing Corp. v. House*, 520 A.2d 162 (Conn. 1987).

84. *See J. WHITE & R. SUMMERS, supra note 26, § 8.3, at 367.*

help to avoid.⁸⁵ The plaintiff had purchased an Oldsmobile covered by General Motor's 12 month/12,000 mile "1981 New Car Warranty." The warranty provided that the dealer, Steel City, would repair and adjust defects within the agreed-upon period. The car turned out to have numerous defects which were never successfully repaired. Eventually, the buyer sued for breach of warranty.⁸⁶ The trial court granted the defendants' motion for summary judgment based upon the statute of limitations defense. The Alabama Supreme Court framed the section 2-725(2) issues on appeal as whether the repair warranty explicitly extended to the car's future performance, and, if not, whether a breach of the repair warranty occurred upon tender of the car or upon failure to subsequently repair the defects.⁸⁷

The court adopted the view that such warranties do not guarantee the future performance of the car.⁸⁸ If anything, they imply "that the goods may fall into disrepair or otherwise malfunction. No warranty that the goods will not, is to be inferred from the warranty to make needed repairs."⁸⁹ Since the warranty did not extend to the car's future performance, that exception to the time of tender rule was inapplicable. As to the issue of whether the statute began to run upon tender or when the promise to repair was breached, the court found the answer in the subsection's "plain meaning."⁹⁰ The repair or replace clause is a warranty, but it does not extend to the future performance of the goods. Therefore, we are told the statute of limitations must run from the time of tender.

The holding of *Tittle* with regard to when the statute of limitation begins to run is contrary to common sense. Imagine an optimistic car buyer with a 5 year/60,000 mile warranty. If the statute begins to run from the time of tender, the buyer could not sue on the contract even though she would still have one year of protection remaining. There is no compelling policy reason for this result.

I would propose—on the basis of the language of the U.C.C.—that the crucial distinction is one between remedial promises and warranties. Section

85. 544 So. 2d 883 (Fla. 1989).

86. The defendants were Steel City Oldsmobile GMC Truck, Inc., General Motors Corporation, and GMAC.

87. U.C.C. § 2-725(2) (2008) provides:

A cause of action accrues when the breach occurs regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Id.

88. See e.g., *Ontario Hydro v. Zallea Sys.*, 569 F. Supp. 1261 (D. Del. 1983); *Carabello v. Crown Controls Corp.*, 659 F. Supp. 839 (D. Colo. 1987). But see *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813 (6th Cir. 1978) (repair or replace warranty for a specific period of time explicitly warrants future performance so that a cause of action accrues when the buyer discovered or should have discovered the defect within the warranty period).

89. *Tittle*, 544 So. 2d at 889 (quoting *Owens v. Patent Scaffolding Co.*, 77 Misc. 2d 992, 354 N.Y.S. 2d 778 (Sup. Ct. 1974)).

90. *Id.* at 891.

2-313 leaves little doubt that an express warranty relates to the quality or description of the goods.⁹¹ On the other hand, the promise to replace of the type found in *Tittle* relates solely to the seller's undertaking, not the condition of the goods (i.e., no representations were made as to the quality of the automobile, nor was there a promise that the automobile would have no mechanical problems or never break down). This distinction suggests that:

[t]he sounder approach is to recognize that the failure to repair or replace is merely a breach of contract and not a breach of warranty, and therefore no cause of action arises until the seller has refused to repair or replace the goods. This is because until the seller has failed or refused to make the repairs or provide a replacement, the buyer, not being entitled to such a remedy, has no right to commence an action for damages. As a result, the action is timely if brought within four years of the seller's failure or refusal.⁹²

Consequently, Amended Article 2 would help lead courts to the better result by its inclusion of the new concept of "remedial promise."⁹³ Amended section 2-313(4) provides that "[a]ny remedial promise made by the seller to the immediate buyer creates an obligation that the promise will be performed upon the happening of the specified event."⁹⁴ And of course, if the remedial promise is breached, the cause of action accrues when the remedial promise "is not performed when performance is due."⁹⁵

CONCLUSION

Whatever the reason and whatever the wisdom, Amended Article 2 evolved from a statute that would have helped reshape prevailing consciousness regarding the law of sales in significant ways to what was thought to be a politically safe document. Although the Committee could have done a great deal more to take into account technological developments and

91. Under U.C.C. § 2-313(1)(a) (2008), "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." See also Max E. Klinger, *The Concept of Warranty Duration: A Tangled Web*, 89 DICK. L. REV. 935, 939 (1985) ("Section 2-725(2) presumes that all warranties, express or implied, relate only to the condition of the goods at the time of sale."); Larry Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U. L. REV. 345, 379 (2003) ("Article Two defines a range of express and implied warranties" which "[a]ll go to the quality of the goods at tender.").

92. LARRY LAWRENCE, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-725:101, at 303 (3d ed. 2001). For a recent case example of this approach, see *Mydlach v. Daimlerchrysler, Corp.*, 875 N.E. 2d 1047 (Ill. 2007).

93. See Amended U.C.C. § 2-103(1)(n) (2003) ('Remedial promise' means a promise by the seller to repair or replace the goods or to refund all or part of the price upon the happening of a specified event.).

94. Amended U.C.C. § 2-313(4) (2003). Amended sections 2-313A and 2-313B provide for similar treatment of remedial promises in the non-privy context.

95. Amended U.C.C. § 2-725(2)(c) (2003).

changes in business practices, the amendments do cure some judicial mis-constructions and help to clear up a variety of conflicting interpretations. All of this leads up to a concluding comment. It is crucial to distinguish between those amendments that directly conflict with existing provisions and those that do not. As to the former, Amended Article 2 can be used to generate stimulating normative hypotheses about what the law should be, but that is all.⁹⁶ The latter amendments can, however, be put to positive use. Because they provide a set of useful expert judgments about what commercial law can now be, lawyers and courts should be aware that Amended Article 2 can be consulted as an aid when a problem arises in interpreting the existing statute. Using Amended Article 2 in this way can give new vitality to the law until there is an effort, once again, to produce an Article 2 for the new millennium.

96. For example, current section 2-607(3)(a) provides that the buyer's failure to notify the seller of a breach within a reasonable time bars any remedy. This has proven to be an extremely harsh penalty. Such is certainly the case where the buyer is unsophisticated or, for some reason, has difficulty uncovering the identity of the responsible party. Amended section 2-607(3)(a) adopts the more lenient rule that recovery is precluded only to the extent that the seller can establish that it was prejudiced by the failure to receive timely notice. Regardless of the merits of the change, courts remain bound by the current provision.

