

## Uniform Commercial Code Article 2 On Sales of Goods and the Uniform Law Process: A True Story of Good v. ?

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### I. INTRODUCTION

The topic announced for this spring 2009 issue is: will the current version of U.C.C. Article 2 be satisfactory to deal with modern issues in American law? What specific problems do we see arising because of the failure to adopt a new revision? In a nutshell the answer to the first question is clearly no, but nonetheless present Article 2 for the reasons discussed, *infra*, may have to continue to serve, even though that will allow further litigation and transaction costs. The answer to question two is that the problems may be much more significant than a continued volume of litigation and transaction costs; these factors may result in the irreversible erosion of perhaps the most significant state law in U.S. history – the Uniform Commercial Code.

U.C.C. Article 2 is the oldest of the U.C.C. Articles, having basically been written in the 1940s in response to an effort to federalize sales law because the Uniform Sales Act, the predecessor to Article 2, was allowed to atrophy and become less and less useful.<sup>1</sup> Even at an early date, it was obvious that the 1962 Official Text could not be the perpetual version of Article 2. As Robert Nordstrom noted in 1970 in his Hornbook, “[i]t would, however, be erroneous to believe the process of study and amendment is now closed. [T]here remain isolated sections which will not produce the legal results intended by the drafters or by the legislatures. These must be amended.” This analysis has proved to be true. Article 2 was written in what may be considered a general style; the rules for the most part are default rules, the effect of which can be varied by agreement.<sup>2</sup> Moreover, the rules are

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1. ROBERT J. NORDSTROM, LAW OF SALES § 2 (West 1970). The first Official Text was the 1952 Version. Changes occurred because of a study by the New York Law Revision Commission, resulting in 1958 and 1962 Official Texts.

2. U.C.C. § 1-302(a). Citations are to the current Official Text of U.C.C. Article 1, even though it may not be enacted in every state. Citations to U.C.C. Article 2 are to the 2000 Official Text, and not to the 2003/2005 amendments (except where those amendments are being described), as the 2003/2005 amendments are not yet enacted by the states.

couched in general terms such as “a contract for sale of goods may be made in any manner sufficient to show agreement”;<sup>3</sup> “an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances”;<sup>4</sup> and “a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time.”<sup>5</sup> This was done intentionally to leave room for judicial interpretation.<sup>6</sup> Consequently, it is not surprising to find a tremendous flow of litigation under U.C.C. Article 2 that tests both rules in agreements, and the proper interpretation of general statutory provisions. Since there are a limited number of precise statutory provisions to govern issues, probably more published cases every year are litigated under U.C.C. Article 2 than under any other Article of the U.C.C.<sup>7</sup> These were the reasons, in addition to technological developments and significant changes in the method of distributing goods,<sup>8</sup> that prompted a perceived need to update and clarify the rules for sales of goods in the late 1980s.<sup>9</sup> Clearly, after some 25 years, that effort was timely.

## II. THE INITIAL EFFORT TO AMEND U.C.C. ARTICLE 2

In 1987, the Permanent Editorial Board for the U.C.C., with the support of The American Law Institute (ALI) and the ULC, established a committee to study Article 2 of the U.C.C. The study committee recommended revision of Article 2 including a number of specific changes. The full report was issued in March 1990, recommending the creation of a drafting committee. Commentary on the report by a Task Force of the American Bar Association was also published: *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. OF CORP. LAW 981-1325 (1991). An executive summary of the Permanent Edi-

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3. U.C.C. § 2-204(1).

4. U.C.C. § 2-206(1)(a).

5. U.C.C. § 2-207(1). Many other examples could be listed.

6. This approach reflects the need for flexibility, given the very broad scope of transactions covered by the Article, and also reflects the trust of the drafters in courts being able to arrive at sensible applications of general rules to specific circumstances.

7. This is the author's observation based mainly on cases discussed in the U.C.C. Bulletin. To illustrate, from January 2006 through December 2006, there were 154 cases under Article 2, 96 cases under Articles 3 and 4, and 73 cases under Article 9. Of course, all of those Articles, except Article 2, have been amended to answer issues that previously were litigated, but that itself makes the point for a need for amendment.

8. Again, as early as 1970, Nordstrom noted: “Also, despite the foresight which the drafters evidenced, there will inevitably be changes in commercial practices which will require additions to and changes in the Official Text.” Nordstrom, *supra* note 1.

9. “[T]he two sponsoring organizations . . . established a Permanent Editorial Board for the Uniform Commercial Code. This Board reviews state changes in the Code's official text and recommends whether those changes should be uniformly adopted. In addition, the Board recommends amendments whenever new commercial practices have rendered provisions of the Code obsolete or new provisions desirable, court decisions have cast doubt on the intended interpretation of some section, some provision has been proved unworkable, or for any other reason a provision ‘obviously requires amendment.’” *Id.*

torial Board Study Group report, with additional recommendations, was published in 46 *BUS. LAW.* 1869 (1991).

A drafting committee, composed of members of the ALI and the ULC, was organized in the fall of 1991. In May 1994, the drafting committee issued a prototype “hub and spoke” draft that integrated contracts for the sale of goods with licenses of software and other information technology. Although the two types of transactions differ in many and significant ways, a number of provisions are workable in either context, as courts have long recognized. However, this prototype was the subject of much disagreement and was abandoned in the fall of 1995, after which the drafting committee worked exclusively on the revision of Article 2. With the elimination of the draft provisions on licenses of software, the governing law for those transactions was relegated to developing the applicable law on a case-by-case basis, an approach not conducive to the certainty those transactions require, or to the development of a separate statute, a project undertaken by the ULC in the Uniform Computer Information Transactions Act (UCITA). But that is another story.

After more than 25 meetings of the drafting committee, an amended Article 2 was approved by the American Law Institute in May 1999. Subsequently, this draft was presented for final approval at the annual meeting of the ULC in July 1999.

Lawrence Bugge, a Commissioner of the ULC from Wisconsin and a past president of the organization, was the chair of the drafting committee that produced this draft. The initial reporter was Professor Richard Speidel, a well-known commercial law teacher who had also served as chair of the study committee. He was later joined in the reporter role by Professor Linda Rusch, an up and coming star in the field of commercial law.

In the ULC process, representatives of organizations interested in the law that is the subject of the project are asked to participate in all drafting committee meetings. While members of the drafting committee (Commissioners and ALI members) make the ultimate decisions, the input from these other participants assists the committee in adopting rules that reflect, within the bounds of good public policy, the way business is actually done.

The drafting committee, from the very beginning, adopted an ambitious agenda that often went beyond codifying current practices, and included proposals that were perceived to change long-standing norms. While that initially is not unusual, since preliminary concepts are refined and are often either eliminated or limited as drafts are reworked over time, in retrospect this approach was probably a mistake, as many of the invited participants became concerned with the volume of changes as well as the inevitable (given the times) addition of special consumer provisions.<sup>10</sup>

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10. Because Article 2 was promulgated at the beginning of a period of development of consumer law, much consumer law in the sale of goods area occurred outside of the Article, necessitating consulta-

The draft that went before the membership of the two sponsoring organizations was very broad. First, it reflected a substantial reorganization of former Article 2 and the renumbering of most sections. New subpart B to Part 2 dealt with electronic contracting, which had developed since Article 2 was first promulgated; Part 4 dealt exclusively with warranties; Part 5 dealt with subject matter in former Part 4; Part 6 dealt with subject matter in former Part 5; and Part 7 dealt with subject matter in former Part 6. Part 8, Remedies, dealt with subject matter in former Part 7 and was reorganized into three subparts. Subpart A dealt with policies applicable to both seller and buyer, Subpart B dealt with seller's remedies, and Subpart C dealt with buyer's remedies. This was a logical reordering, but many thought they saw an agenda beyond that.

Second, there were many specific and significant revisions of former Article 2 rules in the reordering, including:

- The exclusion of transactions in computer information and computer programs, unless a computer program was embedded in goods. Since many courts had applied Article 2 to such transactions, this reflected a change that concerned many as to what law would then apply to such transactions, and others saw it as an unbalancing of current legal positions.
- Clarification of the relationship between Article 2 and other laws, such as state certificate of title laws, laws establishing different rules for consumers, and the Uniform Electronic Transactions Act (UETA). Particular concern was expressed as to whether the subjection of Article 2 rules to different rules for consumers would allow a later court case to change the statutory rule.
- The addition of two new subsections on unconscionability in consumer contracts. The new subsections stated when a non-negotiated term in a standard form record would be substantively unconscionable, and another subsection, derived from § 2A-108(2), protected against contracts, terms, or the collection of claims that had been induced by unconscionable conduct. In addition, the draft contained a number of other rules that applied to consumer contracts, including: a provision stating that, in a consumer contract, a merger clause would not be conclusive evidence of an intent to integrate the writing; new requirements for an effective disclaimer of implied warranties in consumer contracts; a new "pass through" express warranty obligation that extended beyond a remote buyer to certain consumers; and an extension of warranties

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tion of more than one statute and raising serious problems of coordination. Incorporating some of this into the Code, or clarifying the relationship with consumer law outside the Code could be seen as an important simplification instead of radical revision.

made to immediate consumer buyers to household members, guests, invitees, and certain transferees. Additionally, while a seller was granted consequential changes, the seller was then precluded from recovering consequential damages from a consumer in a consumer contract; there was a prohibition on the parties agreeing to the remedy of specific performance in a consumer contract; there was a provision that consequential damages were available to consumers in a consumer contract where a limited remedy failed of its essential purpose; and there was a provision that a term in a consumer contract reducing the statute of limitations below four years was not enforceable.

- The requirements of the statute of frauds were somewhat relaxed. The doctrine would not apply if the price was less than \$5,000. It also was easier to satisfy the requirements where the price was \$5,000 or more. For example, a record would not be insufficient simply because it omitted a quantity term, and only the person receiving a confirmation needed to be a merchant.
- The draft removed principles of contract formation from § 2-207 and integrated them with the basic principles in §§ 2-203, 2-204, and 2-205. Thus, the principles in former § 2-207(1) would now be found in §§ 2-205(b) and 2-203(d), and the principle in former § 2-207(3) was now found in § 2-203(a). Section 2-207(a) dealt explicitly with standard terms. Thus, for a seller or buyer to get a standard term into the contract, the records of the parties had to agree on it, or the other party had to expressly agree to that term; the mere retention or use of goods by one party would not be an express agreement to a standard term.
- Former §§ 2-319 through 2-324 were replaced by the simple principle of § 2-309, which provides that the effect of the party's use of shipment terms, such as "FOB," should be interpreted in light of any applicable usage of trade, course of performance, or course of dealing between the parties.
- Section 2-313 was limited to contracts between a seller and an immediate buyer; after all, these were the parties to the necessary "bargain." The draft also clarified that a representation could be made by advertising, and also more clearly dealt with when a representation made by a seller to a buyer about the goods becomes part of the basis of the bargain.
- The draft dealt with two situations where a seller's representation ("remedial promise" as differentiated from warranty, such as a promise to repair or replace as opposed to a statement the goods were without defects) would create obligations to a remote buyer, a lessee, or a trans-

feree. The provision was limited to new goods sold to the remote buyer.

- The draft clarified that a secured party who entrusted goods to a merchant would lose its security interest if the goods were sold by the merchant to a buyer in the ordinary course of business.
- The draft integrated former §§ 2-509 and 2-510 into one section, and sharply reduced the effect of a breach by either party on the basic risk of loss principles. Thus, risk of loss was allowed to pass even though the goods were not conforming to the contract. Another change was that in designated cases the risk passed upon receipt or control of the goods, and not on tender of delivery.
- The draft preserved the “perfect tender” rule and stated when a rejection was effective, stated the duties of a buyer in possession of goods that have been effectively rejected or where there was a justifiable revocation of acceptance, stated the effect of a use of goods effectively rejected or where acceptance was justifiably revoked, and provided that if a use was reasonable under the circumstances, the buyer did not undo revocation but had to pay the seller the reasonable value of the use to the buyer.
- The draft provided that the failure after acceptance to notify the seller of a breach did not bar any remedy unless the party entitled to be notified established that it was prejudiced by the failure of notice and, then, only to the extent of the prejudice.
- The draft expanded the seller’s power to cure a breach while, at the same time, imposed the cost of the non-conforming tender and subsequent cure on the seller. The power to cure was also extended to a revocation of acceptance.
- A working definition of “repudiation” was provided.
- Both the seller and the buyer could obtain specific performance, and the parties had the power to agree to that remedy even though the normal conditions to it were not present. In no case, however, could the court enter a decree for specific performance if the breaching party’s sole remaining contractual obligation was the payment of money.
- The draft made changes as to liquidated damages: (1) the “inconvenience or non-feasibility” factor applied only in consumer contracts; (2) if a term liquidating damages was unenforceable, the aggrieved party could pursue the remedies in the article; and (3) a clearer line was drawn between a term that limited and a term that liquidated damages.

- The draft clarified, in both commercial and consumer contracts, the effect of a limited remedy that failed its essential purpose. The main difference was with consequential damages: in commercial contracts, a term excluding consequential damages was still effective if the requirements were satisfied, and in a consumer contract, the consumer could recover consequential damages regardless of such a term.
- There were several substantive revisions to the statute of limitations:
  - (1) An action could be commenced one year after the breach was or should have been discovered, but no longer than five years after the cause of action accrued.
  - (2) In a consumer contract, the period of limitation could not be reduced by agreement.
  - (3) When a right of action accrued was stated for a repudiation, for breach of a remedial promise, and for an action by a buyer against a person that was answerable over to the buyer.
  - (4) The accrual times for breach of warranty claims were spelled out in some detail and coordinated with the different sections in Part 4 where warranty obligations were created. In most cases, the accrual time varied with the type of warranty made.
- The draft provided expanded protection to the pre-paying buyer where the goods were identified and the buyer kept open a tender of full performance. The buyer's right to the goods was stated to arise under Article 2 and not under Article 9; and that the buyer's right vested upon identification to the contract, even though the seller was not yet in breach. The time of vesting would determine the buyer's right to the goods against creditors of the seller. Thus, if the buyer's right vested by identification on March 1, a secured party perfected a security interest in the goods on March 5, and the seller breached on March 10, the buyer would be entitled to the goods against both the seller and the secured party, but if the buyer's right vested on March 7, the buyer would be subject to the security interest unless it was a buyer in the ordinary course of business.

It can be persuasively argued that this initial effort to amend Article 2 addressed most, if not all, of the differing interpretations of the general rules in Article 2, as well as updated Article 2 for advances in technology and the changes in the way goods are sold and distributed. It can be further shown that the draft contained a balance of provisions favorable to both sellers and buyers. To briefly illustrate, the draft, in conjunction with Article 1, favored both sellers and buyers in the following ways:

- It continued the policy of freedom of contract, both as to varying the effect of Article 2 and in designing the bargain, as well as preserved the important role of trade usage, course of dealing, and course of performance so that a contract for sale may be adapted to the type of goods sold and the circumstances of the parties.
- It expanded the duty of good faith to cover non-merchants as well as merchants.
- It updated the statute to reflect changes in technology for electronic contracting and for business practice, and, where appropriate, revised particular sections to resolve ambiguities and conflicting judicial interpretations that had emerged in over 50 years of use.
- It clarified the scope of Article 2 by excluding foreign exchange transactions, and defined more clearly the relationship of Article 2 to other articles of the U.C.C. and to other state law.
- It preserved the objectives of the statute of frauds while reducing the risk that it would be used to perpetrate fraud.
- It preserved the effect of the parol evidence rule while clarifying the test for determining intention to integrate and the issues to which the parol evidence rule applied.
- It clarified the rules of contract formation, as well as in the so-called battle of the forms by separating the question of formation from the question of what are the terms of the contract.
- It deferred, where appropriate, to evolving international standards, particularly where the meaning of shipment terms were involved.
- It provided rules on the abrogation of privity that were favorable to buyers but, at the same time, contained limitations upon the scope of seller liability.
- It provided revised risk of loss rules that were in accord with the expectations of the parties and the role of insurance, and minimized the effect of breach on who bore the risk of loss.
- It created a new subpart for remedies that contained clear, balanced policies that applied to both sellers and buyers.
- It facilitated the choice by sellers and buyers of remedies available.
- It made liquidated damage provisions easier to enforce.

- It clarified when a cause of action accrued for breach of warranty, and that the statute of limitations and the provision on vouching applied to indemnity agreements.

There, of course, were some provisions that primarily favored sellers such as:

- The draft clarified the relationship between warranty and product liability where injury to person and property was involved, and assured that goods that were not defective under tort law could not be unmerchantable under warranty law. The draft expanded the right to cure a nonconformity after rightful rejection and a justifiable revocation of acceptance. The draft allowed a seller to recover consequential damages. Finally, in commercial contracts, the draft clarified that if an agreed remedy failed its intended purpose, an express agreement excluding consequential and incidental damages was still enforceable unless it was deemed to be unconscionable.

However, other revisions tended to primarily favor buyers such as:

- The draft clarified, in a manner favorable to buyers, the applicability of certificate of title laws to entrustment situations in relation to how long a seller may avoid a transfer of title. The draft preserved consumer protection laws outside of Article 2, while adding modest and balanced consumer protection rules within Article 2 to reflect a more modern approach. Further, the draft codified the law that a manufacturer's express warranty made through a dealer by advertising to a remote buyer or its transferee created a limited obligation that could be enforced directly against the manufacturer. The draft also permitted limited, reasonable use of goods after rejection or revocation of acceptance without finding an acceptance.

Nonetheless, the National Association of Manufacturers (NAM), as well as a number of other business interests and even some consumer interests, vehemently opposed the draft when it was presented for approval to the ULC. NAM objections included:<sup>11</sup>

- **Revised Article 2 does not meet the objectives of the Uniform Commercial Code.** The objectives are to simplify, *clarify*, and *modernize* law governing commercial transactions, and to permit the continued *expansion* of commercial *practices*. Revised Article 2 will retard and disrupt commerce, as well as impose huge additional costs, especially in the area of electronic commerce. It alters significant rules

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11. The author expresses no opinion on the validity or accuracy of these objections, and leaves that judgment to the reader.

that have become the basis for customary practice, and does so in a way that affirmatively harms all industries.

- **Existing Article 2 is virtually uniform; Revised Article 2 will not be because it is not supported by any industry and opposed by many.** No industry requested or invited these revisions. Not one letter of affirmative support for any version of Revised Article 2 has come from any affected industry, but many have sent letters opposing it. The absence of support, and the existence of strong opposition, will lead to nonuniformity and render invalid one of the chief benefits of existing Article 2. These also indicate the lack of justification for these changes.

- **Revised Article 2 encourages litigation generally, and class actions in particular.** This is a litigation statute, not a commercial contract statute. Revised Article 2 blurs contract law and tort law, creating liability risk without contract or tort basis. It creates confusion on contract formation. It creates several new basis of liability. Its comments purport to overrule cases in various states and reduce certainty in when terms are enforceable.

- **Revised Article 2 gives courts the right to rewrite and overrule the statute in contracts involving consumers.** Existing Article 2 defers to consumer protection statutes. Revised Article 2, however, also is subordinate to any judicial decision “that establishes a different rule for consumers.” The courts may, for their own reasons, randomly override Article 2 rules. This an unprecedented delegation of power to courts, and destroys uniformity in consumer commerce.

- **Revised Article 2 creates a new form of liability that invites class action litigation by creating liability for advertisements or other “public communications.”** The new rule is a major change that conflicts with the direction of most recent court and legislative action. It creates liability for public communications, even though the communication was not a part of the agreement and even if it did not cause personal injury. In any event, this is a contract statute and should deal with contracts. This rule is a huge step backward that invites class action litigation, and is outside the domain of a commercial contract law.

- **Revised Article 2's silence on scope forces non-uniform and unpredictable solutions on how to treat computer information transactions.** One reason to revise Article 2 would have been to clarify that its rules on goods were not written for, and do not apply to, information transactions. Revised Article 2, because of a political “compromise” made without the participation of any of the affected industries, leaves the issue unanswered. The risk that software and other information

transactions will be brought within Revised Article 2 is also contrary to the fact that the drafters never considered information transactions in their substantive debates. It exacerbates the uncertainty about what law governs these transactions, potentially costing the information industries and their customers billions of dollars. The draft results from a last-minute abandonment of an intellectually honest approach in response to ALI political demands.

While some argue that the revision retains the status quo, this is not true. The revisions contradict recent uniform statutes enacted by states: (1) NCCUSL and ALI adopted Article 2A which expressly excludes “general intangibles” (e.g., software) from the definition of “goods.” Revised Article 2A removes that exclusion. (2) NCCUSL and ALI promulgated Revised Article 9, which clarifies that software is ordinarily not a good and is a general intangible except in some limited cases of embedded software. (3) NCCUSL promulgated UCITA because information transactions differ from transactions in goods.

The better approach is to exclude all information transactions from Article 2 and allow the common law or UCITA to develop an appropriate contract law framework, rather than to potentially put information transactions under an inappropriate law rewritten without regard to the nature of those transactions.

- **Revised Article 2 fails to recognize the strong majority of cases approving modern “rolling” or “layered” contracts.** In the complex modern economy, many commercial practices entail so-called layered or rolling contracts in which parties form the terms over time rather than at one particular instant. Case law widely recognizes and enforces this contract practice. Yet Revised Article 2 does not recognize this framework, and may threaten its validity. One type of rolling contract is: a telecommunications company sells an Internet-ready cell phone, delivering it with a cellular subscription agreement, web portal terms of use, and a data storage agreement. The contract terms start with the phone order but do not end there. Courts overwhelmingly view the subsequently delivered terms as part of the contract if the buyer had reason to know the contract would roll and a refund is available if the terms are rejected. Revised Article 2 ignores such transactions, while its comments seem to call into question their enforceability. This completely fails the U.C.C.’s goals of simplifying, clarifying, and modernizing the law.

- **Revised Article 2 significantly expands the risk of liability for breach of the warranty of good title.** Current law makes sellers liable if they actually do not have “good title;” whereas Revised Article 2-312 creates liability any time a third party makes a “colorable claim” to

title. It expands liability risk under a new statutory term that has no definition. The source of the new language is in comments to existing Article 2, but there the term *explains* what is meant by good title. In Revised Article 2, it is an *additional* statutory liability .

- **The new “remedial promise” concept is a solution in search of a problem that creates worse problems.** Revised Article 2 creates an entirely new concept of liability called a remedial promise. It was allegedly intended to address a problem in the statute of limitations. But application of the concept has been expanded. A remedial promise is now a new, separate agreement, with its own statute of limitations, rather than a contractual remedy. This is contrary to modern commercial practice. Under current law, such promises are merely remedies, and if one fails, the buyer has other remedies for breach of the underlying contract. This is where this issue should be left. The new concept is unclear, unknowable and drags services into Article 2.

- **Revised Article 2 creates a forced lease and adversely disturbs the required tension between acceptance and rejection.** Revised Article 2-608 allows buyers to reject goods but still use them if “it is reasonable under the circumstances.” While “in an appropriate case” the buyer can be obligated to the seller “for the value of the use to the buyer,” this is a *forced lease* in which the value of the lease has nothing to do with the parties’ agreement and can only be determined in litigation. Under existing law, buyers must fish or cut bait: if the buyer rejects goods it cannot use them (subject to reported cases dealing with unique situations that courts are well able to handle). Existing law protects buyers and sellers. Revised Article 2 radically alters this balance.

- **Revised Article 2 creates an unending statute of limitations for important transactions.** Revised Article 2-725(3) creates a potential never-ending statute of limitations for goods that the seller agrees to install or assemble: the rule does not accrue until the seller has completed the installation or assembly. This is simply bad law, and runs contrary to the long-standing purpose of statutes of limitations: the creation of an end point beyond which a claim cannot be brought. If a buyer claims that an agreed installation or assembly *never* properly occurred, the statute of limitations *never* ends.

- **Revised Article 2-710(3) allows recovery for consequential loss against a buyer, but precludes that recovery from consumers even if the consumer breach imposes significant losses on the seller.** This deprives an injured party of the benefit of its bargain. Given the vague scope of Revised Article 2, the rule may cause tremendous harm for information providers. Assume a license for database software which lists restaurants in 1,000 cities including their menus, ratings, and most

famous recipes - the license limits uses to consumer purposes. A consumer copies the data, places it on the Internet selling it commercially, and effectively eliminates the licensor's entire market. There would be no contract damages for this harmful conduct. The transaction should not be an Article 2 transaction at all. But under Revised Article 2's ambiguous scope, could it be? If it is, the Revised Article 2 rule eliminates the licensor's most effective remedy, the reasonable behavior caused by the possibility of consequential damages. The new rule leaves the database provider with no effective remedy.

• **Revised Article 2 creates new uncertainties in domestic and international law by deleting standards concerning shipping terms.** Existing Article 2 rules may be out of date. But they provide explicit guidance, and practices have been based on them, and further, international rules have been adopted. Revised Article 2 should provide clear guidance for current practices. Instead, it leaves the issue open. Extensive litigation, uncertainty, and costs are the likely result.

Whatever the actual merits of the NAM objections, and those of others, the ALI approved the draft. But the ALI does not have to enact a statute. When it came before the ULC for approval, it became apparent to the ULC that even if the draft was approved by the ULC, it would be unlikely to be enacted in uniformity by many states. Accordingly, the ULC approval process was terminated, and the leadership of the sponsoring organizations began discussion of what to do next. Ultimately, it was decided to reconstitute the drafting committee and begin work on a less ambitious revision of Article 2.

### III. SUBSEQUENT EFFORTS TO AMEND ARTICLE 2

This effort (the "second" draft) resulted in a set of discrete amendments to Article 2 that were finally approved by both organizations in 2003.<sup>12</sup> The more limited goal was not to revise the Article thoroughly, as in many cases it continues to serve well enough. Thus, for example, the reordering of the initial draft was dropped. Instead, the goal was to "update the [A]rticle to accommodate electronic commerce (desirable to avoid questions of interrelation with federal law), and to reflect development of business practices, changes in other law, and interpretive difficulties of practical significance."

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12. Based on a further examination of this second draft by a committee of the California Bar Association, some revision to this draft, and some additional amendments, were approved in 2005. Substantial portions of the following text are derived from articles by the author and William H. Henning that appeared in the December 2003 and January 2004 U.C.C. Bulletins. The articles are *State of the Uniform Commercial Code - 2003*, pt. 1-2, 51 U.C.C. BULLETIN 1 RELEASE 3 (Dec. 2003); and 51 U.C.C. BULLETIN 1 RELEASE 4 (Jan. 2004), used with the permission of Thomson Reuters/West.

Although more modest overall than the earlier draft, the 2003/2005 amendments nevertheless still address an impressive array of issues.

Accommodation to electronic commerce is accomplished by adopting terminology and substantive provisions consistent with federal E-Sign<sup>13</sup> and the Uniform Electronic Transactions Act.

Changes in the area of contract formation or content include:

- In § 2-201, increasing the jurisdictional amount from \$500 to \$5,000; broadening the exception for admissions to encompass out-of-court statements under oath; implicitly recognizing nonstatutory exceptions based on estoppel; and excluding application of the common-law “one-year” rule.
- Clarifying in § 2-202 that evidence from an implied-in-fact source may be introduced to explain a term without a judicial finding of ambiguity.
- Deleting §§ 2-319 through 2-324, which dealt with standard shipping terms in an out-of-date manner, appropriately leaving them to be interpreted in light of any applicable course of performance, course of dealing, or usage of trade. When these sections were originally enacted, they reflected the industry understanding of the designated trade shipping terms “shorthand.” As the legislative note to reserved § 2-319 points out, they no longer necessarily do. Thus, these statutory definitions either present a trap for the unwary, if one of the terms is used under the misunderstanding of what it means, or requires overriding its meaning by agreement. Without the statutory definitions, the parties can either define the term expressly, or rely on current usage for its meaning.

Without doubt, the most important contribution in this area is the complete reworking of former § 2-207, the inadequacy of which is proved by the high volume of litigation the section continues to generate 40 years after its

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13. 15 U.S.C. § 7001 *et seq.* (2008). See §§ 2-211, 2-212, 2-213, and various definitions in § 2-103, as well as other modifications changing “writing” to “record,” recognizing “electronic agents” in § 2-204(4), and so on. Pursuant to amended § 2-108(4), the provisions on electronic commerce in amended Article 2 will supersede E-sign so that issues of preemption are avoided, and will address issues that have arisen in the application of Article 2 to electronic commerce as evidenced by *Home Basket Co. v. Pampered Chef, Ltd.*, 2005 WL 82136, 55 U.C.C. Rep. Serv. 2d 792 (D. Kan. Jan. 12, 2005) (unpublished table decision) (supplier that, after receiving e-mails from vendor regarding offers to fill orders, placed orders using vendor’s internet-based purchase order system was bound by terms and conditions incorporated in the system); *Int’l Casings Group, Inc. v. Premium Standard*, 358 F. Supp. 2d 863, 56 U.C.C. Rep. Serv. 2d 736 (W.D. Mo. 2005) (contract existed where exchange of numerous e-mails contained the essential terms of an agreement; fact no written document with handwritten signature existed insufficient to escape liability for breach of contract); and *Vision Sys., Inc. v. EMC Corp.*, 2005 WL 705107, 56 U.C.C. Rep. Serv. 2d 875 (Mass. Dist. Ct. Feb. 28, 2005) (unpublished table decision) (e-mail memorandum not adequate to take out of statute of frauds because it was merely an invitation to offer, rather than language indicating a contract for sale had been made).

widespread adoption. The amendments separate the issues of contract formation and contract terms by moving the concept of the “definite and seasonable expression of acceptance” to § 2-206, which deals generally with offer and acceptance. Amended § 2-207 then creates a framework for determining the terms of contracts formed in any manner. In classic “battle-of-the forms” cases, it avoids the common-law’s last-shot advantage and the former section’s first-shot bias by adopting the “knock-out” rule of former subsection (3). Some with ties to particular industries, however, have criticized this approach for undermining the ability of businesses to rely on standard terms, or for impeding the ability of courts to enforce terms first provided after a buyer has paid for goods. Both criticisms are misplaced. Based on the cases and the attitude of courts, it is delusional to think the former section permits a business to rely on its standard terms without obtaining express agreement, and the amended section, as Official Comment 5 points out, is neutral with regard to later terms. Some cases, such as *Lively v. IJAM, Inc.*<sup>14</sup> and *Rogers v. Dell Computer Corp.*,<sup>15</sup> fail to recognize that, even if a contract was formed at the time of the order, if the parties did not intend to be bound until “later terms” that come with the goods are accepted by retention of the goods, instead of being rejected by their return which ends the transaction with a refund, that § 2-207 is not applicable. The correct analysis is shown by cases like *Defontes v. Dell Computer Corp.*,<sup>16</sup> which recognizes that later terms can be part of the contract when the parties intend that result. An explanation as to the efficiency and efficacy of this method of contracting is shown by *ProCD, Inc. v. Zeidenberg*.<sup>17</sup>

In the area of warranty, a particularly important clarification occurs in amended § 2-313, which makes it clear that it applies only to parties in privity (subject, of course, to § 2-318), and new §§ 2-313A and 2-313B (also subject to § 2-318) clarify that there are statutory obligations in the nature of express warranties that have been recognized by the courts and that run from sellers to parties not in privity. All three sections also recognize “remedial promise” as a distinct type of obligation not subject to the basis-of-the-bargain test in § 2-313 or its counterparts in §§ 2-313A and 2-313B.

Section 2-313A, which deals with what is sometimes called the “card-in-the-box” warranty, § 2-313B on advertising, and remedial promise have been controversial, eliciting overheated criticism from some. Nonetheless, courts have long recognized that sellers can incur warranty-like liability to remote parties based on advertising,<sup>18</sup> and § 2-313B codifies that result for new goods purchased within the normal chain of distribution (§ 2-313A is

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14. 114 P.3d 487 (Okla. Civ. App. 2005).

15. 138 P.3d 826 (Okla. 2005).

16. 2004 WL 253560 (R.I. Super. Jan. 29, 2004) (unpublished table decision).

17. 86 F.3d 1447 (7th Cir. 1996).

18. See, e.g., *Randy Knitwear, Inc. v. Am. Cyanamid Co.*, 181 N.E.2d 399 (N.Y. 1962).

similarly limited).<sup>19</sup> Without the section, the cases would continue to impose liability, so in that sense the provision is unnecessary, but its main purpose is to provide a uniform test for establishing liability and uniform rules for resolving related issues. In these regards, the section is quite protective of sellers. For liability to exist, the remote purchaser would have to know of the advertising and believe it created an obligation, a reasonable person in the position of the remote purchaser would have to believe it created an obligation, and it must not constitute puffing. The seller is explicitly permitted to modify or limit remedies as long as the modification or limitation is provided at or before the time the remote purchaser acquires the goods, and the remote purchaser may not recover consequential damages in the form of lost profits. The comments provide significant guidance, reducing the possibility that the section will be misapplied.

The remedial-promise concept was created to resolve a statute-of-limitations problem that arose because some courts treated such promises as express warranties, which they clearly are not, and inappropriately applied former § 2-725's four-years-from-tender rule. The term is defined quite narrowly – it applies only to promises to repair, replace, or refund, and then only if the promise is triggered by the happening of an event that the seller is fully empowered to specify. The criticism seems to be that courts will somehow misapply the concept, but the critics have failed to demonstrate why this is more than a remote possibility or is unique to this provision. The argument that a well-drafted, conceptually sound rule should be jettisoned because it might be misapplied in some unspecified manner is just not persuasive. Nonetheless, there is less here than meets the eye, as better reasoned decisions would still reach the right result without statutory guidance.<sup>20</sup>

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19. Section 2-313A reflects current law, as there seems little question that a manufacturer's express warranty (or that of a person down the distribution chain) may extend to the ultimate purchaser even though that purchaser did not purchase from the person making the warranty. The issue then may center on whether what the manufacturer stated constituted a warranty. Recent cases, including *Sharp v. Tamko Roofing Prod., Inc.*, 695 N.W.2d 43, 55 U.C.C. Rep. Serv. 2d 226 (Iowa Ct. App. 2004) (unpublished table decision), *Wojcik v. Empire Forklift, Inc.*, 783 N.Y.S.2d 698, 55 U.C.C. Rep. Serv. 2d 190 (N.Y. App. Div. 2004), and *Yurcic v. Purdue Pharma, L.P.*, 343 F. Supp. 2d 386, 55 U.C.C. Rep. Serv. 2d 10 (M.D. Pa. 2004), have focused on lack of reliance, and have not allowed successful claims for breach of express warranty based on material either not directed at persons in the class of plaintiffs or not seen by plaintiffs.

As noted, § 2-313B is not new but indeed codifies case results only applying in the case of new goods in a transaction of purchase in the normal chain of distribution, and where the purchaser enters into the transaction with knowledge of and the expectation that the goods will conform to the affirmation of fact, promise, or description, and excluding the case of opinion or if a reasonable person in the position of the purchaser would not believe the statement.

20. Since the statute of limitations begins to run against a buyer with respect to warranty at delivery under the current basic rule of § 2-725(2), where a defect is later discovered or attempts at repair ultimately fail, the limitations period may have expired. Thus, there is an incentive to try to establish that the warranty is instead one of future performance, where the period does not commence until discovery under § 2-725(2) (amended Article 2 is the same under § 2-725(3)(a) and (3)(c)). The litigation reflects this, and consistently denies that a warranty against defects with a promise to repair or replace is a warranty of future performance. *Allstate Ins. Co. v. Gen. Motors Corp.*, 2005 WL 264276, 56 U.C.C. Rep. Serv. 2d

Other warranty provisions of interest in the second draft include:

- Amended § 2-312, which simply brings into the text what was formerly in the comments and generally accepted by the courts – the warranty of title is breached if the buyer is unreasonably exposed to litigation because of a colorable claim to, or interest in, the goods.<sup>21</sup>
- Amended § 2-316(2), which was made more consistent with the policy behind allowing disclaimers (to prevent unfair surprise by an obscure contractual provision) by providing that a disclaimer of an implied warranty in a consumer contract (a defined term) must be in a record, be conspicuous, and use more understandable language than that formerly required. In the case of the implied warranty of merchantability, the disclaimer must state, “the seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract,” and in the case of the implied warranty of fitness for a particular purpose, it must state, “the seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in this contract.” An amendment to § 2-316(3) continues this policy by requiring that an “as is” or “with all faults” disclaimer in a consumer contract evidenced by a record be conspicuously set forth in the record. By implication, such a disclaimer need not be conspicuous in a nonconsumer contract evidenced by a record.

The amendments in the areas of performance, breach, and remedies include a revision of § 2-508 which *inter alia* provides for cure following revocation of acceptance under § 2-508(2) in nonconsumer cases, thereby promoting informal problem solving between businesses while preserving for consumers the negotiating leverage provided by an absolute right to re-

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241 (Minn. Dist. Ct. Jan. 24, 2005) (unpublished table decision) (a warranty to repair or correct a new motor vehicle for 4 years or 50,000 miles was not a warranty of future performance, and the statute of limitations began running on tender of delivery; a warranty of future performance must explicitly extend to the future performance of the goods); Taylor v. First of Am. Bank, N.A., 2005 WL 355212, 56 U.C.C. Rep. Serv. 2d 597 (Mich. Ct. App. Feb. 15, 2005) (unpublished table decision), and Pender v. Daimler-Chrysler Corp., 2004 WL 2191030, 54 U.C.C. Rep. Serv. 2d 1073 (Del. Super Ct. July 30, 2004) (unpublished table decision). Compare, however, Meron v. Ward Lumber Co., 779 N.Y.S.2d 597, 54 U.C.C. Rep. Serv. 2d 55 (N.Y. App. Div. 2004) (warranty of repair or replacement of goods is not a warranty of future performance, but when warranty expressly provided it began at installation and ran for 20 years, it survived four year statute of limitations). Amended §§ 2-103(1)(n) (remedial promise) and 2-725(2)(c) (when breach of remedial promise accrues) are designed to separate these concepts. A warranty relates to performance of the goods and a remedial promise relates to performance of the seller, and thus the amendments reduce or eliminate the incentive for significant continuing litigation. See Official Comment 9 to § 2-103.

21. Section 2-312(1)(a) reflects current law, which follows Official Comment 1 to present § 2-312; there is nothing new here except a more helpful comment as to what constitutes a colorable claim. See Mercer v. Braziel, 746 P.2d 702, 4 U.C.C. Rep. Serv. 2d 1370 (Okla. Civ. App. 1987) (assertion of claims on car by police and insurer constituted a shadow on plaintiff's title; breach of § 2-312 as a matter of law).

voke.<sup>22</sup> The amendments also clarify the relationship between §§ 2-508 and 2-612 on installment contracts; jettison the test of former § 2-508(2) and substitute a test that focuses on both the good faith of the seller and the needs of the buyer, and provide for recovery by the buyer of reasonable expenses incurred as a result of the breach and its subsequent cure. A concomitant amendment to § 2-605(1), which formerly dealt only with cases of rejection, articulates when a bill of particulars is necessary in connection with a revocation. The section has also been amended to provide that, while failure to state a defect with particularity still bars the buyer from relying on the defect to justify rejection or revocation, it no longer bars the buyer from using the defect to establish breach in an action for money damages. The softening of the former rule is consistent with a change to § 2-607(3)(a), which now provides that failure to give timely notice of breach with regard to accepted goods bars the buyer from a remedy only if the failure prejudices the seller.

Provisions regarding acceptance, rejection, and revocation of acceptance have been amended to make the test for rejection of a single installment in § 2-612(1) consistent with the test for revocation of acceptance. That is, rejection is appropriate if the value of the installment “to the buyer” is substantially impaired, and to more carefully differentiate between rightful and wrongful rejections in §§ 2-602, 2-603, and 2-604. Section 2-608 is amended to provide in § 2-608(4) that a buyer’s reasonable use of goods after rejection or revocation of acceptance is not an acceptance of the goods, but may create an obligation to pay for the value of the use to the buyer (unreasonable use remains wrongful and is an acceptance if ratified). Courts long ago recognized that in some instances a buyer could be forced to the mat economically if it could not use the goods after a seller failed to make a refund following a rightful rejection or justifiable revocation of acceptance, and they carved out an exception to the general rule that post-rejection/revocation use inconsistent with the seller’s ownership is wrongful.<sup>23</sup> Consumers who need cars or mobile homes and don’t have the re-

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22. See *H.A.S. of Fort Smith, LLC v. J.V. Mfg., Inc.*, 2004 WL 2102009, 54 U.C.C. Rep. Serv. 2d 1007 (Ark. Ct. App. Sept. 22, 2004) (unpublished table decision) (although the U.C.C. does not give seller a right to cure in revocation of acceptance, Arkansas recognizes such a right).

23. Thus, § 2-608(4) concerning revocation of acceptance reflects current law. The basic rule of § 2-608(4)(a) is that use of goods after rejection or justified revocation of acceptance is wrongful and may be treated as an acceptance, but, as amended § 2-608(4)(b) states, use that is reasonable is not wrongful or an acceptance. *A.O. Smith Corp. v. Elbi S. p. A.*, 123 F. App’x 617, 56 U.C.C. Rep. Serv. 2d 360 (5th Cir. 2005) (generally a buyer revoking acceptance of goods must discontinue their use or sale, but continued use of non-conforming goods does not in all cases waive or cancel the revocation. Rather, the issue is to be determined on a case-by-case basis with the reasonableness of post-revocation use being the underlying consideration); *Computer Network, Inc. v. AM Gen. Corp.*, 696 N.W.2d 49, 56 U.C.C. Rep. Serv. 2d 425 (Mich. Ct. App. 2005) (a purchaser may be entitled to use a vehicle after revocation to mitigate damages, such as where the alternative to continued use was going out of business or where the purchaser could not find another place to live and abandoned use as soon as possible). Only if the use is reasonable may the seller be entitled to any compensation; unreasonable use allows a seller to collect the price under § 2-709, or collect use value in conversion.

sources to make a back-up purchase have been particularly vulnerable when the seller refuses to take back the goods, but the concept applies equally to a business that is unable to immediately obtain cover and must temporarily make use of the goods. A comment states that “[i]f circumstances change so that the buyer’s use after an effective rejection or a justified revocation of acceptance is no longer reasonable, the continued use of the goods is unreasonable and is wrongful against the seller.”<sup>24</sup>

Changes in the remedies provisions in the second draft include: amending §§ 2-703 and 2-711 to provide a comprehensive index of available remedies; providing in § 2-710 and the various remedy provisions for sellers’ consequential damages in all but consumer contracts, subject to a foreseeability test consistent with that applied to aggrieved buyers;<sup>25</sup> simplifying § 2-718(1)’s test for enforcement of liquidated damages clauses in all but consumer contracts; providing buyers with enhanced restitution rights by eliminating the statutory liquidated damages provision of former § 2-718(3) and allowing restitution, subject to a setoff for seller’s damages, in all circumstances in which the seller stops performance due to buyer’s breach or insolvency; encouraging courts to honor agreements for specific performance in all but consumer contracts, although not when the sole remaining obligation is the payment of money; following the better reasoned cases by providing in §§ 2-708(1) and 2-713(1) that the appropriate time to measure damages in repudiation cases is a commercially reasonable time after the repudiation;<sup>26</sup> deleting the troublesome language in § 2-708(2) requiring that the seller in all instances give “due allowance the costs reasonably incurred and due credit for payments or proceeds of resale” (the language has been appropriately ignored by courts in lost-volume cases);<sup>27</sup> clarifying in § 2-706 that a seller’s failure to resell in accord with the section does not bar the seller from other remedies; broadening § 2-705 by eliminating the requirement that goods be by the “carload, truckload, planeload or larger shipments of express or freight” as no longer necessary due to modern tracking technology; and revising § 2-725 by increasing the general limitations period from a flat four years to “one year after the breach was or should have been discovered, but no longer than five years after the right of action accrued,” providing that the limitation period may not be reduced in consumer contracts; and retaining

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24. Official Comment 8 to § 2-608.

25. Current Article 2 does not provide for consequential damages for a seller. See current §§ 2-706(1), 2-708, and 1-305; *Nina Indus., Ltd. v. Target Corp.*, 2005 WL 323745, 56 U.C.C. Rep. Serv. 2d 138 (S.D.N.Y. Feb. 8, 2005) (unpublished table decision). Sellers can recover consequential damages under amended § 2-710(2), but not from a consumer in a consumer contract. § 2-710(3). Given the requirement of reason to know and the context, as well as likely consumer assets, the likelihood of significant damage recovery is nil.

26. See also § 2-610 defining “anticipatory repudiation.”

27. In addition to clarifying a seller’s right to damages measured by lost profit, the second draft also clarifies the relationship between the availability of the remedy of damages measured by resale, and damages measured by contract/market differential (§§ 2-706 and 2-708) (and also in the case of a buyer’s remedies under §§ 2-712 and 2-713).

the accrual rules from the former section<sup>28</sup> while adopting specific accrual rules for breach by repudiation, breach of a remedial promise, a claim over (indemnity), breach of the warranty of title and noninfringement, and breach of a statutory obligation in the nature of warranty arising under §§ 2-313A or 2-313B.

Perhaps no issue was, and still is, more controversial than the appropriate treatment of mixed transactions involving goods and information. Most courts in these kinds of transactions have used a “predominant purpose” test. That is, if the predominant purpose of the transaction is a sale of goods, the rules of Article 2 are applied, but if the predominant purpose is other than a sale of goods, other law is applied. For example, compare *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*,<sup>29</sup> which did not apply Article 2 to a transaction in which coating material was applied to rustproof screws, with *Triangle Underwriters, Inc. v. Honeywell, Inc.*,<sup>30</sup> which did apply Article 2 to the delivery of computer “turn key” system involving both hardware and software.

The difficulty with this “all or nothing” approach is that it may impose inappropriate rules on a substantial portion of the transaction. Thus, courts are more willing to use the test when application of the Code will not affect the result of the case.<sup>31</sup>

In some instances, courts have treated a transaction involving goods and other property or services as divisible, or have looked beyond the medium of delivery in order to better reflect their concern about applying inappropriate law.<sup>32</sup> This “gravamen of the action” approach is particularly appropriate in transactions that involve transfers of both goods and computer information. Neither approach is adopted by the second draft. Thus, if a copy of a computer program is embedded in goods that are sold, the transaction would be governed by Article 2.<sup>33</sup> Article 2 does not apply to a pure download of

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28. As to when the cause of action accrues for breach of warranty, § 2-725(3)(a) on when the statute of limitation starts to run for warranty reflects current law. See, e.g., *In re Dorado Marine, Inc.*, 321 B.R. 581, 56 U.C.C. Rep. Serv. 2d 490 (Bankr. M.D. Fla. 2005) (after boat being prepared by dealer for buyer was put to sea trial twice in an attempt to have it conform to buyer’s request of performance, and where at conclusion of third trial the boat still did not attain desired performance and buyer did not take delivery, the third sea trial constituted delivery and dealer was free to resell after buyer’s rejection).

29. 612 N.E.2d 550, 21 U.C.C. Rep. Serv. 2d 219 (Ind. Ct. App. 1993).

30. 457 F. Supp. 765, 24 U.C.C. Rep. Serv. 1088 (E.D.N.Y. 1978).

31. See, e.g., *Meister v. Arden-Mayfair, Inc.*, 555 P.2d 923, 28 U.C.C. Rep. Serv. 841 (Or. 1976) (application of Code would not affect result).

32. See, e.g., *Dravo Corp. v. White Consol. Indus., Inc.*, 602 F. Supp. 1136, 40 U.C.C. Rep. Serv. 362 (W.D. Pa. 1985) (Code not applied where largest single asset was not goods: the significance of the asset was not its physical properties but the ideas conveyed); *Garcia v. Edgewater Hosp.*, 613 N.E.2d 1243, 21 U.C.C. Rep. Serv. 2d 595 (Ill. App. Ct. 1993) (supplying a defective heart valve constituted a sale divisible from the services also being performed) (*but see* *Brandt v. Boston Scientific Corp.*, 792 N.E.2d 296 (Ill. 2003), where the Illinois Supreme Court applied the predominant purpose test in a similar fact situation); and *Grappo v. Alitalia Linee Aeree Italiane, S.p.A.*, 56 F.3d 427, 26 U.C.C. Rep. Serv. 2d 657 (2d Cir. 1995) (license to use customer service training program was not a sale of goods since manuals and other materials were useless absent a legal right to use them).

33. Official Comment 7 to § 2-103 of the second draft.

information not associated with goods, as was the case in *Specht v. Netscape*.<sup>34</sup> Beyond that, the second draft is silent, leaving the matter to the courts with guidance in the Official Comments.<sup>35</sup>

This “non-resolution” was the result of a political compromise among interests with widely divergent views. Unfortunately, the ALI has repudiated this compromise to which it agreed by proceeding with a project to further “guide” the courts, the Principles of the Law of Software Contracts. The view taken by that project, which has not been completed as of this writing but is expected to be completed at the annual meeting of the ALI in May 2009, represents in many instances a different one from that of the ULC which, after disagreement with the ALI on how to treat software contracts, separately promulgated UCITA. UCITA provides an appropriate analytical framework as to proper applicable law. Some concluded, however, that its scope provision was too expansive and advocated a different approach for Article 2, one that would make the article applicable to more mixed transactions than would be the case under UCITA. After numerous attempts, some modeled to an extent on UCITA, some based on technology, and some articulating multiple factors, it was determined that consensus could not be reached. Accordingly, amended Article 2 applies, as did its predecessor, to “transactions in goods.” However, as noted, the amendments acknowledge the obvious by excluding “information,” an undefined term, from the definition of goods, thereby signaling to the courts that there are serious issues that must be addressed when a transaction involves both goods and information. An accompanying Official Comment 7 to § 2-103 provides some guidance. The comment indicates that Article 2 should not be applied to pure information transactions, such as a download from the Internet, and it should be applied *in toto* to everyday goods that use computer programs as they would in an earlier age have used mechanical parts (sometimes called “smart goods”). In between, courts will have to pick and choose. In some instances, as when either the goods aspect or the information aspect of a transaction is trivial, a predominant purpose test will be appropriate; in others, courts will appropriately apply a gravamen-of-the-action test, applying goods law to the goods aspect and other law, including UCITA by analogy, or perhaps as agreed by the parties for its application,<sup>36</sup> to the information aspect.<sup>37</sup> The

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34. 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002).

35. Official Comment 7 to § 2-103 of the second draft.

36. See Fred H. Miller, *Writing Your Own Rules: Contracting Out of (and Into) the Uniform Commercial Code; Intrastate Choice of Law*, 40 LOY. L.A. L. REV. 217 (2006).

37. In summation, amended Article 2 excludes licenses of information, thereby codifying the case of *Specht*, 150 F. Supp. 2d at 585. Given the number of cases that litigate the application of Article 2 to computer information transactions, including *Dealer Mgmt. Sys., Inc. v. Design Auto. Group, Inc.*, 822 N.E.2d 556, 55 U.C.C. Rep. Serv. 2d 965 (Ill. App. Ct. 2005) (off the rack software would be considered a transaction in goods, but one predominantly involving intellectual property rights in software would not; compare Official Comment 7 to amended § 2-103); *K & D Distrib., Ltd. v. Ashton Group (Mich.), Inc.*, 354 F. Supp. 2d 761, 55 U.C.C. Rep. Serv. 2d 1029 (N.D. Ohio 2005) (construing contract warranties and not citing Article 2 in a transaction for entry and accounting software systems; compare Uniform

ALI “Principles” project, however, if completed, and if followed, will represent a thumb on the scale in favor of the ALI position.

Article 2 in § 2-102 always has stated that it does not impair or repeal any statute regulating sales to consumers. Amended § 2-108(1)(b) now also states that a transaction subject to Article 2 is also subject to any applicable rule of law that establishes a different rule for consumers. “Rule of law” includes a statute, an administrative rule properly promulgated under the statute, and a final court decision.<sup>38</sup> This is no different than § 3-106(d) (“required by applicable statute or administrative law” referring to the FTC “Holder” rule), § 3-302(g) (“subject to any law limiting status as a holder in due course”), and § 9-201(b) (“transaction subject to this article is subject to any applicable rule of law which establishes a different rule for consumers”), and is not a license for courts to overrule the statute.

Aside from the foregoing, amended Article 2 addresses a large number of other points that have produced litigation, inappropriate results, or non-uniformity, including:

- (1) clarifying that Article 2 does not apply to foreign exchange transactions (§ 2-103(1)(i) and (k));
- (2) clarifying the law on entrustment, particularly in reference to changes in Article 9;<sup>39</sup> and
- (3) clarifying the relationship between Article 2 and certificate of title laws.<sup>40</sup>

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Computer Information Transactions Act §§ 403 and 404); *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 55 U.C.C. Rep. Serv. 2d 678 (Fed. Cir. 2003) (a license for intellectual property is not a sale of goods; the application of Article 2 is manifestly incorrect); *Mortgage Plus, Inc. v. DocMagic, Inc.*, 2004 WL 2331918, 55 U.C.C. Rep. Serv. 2d 58 (D. Kan. Aug. 23, 2004) (unpublished table decision) (contract for access and use of software worthless without loan preparation services also involved not covered by Article 2); the unfortunate case of *NMP Corp. v. Parametric Tech. Corp.*, 958 F. Supp. 1536 (N.D. Okla. 1997) (predicting Oklahoma law would treat a license to use software as a sale of goods); and the important issues at stake (first sale doctrine and possible loss of the property; appropriate warranty liability; appropriate remedies; among others), this matter should have been further clarified in amended Article 2. However, a source of guidance for the application of appropriate law might be UCITA, enacted and working well in Virginia and Maryland and, even if not enacted, it should be made applicable by agreement. *See Miller, supra* note 27.

38. Official Comment 4 to § 2-108 of the second draft.

39. *See* § 2-403 and *Bank One, N.A. v. Americani*, 610 S.E.2d 103, 55 U.C.C. Rep. Serv. 2d 881 (Ga. Ct. App. 2005), *cert. denied* (May 9, 2005).

40. This relationship would be further improved by a state’s enactment of the Uniform Certificate of Title Act (UCOTA). Even more critical, at least in many jurisdictions, the enactment of UCOTA will solve issues where federally recognized Indian tribes are issuing titles as opposed to other jurisdictions. *See, e.g., In re Harper*, 516 F.3d 1180 (10th Cir. 2008).

#### IV. CONCLUSION

Altogether, the second draft of amendments to U.C.C. Article 2 reflects a coherent and balanced attempt to update its provisions to address inconsistencies and ambiguities, and to resolve divergent interpretations.

Nonetheless, to hear the criticism from those who purport to speak for both consumers and industry, one would think that Western civilization will end if amended Article 2 becomes law. In part, this may be because they fear that their ability to continue to argue about the ambiguous provisions of present Article 2 will end if the amendments are enacted. In short, they find false solace in the ability to continue to push a particular position, a solace that narrows each time a decision is rendered against them and which will soon evaporate entirely. However, more of the heat seems to be reflected from the battle over the initial draft and the failure to carefully assess the new second draft. For now, each camp threatens to undermine efforts to modernize the Code if it does not get its way. What is clear is that the courts are fully equipped to do what they have historically done – sort through the issues on a case-by-case basis so that a consensus develops over time. But if the current crop of naysayers cripples the uniform law process in the commercial area, the next group of drafters may be unable to craft a workable revision. Commissioners in several states are working on compromise drafts to try to avoid these consequences.

The bottom line is that the package of amendments to Article 2 largely is appropriate in substance and scope. Consumers gain by the explicit recognition of consumer contracts as a distinct type of transaction, and the articulation of some protective rules for such transactions. Businesses, and by extension also consumers, gain by the simplification and clarification of former rules and by the codification, with an appropriate supporting structure, of rules adopted over the years by the courts. Nevertheless, gaining enactment in the current environment will be a challenge. Perhaps upon reflection some critics will reconsider the basis for their objections, consider the importance of uniformity, and resist expending resources to prevent enactment. In any event, the ULC, whose task it is to translate the work of the drafters into law, will carry out its responsibility with patience and determination. Commissioners are working in various jurisdictions with interested constituencies who recognize the public interest, as well as their own interests, to craft a version of the second draft of the Article 2 amendments that will be enactable in their states. This does not seriously erode uniformity if the package contains what is needed to codify the law on topics that are not now resolved by case law, because, as has been discussed, a great deal of amended Article 2 serves the function of codifying what is existing law to make it easier to find and apply. Codifying rules to fill gaps reflective of changes or developments in the law merely provides guidance that ultimately will be accepted by all. Thus, enactment of amended Article 2 reflects

good policy, as well as a means to reduce transaction and litigation costs and risks to the benefit of everyone.<sup>41</sup>

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41. As noted, there is possibly more at stake here than simply a faster or slower development of the law. If that development is slower, the various states may act independently to improve the law as they see fit. If there is a degree of uniformity now in Article 2, that will weaken it. When that occurred before in the case of the Uniform Sales Act, it almost resulted in federalization of a large segment of state law. In the increasingly preemptive environment today, federalization could perhaps result, and what is once lost, seldom if ever is regained.