

D R A F T
FOR APPROVAL

**REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 2 – SALES**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-NINTH YEAR
ST. AUGUSTINE, FLORIDA
JULY 28 – AUGUST 4, 2000

**REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 2 – SALES**

WITH PREFATORY NOTE AND REPORTER'S NOTES

Copyright © 2000
By
THE AMERICAN LAW INSTITUTE
and the
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws, the American Law Institute, or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners, the Institute and its Members, and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

**DRAFTING COMMITTEE TO REVISE
UNIFORM COMMERCIAL CODE ARTICLE 2 – SALES**

WILLIAM H. HENNING, University of Missouri-Columbia, School of Law, 313 Hulston Hall,
Columbia, MO 65211, *Chair*
BORIS AUERBACH, 332 Ardon Lane, Wyoming, OH 45215, *Enactment Plan Coordinator*
MARION W. BENFIELD, JR., 10 Overlook Circle, New Braunfels, TX 78132
AMELIA H. BOSS, Temple University, School of Law, 1719 N. Broad Street, Philadelphia, PA 19122,
American Law Institute Representative
NEIL B. COHEN, Brooklyn Law School, Room 904A, 250 Joralemon Street, Brooklyn, NY 11201,
American Law Institute Representative
HENRY DEEB GABRIEL, JR., Loyola University School of Law, 526 Pine Street, New Orleans,
LA 70118, *National Conference Reporter*
JAMES C. McKAY, Office of Corporation Counsel, 441 4th Street, NW, Washington, DC 20001,
Committee on Style Liaison
BYRON D. SHER, State Capitol, Suite 2082, Sacramento, CA 95814
JAMES J. WHITE, University of Michigan Law School, Hutchins Hall, Room 300, 625 S. State Street,
Ann Arbor, MI 48109-1215
LINDA J. RUSCH, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104,
Associate Reporter from 1996 to 1999
RICHARD E. SPEIDEL, Northwestern University, School of Law, 357 E. Chicago Avenue, Chicago
IL 60611, *Reporter from 1991 to 1999*

EX OFFICIO

JOHN L. McCLAUGHERTY, P.O. Box 553, Charleston, WV 25322, *President*
JOHN P. BURTON, P.O. Box 1357, Suite 101, 123 E. Marcy Street, Santa Fe, NM 87501,
Division Chair

AMERICAN BAR ASSOCIATION ADVISOR

THOMAS J. MCCARTHY, Barley Mills Plaza, Junction of Lancaster Avenue and Route 141,
Building 25, Room 2160, Wilmington, DE 19805

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman,
OK 73019, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

312/915-0195
www.nccusl.org

REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 2 – SALES

TABLE OF CONTENTS

PART 1. GENERAL PROVISIONS

SECTION 2-101. SHORT TITLE	10
SECTION 2-102. DEFINITIONS	10
SECTION 2-103. SCOPE	22
SECTION 2-104. TRANSACTION SUBJECT TO OTHER LAW	28
SECTION 2-105. INTEREST AND PART INTEREST IN GOODS	32
SECTION 2-106. EFFECT OF TERMINATION AND CANCELLATION	33
SECTION 2-107. GOODS TO BE SEVERED FROM REALTY: RECORDING	33

**PART 2. FORM, FORMATION, TERMS, AND
READJUSTMENT OF CONTRACT; ELECTRONIC CONTRACTING**

SECTION 2-201. FORMAL REQUIREMENTS; STATUTE OF FRAUDS	35
SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE	39
SECTION 2-203. SEALS INOPERATIVE	40
SECTION 2-204. FORMATION IN GENERAL	41
SECTION 2-205. FIRM OFFERS	44
SECTION 2-206. OFFER AND ACCEPTANCE	44
SECTION 2-207. TERMS OF CONTRACT; EFFECT OF CONFIRMATION	46
SECTION 2-208. COURSE OF PERFORMANCE OR PRACTICAL CONSTRUCTION	49
SECTION 2-209. MODIFICATION, RESCISSION AND WAIVER	49
SECTION 2-210. ASSIGNMENT OF RIGHTS; DELEGATION OF PERFORMANCE	52
SECTION 2-211. LEGAL RECOGNITION OF ELECTRONIC CONTRACTS, RECORDS AND AUTHENTICATIONS	56
SECTION 2-212. ATTRIBUTION	58
SECTION 2-213. ELECTRONIC RECORD	60

PART 3. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

SECTION 2-301. GENERAL OBLIGATIONS OF PARTIES	61
SECTION 2-302. UNCONSCIONABLE CONTRACT OR TERM	61
SECTION 2-303. ALLOCATION OR DIVISION OF RISKS	63
SECTION 2-304. PRICE PAYABLE IN MONEY, GOODS, REALTY, OR OTHERWISE ...	64
SECTION 2-305. OPEN PRICE TERM	64
SECTION 2-306. OUTPUT, REQUIREMENTS AND EXCLUSIVE DEALINGS	65
SECTION 2-307. DELIVERY IN SINGLE LOT OR SEVERAL LOTS	66
SECTION 2-308. ABSENCE OF SPECIFIED PLACE FOR DELIVERY	66
SECTION 2-309. ABSENCE OF SPECIFIC TIME PROVISIONS; NOTICE OF TERMINATION	66
SECTION 2-310. OPEN TIME FOR PAYMENT OR RUNNING OF CREDIT; AUTHORITY TO SHIP UNDER RESERVATION	67
SECTION 2-311. OPTIONS AND COOPERATION RESPECTING PERFORMANCE	68
SECTION 2-312. WARRANTY OF TITLE AND AGAINST INFRINGEMENT;	

BUYER'S OBLIGATION AGAINST INFRINGEMENT	69
SECTION 2-313. EXPRESS WARRANTIES BY AFFIRMATION, PROMISE DESCRIPTION, SAMPLE, MODEL; REMEDIAL PROMISE	72
SECTION 2-313A. OBLIGATION TO REMOTE PURCHASER CREATED BY RECORD PACKAGED WITH OR ACCOMPANYING GOODS	77
SECTION 2-313B. OBLIGATION TO REMOTE PURCHASER CREATED BY COMMUNICATION TO PUBLIC	81
SECTION 2-314. IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE ...	85
SECTION 2-315. IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE	89
SECTION 2-316. EXCLUSION OR MODIFICATION OF WARRANTIES	90
SECTION 2-317. CUMULATION AND CONFLICT OF WARRANTIES EXPRESS OR IMPLIED	95
SECTION 2-318. THIRD-PARTY BENEFICIARIES OF WARRANTIES EXPRESS OR IMPLIED, WARRANTY OBLIGATIONS, AND REMEDIAL PROMISES	96
SECTIONS 2-319 THROUGH 2-324. RESERVED	99
SECTION 2-325. FAILURE TO PAY BY AGREED LETTER OF CREDIT	99
SECTION 2-326. SALE ON APPROVAL AND SALE OR RETURN	100
SECTION 2-327. SPECIAL INCIDENTS OF SALE ON APPROVAL AND SALE OR RETURN	100
SECTION 2-328. SALE BY AUCTION	101

PART 4. TITLE, CREDITORS AND GOOD FAITH PURCHASERS

SECTION 2-401. PASSING OF TITLE; RESERVATION FOR SECURITY; LIMITED APPLICATION OF THIS SECTION	103
SECTION 2-402. RIGHTS OF SELLER'S CREDITORS AGAINST SOLD GOODS	104
SECTION 2-403. POWER TO TRANSFER; GOOD FAITH PURCHASE OF GOODS; ENTRUSTING	106

PART 5. PERFORMANCE

SECTION 2-501. INSURABLE INTEREST IN GOODS; MANNER OF IDENTIFICATION OF GOODS	108
SECTION 2-502. BUYER'S RIGHT TO GOODS ON SELLER'S REPUDIATION, FAILURE TO DELIVER OR INSOLVENCY	109
SECTION 2-503. MANNER OF SELLER'S TENDER OF DELIVERY	110
SECTION 2-504. SHIPMENT BY SELLER	112
SECTION 2-505. SELLER'S SHIPMENT UNDER RESERVATION	113
SECTION 2-506. RIGHTS OF FINANCING AGENCY	114
SECTION 2-507. EFFECT OF SELLER'S TENDER; DELIVERY ON CONDITION	114
SECTION 2-508. CURE BY SELLER OF IMPROPER TENDER OR DELIVERY; REPLACEMENT	115
SECTION 2-509. RISK OF LOSS IN THE ABSENCE OF BREACH	118
SECTION 2-510. EFFECT OF BREACH ON RISK OF LOSS	119
SECTION 2-511. TENDER OF PAYMENT BY BUYER; PAYMENT BY CHECK	120
SECTION 2-512. PAYMENT BY BUYER BEFORE INSPECTION	121
SECTION 2-513. BUYER'S RIGHT TO INSPECTION OF GOODS	121
SECTION 2-514. WHEN DOCUMENTS DELIVERABLE ON ACCEPTANCE; WHEN ON PAYMENT	122
SECTION 2-515. PRESERVING EVIDENCE OF GOODS IN DISPUTE	123

PART 6. BREACH, REPUDIATION AND EXCUSE

SECTION 2-601. BUYER'S RIGHTS ON IMPROPER DELIVERY	124
SECTION 2-602. MANNER AND EFFECT OF REJECTION	124
SECTION 2-603. MERCHANT BUYER'S DUTIES AS TO REJECTED GOODS	125
SECTION 2-604. BUYER'S OPTIONS AS TO SALVAGE OF REJECTED GOODS	126
SECTION 2-605. WAIVER OF BUYER'S OBJECTIONS BY FAILURE TO PARTICULARIZE	126
SECTION 2-606. WHAT CONSTITUTES ACCEPTANCE OF GOODS	129
SECTION 2-607. EFFECT OF ACCEPTANCE; NOTICE OF BREACH; BURDEN OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM OR LITIGATION TO PERSON ANSWERABLE OVER	130
SECTION 2-608. REVOCATION OF ACCEPTANCE IN WHOLE OR IN PART; USE OF GOODS FOLLOWING RIGHTFUL REJECTION OR JUSTIFIABLE REVOCATION OF ACCEPTANCE	132
SECTION 2-609. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE	135
SECTION 2-610. ANTICIPATORY REPUDIATION	136
SECTION 2-611. RETRACTION OF ANTICIPATORY REPUDIATION	136
SECTION 2-612. BREACH OF INSTALLMENT CONTRACT	137
SECTION 2-613. CASUALTY TO IDENTIFIED GOODS	138
SECTION 2-614. SUBSTITUTED PERFORMANCE	138
SECTION 2-615. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS	139
SECTION 2-616. PROCEDURE ON NOTICE CLAIMING EXCUSE	140

PART 7. REMEDIES

SECTION 2-701. REMEDIES FOR BREACH OF COLLATERAL CONTRACTS NOT IMPAIRED	142
SECTION 2-702. SELLER'S REMEDIES ON DISCOVERY OF BUYER'S INSOLVENCY	142
SECTION 2-703. SELLER'S REMEDIES IN GENERAL	143
SECTION 2-704. SELLER'S RIGHT TO IDENTIFY GOODS TO THE CONTRACT NOTWITHSTANDING BREACH OR TO SALVAGE UNFINISHED GOODS	144
SECTION 2-705. SELLER'S STOPPAGE OF DELIVERY IN TRANSIT OR OTHERWISE	145
SECTION 2-706. SELLER'S RESALE INCLUDING CONTRACT FOR RESALE	146
SECTION 2-707. PERSON IN THE POSITION OF A SELLER	151
SECTION 2-708. SELLER'S DAMAGES FOR NONACCEPTANCE OR REPUDIATION ..	152
SECTION 2-709. ACTION FOR THE PRICE	155
SECTION 2-710. SELLER'S INCIDENTAL AND CONSEQUENTIAL DAMAGES	156
SECTION 2-711. BUYER'S REMEDIES IN GENERAL; BUYER'S SECURITY INTEREST	157
SECTION 2-712. COVER; BUYER'S PROCUREMENT OF SUBSTITUTE GOODS	158
SECTION 2-713. BUYER'S DAMAGES FOR NONDELIVERY OR REPUDIATION	160
SECTION 2-714. BUYER'S DAMAGES FOR BREACH IN REGARD TO ACCEPTED GOODS	162
SECTION 2-715. BUYER'S INCIDENTAL AND CONSEQUENTIAL DAMAGES	163
SECTION 2-716. RIGHT TO SPECIFIC PERFORMANCE OR REPLEVIN OR THE LIKE	164
SECTION 2-717. DEDUCTION OF DAMAGES FROM THE PRICE	166

SECTION 2-718. LIQUIDATION OR LIMITATION OF DAMAGES; DEPOSITS	166
SECTION 2-719. CONTRACTUAL MODIFICATION OR LIMITATION OF REMEDY	169
SECTION 2-720. EFFECT OF “CANCELLATION” OR “RESCISSION” ON CLAIMS FOR ANTECEDENT BREACH	170
SECTION 2-721. REMEDIES FOR FRAUD	170
SECTION 2-722. WHO CAN SUE THIRD PARTIES FOR INJURY TO GOODS	171
SECTION 2-723. PROOF OF MARKET PRICE: TIME AND PLACE	171
SECTION 2-724. ADMISSIBILITY OF MARKET QUOTATIONS	172
SECTION 2-725. STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE	173

PART 8. TRANSITION PROVISIONS

SECTION 2-801. EFFECTIVE DATE	179
SECTION 2-802. REPEAL	179
SECTION 2-803. APPLICABILITY	179
SECTION 2-804. SAVINGS CLAUSE	179
SECTION 2-805. PRESUMPTION THAT RULE OF LAW CONTINUES UNCHANGED	180

1 **REVISION OF UNIFORM COMMERCIAL CODE**
2 **ARTICLE 2 – SALES**

3 **PREFATORY NOTE**

4 This Prefatory Note provides an overview of the approach that has been
5 taken in the preparation of the 2000 Annual Meeting Draft of Uniform Commercial
6 Code Article 2. It also provides a comparison between the key provisions of this
7 draft and related provisions in the 1999 Annual Meeting Draft.

8 **I. Process**

9 Following the 1999 Annual Meeting of NCCUSL, a first new draft of
10 Revised Article 2 (the November 1999 Draft) was presented for comment to the
11 Permanent Editorial Board for the Uniform Commercial Code at its November,
12 1999, meeting. The November 1999 Draft was also presented for comment to the
13 Council of the ALI at its December, 1999 meeting. A subsequent draft (the
14 December 1999 Draft) served as the basis for the first Drafting Committee meeting,
15 which was held in San Jose, California, on February 4-6, 2000, and yet another new
16 draft (the March 2000 Draft) served as the basis for the final Drafting Committee
17 meeting, which was held in Chicago, Illinois, on March 17-19, 2000.

18 Following the March meeting, a draft was prepared for presentation to the
19 ALI at its 2000 Annual Meeting. Subsequently, on April 15, 2000, the ALI draft
20 was discussed with the Committee on Style. Many provisions of the draft retained
21 from current Article 2 language that was unchanged except for the purpose of
22 gender neutralization. Because the 1999 Annual Meeting Draft had been heavily
23 criticized for “costly tinkering,” the Drafting Committee determined that it should
24 preserve as much of the original language as possible even though it does not, in
25 many instances, conform to the Conference’s current style conventions. The
26 Committee on Style, which had prepared a styled version of the draft, ultimately
27 decided that an unstyled draft should be presented at the 2000 Annual Meeting and
28 that final decisions regarding style should be made thereafter. The Committee asked
29 the Chair and Reporter to consider the changes in its styled draft as suggestions, and
30 a limited number of those suggestions have been adopted.

31 While the ALI debated the draft in May, 2000, it will not give its final
32 approval until May, 2001.

33 **II. Form**

34 Please note the following with regard to the form of the 2000 Annual
35 Meeting Draft:

1 (1) The draft for the most part returns to the numbering system used by
2 current Article 2, although the definitions have been moved to Section 2-102 and
3 the scope provision has been moved to Section 2-103. In order to retain the
4 numbering system, two new sections have been added between Sections 2-313 and
5 2-314 (they have been designated Sections 2-313A and 2-313B) and Sections 2-319
6 through 2-324, the content of which has been deleted, have been designated
7 “reserved.”

8 (2) Due to time constraints, Preliminary Comments have been prepared only
9 for those sections that are either new or controversial. Other sections contain only
10 limited, Reporter’s Notes explaining the changes – the Comments for these sections
11 will be based primarily on the Official Comments to current Article 2. For sections
12 where there are either no changes or only minor style changes, the Reporter’s Notes
13 state “[t]his section reflects current law.”

14 III. Content

15 1. **Scope.** Scope is listed first because it has been the most difficult issue
16 facing the Drafting Committee. Current Article 2’s scope provision refers simply to
17 “transactions in goods.” It does not address whether computer information falls
18 within the definition of goods. The Study Report that preceded the drafting project
19 identified this as an area that required change given that many courts have applied
20 Article 2’s rules to computer information transactions, either directly or by analogy,
21 in ways that lead to inappropriate results.

22 The 1999 Annual Meeting Draft mirrored the approach taken at that time by
23 the Uniform Computer Information Transactions Act (UCITA). In mixed
24 transactions involving goods and computer information, the applicable paragraphs of
25 Section 2-103(b) in that draft provided as follows:

26 (2) Except as provided in paragraph (3), if a transaction involves a
27 computer program embedded in goods this article applies to both the goods and
28 the computer program if:

29 (A) the computer program is associated with the goods in such a
30 manner that it customarily is considered part of the goods, or

31 (B) by becoming the owner of the goods, a person acquires a right to
32 use the program in connection with the goods. Goods in this paragraph does
33 not include goods that consist solely of the medium in which the program is
34 embedded.

35 (3) This article does not apply to a computer program under paragraph
36 (2) if giving the buyer of the goods access to or use of the computer program

1 itself, other than for the operation of the goods in which the program is
2 embedded, is a material purpose in ordinary transactions of this type. Even if the
3 computer program is not subject to this article under this paragraph, this article
4 applies to the goods.

5 Section 2-103(b) of the 2000 Draft continues the same basic approach,
6 although the precise format has changed because of subsequent amendments to
7 UCITA. The following changes have been implemented to deal with certain
8 criticisms of the UCITA approach:

9 " At the time the 1999 Draft was approved by the ALI, its definition of
10 "computer" was consistent with UCITA's corresponding definition. Since then,
11 the definition in UCITA has been broadened. The 2000 Draft differs from
12 UCITA in that it retains the narrower definition. Section 2-102(a)(6).

13 " The "material" purpose test of UCITA has been modified to a "substantial"
14 purpose test in the 2000 Draft; that is, Article 2 applies to an embedded
15 computer program unless the goods are a computer or computer peripheral or
16 gaining access to or use of the program itself is ordinarily a *substantial* purpose
17 in transactions of the type at issue. Section 2-103(b)(2). The change was made
18 to avoid the historical baggage associated with "material," which generally
19 means nontrivial. "Substantial" requires that the purpose of gaining access to or
20 use of the program be more than merely nontrivial. It does not require that the
21 purpose be dominant.

22 Other definitions relevant to this issue are computer information (Section
23 2-102(a)(7)), computer program (Section 2-102(a)(8)), copy (Section
24 2-102(a)(14)), goods (Section 2-102(a)(23)), information (Section 2-102(a)(24)),
25 informational content (Section 2-102(a)(25)), and informational rights (Section
26 2-102(a)(26)).

27 Like its predecessor, the 2000 Draft explicitly removes "foreign exchange
28 transactions" from its scope. Sections 2-102(a)(20), 2-103(d).

29 **2. Electronic Contracting.** Current Article 2 does not deal with electronic
30 contracting. The 2000 Draft continues the "bare bones" approach to electronic
31 contracting taken in the 1999 Draft. That is, it facilitates electronic contracting in
32 general terms but makes no attempt to resolve the myriad issues that will inevitably
33 arise as this form of commerce becomes more prevalent (*e.g.*, electronic mistake).

34 The 2000 Draft is modeled on the Uniform Electronic Transactions Act
35 (UETA) and is more consumer-friendly than the 1999 Draft in several important
36 respects:

1 " The 1999 Draft's definition of "conspicuous" contained a safe-harbor for
2 terms prominently referenced in an electronic record or display. This safe-
3 harbor has been eliminated in the 2000 Draft. Section 2-102(a)(10).

4 " Unlike the 1999 Draft, the 2000 Draft's definition of "receipt" provides that
5 "an electronic record is not received if the sender or its information processing
6 system inhibits the ability of the recipient to print or store the record." Section
7 2-102(a)(32).

8 " The 1999 Draft facilitated electronic contracting by providing that any
9 statutory writing requirement could be satisfied by a record and any statutory
10 signature requirement could be satisfied by an authentication. The 2000 Draft
11 continues this approach for commercial contracts but adopts the approach of
12 Section 8 of UETA for consumer contracts. Section 2-104(b) and (c). This
13 approach preserves certain formal requirements imposed by state consumer
14 protection statutes.

15 " Unlike the 1999 Draft, the 2000 Draft contains an "opt-in" provision for
16 electronic contracting. Section 2-211(a) provides that a record or authentication
17 cannot be denied legal effect solely because it is in electronic form, but this rule
18 is modified by the requirement in Section 2-211(c) that the parties first agree to
19 conduct their transaction by electronic means. The statutory override of state
20 consumer protection laws referenced above is also predicated on agreement by
21 the parties to conduct their transaction electronically. Section 2-104(b) and (c).

22 Otherwise, the electronic contracting provisions of the 2000 Draft are
23 generally consistent with those of the 1999 Draft. There are some minor differences
24 in language, primarily because the 2000 Draft more rigorously adheres to the UETA
25 model than did its predecessor, which contained a blend of provisions based on
26 UETA and UCITA.

27 Other definitions relevant to this issue are authenticate (Section
28 2-102(a)(1)), electronic (Section 2-102(a)(16)), electronic agent (Section
29 2-102(a)(17)), electronic record (Section 2-102(a)(18)), information processing
30 system (Section 2-102(a)(27)), and record (Section 2-102(a)(34)).

31 3. **"Battle of the Forms."** The 2000 Draft contains a thorough revision
32 and simplification of current Section 2-207. Like the 1999 Draft, it disconnects
33 issues of contract formation from issues regarding the terms of contracts. The
34 formation rule – that a "definite and seasonable expression of acceptance" operates
35 as an acceptance even though it does not mirror the offer – is set forth in the section
36 dealing with offer and acceptance generally. Section 2-206(c).

1 Section 2-207 now states the terms of all contracts and is not limited to
2 cases where there has been a “battle of the forms.” The terms include, subject to the
3 parol evidence rule: (1) terms that appear in the records of both parties; (2) terms,
4 whether in a record or not, to which both parties agree; and terms supplied or
5 incorporated under the UCC. Preliminary Comment 2 explains that the courts will
6 have to determine, based on context, whether the parties have “agreed” to a
7 particular term. The same analysis applies when a contract formed in any manner is
8 later confirmed in a record that contains terms additional to or different from the
9 terms of the contract being confirmed.

10 The 2000 Draft does not attempt to solve the “rolling contract” problem that
11 arises when a seller delivers terms with the goods. The courts will have to continue
12 to develop this issue. *See* Section 2-207, Preliminary Comment 3.

13 **4. Unconscionability.** Generally, courts applying the unconscionability
14 doctrine have insisted that elements of both procedural and substantive
15 unconscionability be present. The 1999 Draft expressly permitted courts to apply
16 the doctrine to consumer contracts on the basis of either type of unconscionability
17 standing alone. The text of the 2000 Draft returns to the formulation in current
18 Article 2, but the Preliminary Comment is designed to encourage the courts to be
19 more flexible in this area. Section 2-302. Specifically, the Preliminary Comment:

20 " Recognizes that in certain circumstances a term can be held unenforceable on
21 the basis of procedural or substantive unconscionability alone (citing with
22 approval *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y.A.D. 1998),
23 which held elements of an arbitration clause unconscionable even though there
24 was no evidence of procedural unconscionability);

25 " Recognizes that disclaimers that meet the conspicuousness and language
26 requirements of Section 2-316 can be held unconscionable under the traditional
27 test (this has not been recognized by all courts); and

28 " Provides additional support for the requirement imposed by some courts
29 under Section 2-719 that sellers using exclusive remedy clauses provide at least
30 a minimum adequate remedy to their buyers.

31 **5. Warranty.** Current Article 2 contains provisions dealing with the
32 warranty of title and with the three warranties of quality – express warranty, implied
33 warranty of merchantability, and implied warranty of fitness for a particular purpose.
34 The 1999 Draft continued each of these warranties, with some modifications, and
35 added two new warranty-like obligations running from a seller to a person not in
36 privity of contract with the seller – an obligation created by a record packaged with
37 or accompanying the goods, and an obligation created by advertising or a similar

1 communication to the public. The 2000 Draft continues the approach of the 1999
2 Draft, with some modifications.

3 **Warranty of Title (Section 2-312).** The 1999 Draft was generally
4 consistent with current Article 2 but brought up from the Comments the
5 requirement that the seller not unreasonably expose the buyer to litigation over title
6 to the goods. The 2000 Draft continues this approach.

7 **Express Warranty (Section 2-313).** The primary difference between the
8 1999 Draft and current Article 2 is that the 1999 Draft defined the term “basis of the
9 bargain.” The 2000 Draft returns to current law, which does not define the term.

10 **Obligation Created by a Record (Section 2-313A); Obligation Created**
11 **by Communication to the Public (Section 2-313B).** Both the 1999 Draft and the
12 2000 Draft go beyond current Article 2 in explicitly recognizing that warranty-like
13 obligations can flow directly from a seller to a person with which the seller is not in
14 privity of contract. Both drafts limit the seller’s obligations to new goods sold in the
15 normal chain of distribution, and both drafts impose tests for enforceability that take
16 the place of basis of the bargain (which is inappropriate given that there is no
17 bargain). Both drafts require that the obligations rest on expressions that amount to
18 more than “puffing” and preclude recovery of consequential damages that take the
19 form of lost profits. The primary difference between the drafts is in the extension of
20 protection to additional parties (discussed next).

21 **Extension of Warranty and Obligation to Statutory Third-Party**
22 **Beneficiaries (Section 2-318).** In the case of express and implied warranties of
23 quality given to a buyer in privity, the 1999 Draft extended liability in consumer
24 contracts to members of the family or household of the buyer, to invitees of the
25 buyer, and to transferees from the buyer. In other cases, the 1999 Draft contained
26 alternatives similar to Alternatives A and B in Section 2-318 of current Article 2.
27 The 1999 Draft did not contain an alternative as liberal as Alternative C to Section
28 2-318. The 1999 Draft also clarified that warranty rights are derivative in nature.
29 This last provision would have overridden those court decisions that have imposed
30 against manufacturers an implied warranty of merchantability that runs with the
31 goods.

32 In the case of nonprivity obligations created by a record, the 1999 Draft
33 extended liability in consumer contracts to members of the family or household of
34 the remote purchaser and to invitees of the purchaser. It also created a default rule
35 extending the obligation to transferees from the purchaser but permitted the seller to
36 limit the obligation to the first user or to a particular class of transferees. The 1999
37 Draft was silent on extension of obligations created by advertising.

1 In all cases, including obligations created by advertising, the 2000 Draft
2 applies the three alternatives that are in current Section 2-318. It does not address
3 whether warranty rights are derivative in nature, leaving those courts that are
4 inclined to create an implied warranty of merchantability that runs with the goods
5 free to do so. Although it does not explicitly extend liability to members of a
6 consumer buyer's household, the Preliminary Comments recognize that under the
7 law of agency a household might be considered a single buying unit. *See* Section
8 2-313B, Preliminary Comment 4.

9 **Disclaimer of Warranty (Section 2-316).** The 2000 Draft essentially
10 follows the approach taken in the 1999 Draft. It differs from current Article 2 in
11 that: 1) in a consumer contract evidenced by a record, language such as "as is" must
12 be conspicuous; and 2) in a consumer contract, the statutory disclaimer language
13 ("[t]he seller undertakes no responsibility for the quality of the goods") is more
14 informative than the current law's requirement that some variant of the word
15 "merchantable" be used.

16 **Remedial Promise.** Both the 1999 Draft and the 2000 Draft introduce a
17 term, "remedial promise," not found in current Article 2. The term is used to
18 resolve a statute-of-limitations problem that has arisen as a result of ambiguities in
19 current law. Remedial promises can be made by a seller to an immediate buyer
20 (Section 2-313(d)) or by a seller to a remote purchaser (Sections 2-313A(b) and
21 2-313B(b)). A remedial promise is not a warranty, and it is not subject to the basis-
22 of-the-bargain requirement in Section 2-313 or to the substitutes for that
23 requirement in Sections 2-313A and 2-313B.

24 A remedial promise is a promise by a seller to repair or replace the goods, or
25 to refund all or part of the price, upon the happening of a specified event. Section
26 2-102(a)(35). The typical event that will trigger a remedial promise is the
27 manifestation of a defect in one or more parts. If the remedial promise is made in
28 connection with an express or implied warranty to an immediate buyer or in
29 connection with an obligation (other than the remedial promise itself) to a remote
30 purchaser, the limitation period expires when the right of action on the warranty or
31 other obligation expires or two years after the remedial promise is breached,
32 whichever is later. Section 2-725(b)(3)(B). If the remedial promise stands alone,
33 the statute expires four years after tender of the goods or two years after the
34 remedial promise is breached, whichever is later. Section 2-725(b)(3)(A). In other
35 words, the limitation period can never be less than two years after the seller fails to
36 provide the promised remedy.

37 **6. Prepaying Consumer Buyer.** Both the 1999 Draft and the 2000 Draft
38 grant a prepaying consumer buyer a right to recover the goods when the seller
39 repudiates or fails to deliver. Section 2-502(a)(1). This right, which is not present

1 in current law, is important because a buyer with a right to recover the goods can
2 qualify as a buyer in ordinary course of business under the definition of that term as
3 revised recently to conform to the latest version of Article 9. Section 1-201(9).

4 **7. Cure.** Current Article 2 provides a right to cure only in cases of
5 rejection. Its test for whether a seller has a right to cure focuses exclusively on the
6 seller's state of mind, asking whether the seller had reasonable grounds to believe
7 that tendered goods would be acceptable to the buyer.

8 The 1999 Draft provides for cure after both rejection and revocation of
9 acceptance. Its test for whether cure is available focuses exclusively on the buyer's
10 needs, asking whether the cure is appropriate and timely under the circumstances.

11 The 2000 Draft provides for cure after both rejection and revocation of
12 acceptance in commercial contracts but limits cure to cases of rejection in consumer
13 contracts. Its test for whether cure is available focuses on both the buyer and the
14 seller. From the perspective of the buyer, the cure must be appropriate and timely in
15 the circumstances. From the perspective of the seller, the original tender must have
16 been made in good faith. This last requirement is designed to preclude a seller that
17 finds itself unable to perform on time from tendering goods that it knows will be
18 unacceptable just to gain additional time. In addition, both drafts provide that the
19 seller is liable to the buyer for reasonable expenses caused by the seller's breach and
20 subsequent cure. Section 2-508.

21 **8. Notice of Breach.** Current Article 2 requires that an aggrieved buyer
22 notify a seller within a reasonable time after it discovers or should have discovered
23 the breach or be barred from any remedy. Both the 1999 Draft and the 2000 Draft
24 provide that a failure to give timely notice bars the buyer from obtaining a remedy
25 only to the extent that the seller is prejudiced. Section 2-607(c)(1).

26 Under current Article 2, there is a special notice rule for buyers that reject
27 goods – a buyer that fails to particularize a defect that was ascertainable by
28 reasonable inspection is precluded from relying on the defect to justify rejection or
29 to establish breach if the seller could have cured the defect. Both the 1999 Draft
30 and the 2000 Draft expand this rule to cover defects that justify revocation of
31 acceptance but limit the rule's preclusive effect. A buyer that fails to particularize is
32 precluded from relying on the unstated defect to justify rejection or revocation of
33 acceptance if the seller had a right to cure and could have cured the defect, but a
34 buyer seeking monetary damages is not precluded from relying on the unstated
35 defect to establish breach. Section 2-605(a).

36 **9. Reasonable Use of Goods Following Rejection or Revocation of**
37 **Acceptance.** The text of current Article 2 precludes a buyer that has rejected or

1 revoked acceptance from using the goods in a manner that is inconsistent with the
2 seller's ownership. Both the 1999 Draft and the 2000 Draft permit reasonable use
3 for the purpose of mitigating the buyer's loss, subject to a requirement that the
4 buyer compensate the seller for the reasonable value of the use. Section 2-608(d).

5 **10. Measuring Market-Based Damages.** Sections 2-708 and 2-713 deal
6 respectively with sellers' and buyers' market-based damages. Current Article 2
7 measures the market for aggrieved sellers at the time for tender and measures the
8 market for aggrieved buyers at the time the buyer learned of the breach. In cases
9 other than breach by repudiation, the 2000 Draft changes the measuring date for
10 aggrieved buyers to the time for tender. Section 2-713(a)(1). In cases of
11 repudiation by either the seller or buyer, both the 1999 Draft and the 2000 Draft
12 measure the market a commercially reasonable time after the aggrieved party learns
13 of the repudiation (but no later than the time of tender). Sections 2-708(a)(2) and
14 2-713(a)(2).

15 **11. Sellers' Consequential Damages.** Current Article 2 does not provide
16 for sellers' consequential damages. Both the 1999 Draft and the 2000 Draft
17 explicitly permit recovery of such damages. Section 2-710(b). The 1999 Draft
18 provides that such damages are not available in a consumer contract if the buyer has
19 not agreed to be liable. The 2000 Draft precludes sellers in consumer contracts
20 from recovering consequential damages as a matter of law. Section 2-710(c).

21 **12. Specific Performance.** Unlike current Article 2, both the 1999 Draft
22 and the 2000 Draft encourage the courts to enforce agreements providing for the
23 remedy of specific performance in commercial contracts. Both drafts also provide
24 that a court may not decree specific performance if the breaching party's sole
25 remaining contractual obligation is the payment of money. Section 2-716.

26 **13. Liquidated Damages.** Current Article 2 provides a complex, three-
27 part test to determine whether a liquidated damages clause can be enforced. Both
28 the 1999 Draft and the 2000 Draft simplify the test for contracts other than
29 consumer contracts. The party seeking to enforce the clause need only show that it
30 was reasonable in light of the anticipated or actual harm caused by the breach.
31 Section 2-718(a).

32 Current Article 2 provides for statutory liquidated damages in the case of a
33 prepaying buyer that later fails to accept a conforming tender. Both the 1999 Draft
34 and the 2000 Draft eliminate this provision and explicitly allow the buyer to recover
35 the full down payment (subject, of course, to the seller's claim for actual damages).
36 Both drafts also expand the buyer's restitutionary right to cases where the seller
37 stops performance as a result of the buyer's breach or insolvency. Section 2-718(b).

1 **14. Statute of Limitations.** Both the 1999 Draft and the 2000 Draft differ
2 from current law in that they permit the four-year limitations period to be extended
3 for defects that are discovered during the last year and they preclude sellers from
4 reducing the limitations period in consumer contracts. Both drafts improve on
5 current law by clarifying the accrual rules for causes of action based on different
6 obligations, including claims against a buyer for which another person is answerable
7 over and claims for breach of the warranty against infringement. Both drafts also
8 contain rules governing warranty-like obligations running to remote purchasers and
9 remedial promises (the 2000 Draft's provisions on remedial promises are discussed
10 above in Paragraph 5). Section 2-725.

1 **REVISION OF UNIFORM COMMERCIAL CODE**
2 **ARTICLE 2 – SALES**

3 **PART 1**
4 **GENERAL PROVISIONS**

5 **SECTION 2-101. SHORT TITLE.** This article may be cited as Uniform
6 Commercial Code – Sales.

7 **SECTION 2-102. DEFINITIONS.**

8 (a) In this article unless the context otherwise requires:

9 (1) “Authenticate” means (i) to sign, or (ii) to execute or otherwise
10 adopt a symbol, or encrypt or similarly process a record in whole or in part, with
11 present intent of the authenticating person to identify the person or to adopt or
12 accept a record or term.

13 **Preliminary Comment**

14 This definition differs from revised Article 9 in that it uses the disjunctive
15 rather than the conjunctive between “identify the person” and “adopt or accept a
16 record or term.” An “X” does not identify the authenticating person but when used
17 to accept or adopt a record or term qualifies as an authentication. The definition is
18 broad enough to cover any record that is “signed” within the meaning of existing
19 Article 1 (Section 1-201(39)) or that contains an “electronic signature” within the
20 meaning of the Uniform Electronic Transactions Act (Section 2(8)).

21 (2) “Between merchants” means between parties in any transaction with
22 respect to which both parties are chargeable with the knowledge or skill of
23 merchants.

24 (3) “Buyer” means a person that buys or contracts to buy goods.

(4) “Cancellation” means an act by either party which puts an end to the contract for breach by the other.

(5) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine; or a set of articles, as a suite of furniture or an assortment of sizes; or a quantity, as a gross or carload; or any other unit treated in use or in the relevant market as a single whole.

(6) “Computer” means an electronic device that can perform substantial computations, including numerous arithmetic operations or logic operations, without human intervention during the computation or operation.

Preliminary Comment

The definition of computer should be applied by the courts with common sense. The term does not include a traditional television set, radio or toaster even if they include a computer chip. The term might properly be held to include new generations of machines that, for example, combine computation, word processing, Internet access, and traditional broadcast reception.

(7) “Computer information” means information in electronic form which is obtained from or through the use of a computer, or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy.

Preliminary Comment

This term covers information that is in electronic form and that is obtained from, accessible with, or usable by, a computer; it includes the information, the copy of it (Section 2-102(a)(14)), and its documentation (including nonelectronic documentation). The term does not include information merely because it could be

1 scanned or entered into a computer; it is limited to electronic information in a form
2 capable of being directly processed in a computer.

3 (8) “Computer program” means a set of statements or instructions to be
4 used directly or indirectly in a computer to bring about a certain result. The term
5 does not include separately identifiable informational content.

6 **Preliminary Comment**

7 A computer program is a type of computer information. The first sentence
8 of the definition parallels copyright law. 17 U.S.C. Section 101 (1998). The second
9 sentence distinguishes between computer programs as operating instructions
10 communicated to a computer and “informational content” communicated to human
11 beings. This distinction parallels that used in discussions of formal programming
12 languages between syntax (grammar) and semantics (meaning). As used in this
13 Article, “computer program” refers to functional and operating aspects of a digital
14 or similar system, whereas “informational content” refers to material that
15 communicates to a person. It does not relate to the copyright law issue of
16 distinguishing between a process and a copyrightable expression. The distinction
17 here is more like that in copyright law between a computer program as a “literary
18 work” (code) and output as an “audiovisual work” (images, sounds).

19 (9) “Conforming” goods or conduct means goods or conduct that are in
20 accordance with the obligations under the contract.

21 (10) “Conspicuous,” with reference to a term, means so written,
22 displayed, or presented that a reasonable person against which it is to operate ought
23 to have noticed it. A term in an electronic record intended to evoke a response by
24 an electronic agent is conspicuous if it is presented in a form that would enable a
25 reasonably configured electronic agent to take it into account or react to it without
26 review of the record by an individual. Whether a term is “conspicuous” or not is a
27 decision for the court. Conspicuous terms include the following:

28 (A) with respect to a person:

- 1 (i) a heading in capitals equal to or greater in size than the
2 surrounding text, or in contrasting type, font, or color to the surrounding text of the
3 same or lesser size;
- 4 (ii) language in the body of a record or display in larger type than
5 the surrounding text, or in contrasting type, font, or color to the surrounding text of
6 the same size, or set off from surrounding text of the same size by symbols or other
7 marks that call attention to the language; and
- 8 (B) with respect to a person or an electronic agent, a term that is so
9 placed in a record or display that the person or electronic agent cannot proceed
10 without taking action with respect to the particular term.

11 **Preliminary Comment**

12 The first sentence is based on Section 1-201(10) but is expanded to deal with
13 terms in electronic records. It states the general standard that to be conspicuous a
14 term ought to be noticed by a reasonable person. The second sentence states a
15 special rule for situations where the sender of an electronic record intends to evoke
16 a response from an electronic agent; the presentation of the term must be capable of
17 evoking a response from a reasonably configured electronic agent. Whether a term
18 is conspicuous is an issue for the court.

19 Paragraphs A and B set out several methods for making a term conspicuous.
20 Requiring that a term be conspicuous blends a notice function (the term ought to be
21 noticed) and a planning function (giving guidance to the party relying on the term
22 regarding how that result can be achieved).

23 Paragraph A, which relates to the general standard for conspicuousness, is
24 based on Section 1-201(10) but gives more guidance. Paragraph B is new and
25 relates to the special standard for electronic records intended to evoke a response
26 from an electronic agent. Although these paragraphs indicate some of the methods
27 for making a term attention-calling, the test is whether attention can reasonably be
28 expected to be called to it. The statutory language should not be construed to
29 permit a result that is inconsistent with that test.

1 (11) “Consumer” means an individual that buys or contracts to buy
2 goods that, at the time of contracting, are intended by the individual to be used
3 primarily for personal, family, or household purposes.

4 **Preliminary Comment**

5 This definition is significant in determining whether a contract qualifies as a
6 consumer contract. A consumer is a natural person (*cf.* Section 1-201(30)) who
7 buys the goods for a purpose typically associated with consumers – *i.e.*, a personal,
8 family or household purpose.

9 (12) “Consumer contract” means a contract between a merchant seller
10 and a consumer.

11 **Preliminary Comment**

12 This term is limited to a contract for sale between a seller that is a
13 “merchant” (Section 2-102(a)(30)) and a buyer that is a “consumer” (Section
14 2-102(a)(11)). Thus, neither a sale by a consumer to a consumer nor or a sale by a
15 merchant to an individual who intends that the goods be used primarily in a home
16 business qualify as a consumer contract.

17 (13) “Contract” includes both a present sale of goods and a contract to
18 sell goods at a future time.

19 (14) “Copy” means the medium on which information is fixed on a
20 temporary or permanent basis and from which it can be perceived, reproduced, used,
21 or communicated, either directly or with the aid of a machine or device.

22 **Preliminary Comment**

23 This term refers to the medium containing a computer program. For
24 purposes of this Act, the medium can be tangible (*e.g.*, a plastic diskette containing a
25 program) or electronic (*e.g.*, a program “pre-loaded” into goods).

26 (15) “Delivery” means the voluntary transfer of physical possession or
27 control of goods.

1 (16) “Electronic” means relating to technology having electrical, digital,
2 magnetic, wireless, optical, electromagnetic, or similar capabilities.

3 **Preliminary Comment**

4 The electronic contracting provisions, including the definitions of
5 “electronic,” “electronic agent,” “record,” “electronic record,” “information
6 processing system,” and certain the electronic aspects of “receive” are based on the
7 provisions of the Uniform Electronic Transactions Act.

8 (17) “Electronic agent” means a computer program or an electronic or
9 other automated means used independently to initiate an action or respond to
10 electronic records or performances in whole or in part, without review or action by
11 an individual.

12 (18) “Electronic record” means a record created, generated, sent,
13 communicated, received, or stored by electronic means.

14 (19) “Financing agency” means a bank, finance company or other person
15 that in the ordinary course of business makes advances against goods or documents
16 of title or which by arrangement with either the seller or the buyer intervenes in
17 ordinary course to make or collect payment due or claimed under the contract for
18 sale, as by purchasing or paying the seller's draft or making advances against it or by
19 merely taking it for collection whether or not documents of title accompany the
20 draft. The term includes also a bank or other person that similarly intervenes
21 between persons that are in the position of seller and buyer in respect to the goods.

22 (20) “Foreign exchange transaction” means a transaction in which one
23 party agrees to deliver a quantity of a specified money or unit of account in
24 consideration of the other party’s agreement to deliver another quantity of different

1 money or unit of account either currently or at a future date, and in which delivery is
2 to be through funds transfer, book entry accounting, or other form of payment
3 order, or other agreed means to transfer a credit balance. The term includes a
4 transaction of this type involving multiple moneys and spot, forward, option, or
5 other products derived from underlying moneys and any combination of these
6 transactions. The term does not include a transaction involving multiple moneys in
7 which one or both of the parties is obligated to make physical delivery, at the time of
8 contracting or in the future, of banknotes, coins, or other form of legal tender or
9 specie.

10 **Preliminary Comment**

11 This definition, which is new, is used in Section 2-103(d), which excludes
12 foreign exchange transactions from the scope of Article 2. For further explanation,
13 *see* Preliminary Comment 6 to Section 2-103.

14 (21) “Future goods” means goods that are not both existing and
15 identified.

16 (22) “Good faith” means honesty in fact and the observance of
17 reasonable commercial standards of fair dealing.

18 (23) “Goods” means all things, including specially manufactured goods,
19 that are movable at the time of identification to the contract for sale. The term
20 includes the unborn young of animals, growing crops, other identified things to be
21 severed from realty under Section 2-107, and a copy of a computer program to
22 which this article applies under Section 2-103(b). The term does not include money
23 in which the price is to be paid, other computer information, the subject matter of

1 foreign exchange transactions, documents, letters of credit, letter-of-credit rights,
2 instruments, investment property, accounts, chattel paper, deposit accounts, or
3 general intangibles.

4 **Preliminary Comment**

5 This definition has been revised to make it clear that “goods” includes a copy
6 of a computer program that is subject to this Article pursuant to Section 2-103(b)
7 but does not include other computer information. For further explanation, *see*
8 Preliminary Comment 2 to Section 2-103.

9 (24) “Information” means data, text, images, sounds, mask works, or
10 computer programs, including collections and compilations of them.

11 **Preliminary Comment**

12 This term embraces a wide range of subject matter . As used here, “data”
13 refers to facts whether or not organized or interpreted. Information is not limited to
14 subject matter to which informational property rights attach. It includes, for
15 example, factual data if the data are the subject of a contractual relationship. A
16 “mask work” is defined in federal law; the term refers to a representational
17 technology used in the creation of semiconductor products.

18 (25) “Informational content” means information that is intended to be
19 communicated to or perceived by an individual in the ordinary use of the
20 information, or the equivalent of that information.

21 **Preliminary Comment**

22 This is information whose ordinary use involves communication of the
23 information to a human being (individual). It is the information that humans read,
24 see, hear and otherwise experience. For example, if an electronic database includes
25 images or text and a program enabling display of or access to them, the images are
26 informational content while the search program is not. A Westlaw or Lexis/Nexis
27 search program is not informational content, but the text of the cases is. The term
28 does not include computer program instructions that merely control interaction of a
29 computer program with other programs or with a machine or device.

1 (26) “Informational rights” include all rights in information created
2 under laws governing patents, copyrights, mask works, trade secrets, trademarks,
3 publicity rights, or any other law that gives a person, independently of contract, a
4 right to control or preclude another person’s use of or access to the information on
5 the basis of the rights holder’s interest in the information.

6 **Preliminary Comment**

7 This term includes but is not limited to “intellectual property” rights. It also
8 includes rights created under any law that gives a person a right to control use of
9 information independent of contract, such as may be developing with reference to
10 privacy law. Other laws determine when such rights exist. As with traditional
11 intellectual property law, the rights need not be exclusive as to all other persons and
12 all uses. The term does not include mere tort claims such as the right to sue for
13 defamation.

14 (27) “Information processing system” means an electronic system for
15 creating, generating, sending, receiving, storing, displaying, or processing
16 information.

17 (28) “Installment contract” means a contract that requires or authorizes
18 the delivery of goods in separate lots to be separately accepted, even though the
19 contract contains the term “each delivery is a separate contract” or its equivalent.

20 (29) “Lot” means a parcel or a single article that is the subject matter of
21 a separate sale or delivery, whether or not it is sufficient to perform the contract.

22 (30) “Merchant” means a person that deals in goods of the kind or
23 otherwise by its occupation holds itself out as having knowledge or skill peculiar to
24 the practices or goods involved in the transaction or to which such knowledge or
25 skill may be attributed by its employment of an agent or broker or other

1 intermediary that by its occupation holds itself out as having such knowledge or
2 skill.

3 (31) “Present sale” means a sale that is accomplished by the making of
4 the contract.

5 (32) “Receipt” means:

6 (A) with respect to goods, taking delivery; or

7 (B) with respect to a notice:

8 (i) coming to a person’s attention; or

9 (ii) being delivered to and available at a location, or at an
10 information processing system designated by agreement for that purpose in a form
11 capable of being processed by and perceived from a system of that type by the
12 recipient, or, in the absence of an agreed location or system:

13 (I) in the case of a notice that is not an electronic record,
14 being delivered at the person’s residence, or the person’s place of business through
15 which the contract was made, or at any other place held out by the person as a place
16 for receipt of communications of the kind, but an electronic record is not received if
17 the sender or its information processing system inhibits the ability of the recipient to
18 print or store the record; or

19 (II) in the case of a notice that is an electronic record, being
20 delivered to and available at a system or at an address in that system in a form
21 capable of being processed by and perceived from a system of that type by a
22 recipient, if the recipient uses, or otherwise holds out, that system or address for

1 receipt of notices of the kind to be given and the sender does not know that the
2 notice cannot be accessed from that place, but an electronic record is not received if
3 the sender or its information processing system inhibits the ability of the recipient to
4 print or store the record.

5 **Preliminary Comment**

6 To the extent that it deals with nonelectronic communications, this definition
7 is based on existing Section 1-201(26). To the extent that it deals with electronic
8 communications, it is based on Section 15 of the Uniform Electronic Transactions
9 Act.

10 The definition must be read in a manner that is consistent with existing
11 Section 1-201(27) dealing with receipt by an organization.

12 (33) “Receive” means to take receipt.

13 (34) “Record” means information that is inscribed on a tangible medium
14 or that is stored in an electronic or other medium and is retrievable in perceivable
15 form.

16 (35) “Remedial promise” means a promise by the seller to repair or
17 replace the goods or to refund all or part of the price upon the happening of a
18 specified event.

19 **Preliminary Comment**

20 A “remedial promise” is a promise by the seller to take remedial action upon
21 the happening of a specified event. The types of remediation contemplated are
22 specified in the definition – repair or replacement of the goods, or refund of all or
23 part of the price. No other promise by a seller qualifies as a remedial promise.
24 Further, the seller is entitled to specify precisely the event that will trigger its
25 obligation. Typical examples include a commitment to repair any parts that prove to
26 be defective, or a commitment to refund the purchase price if the goods fail to
27 perform in a certain manner. It is irrelevant whether the promised remedy is
28 exclusive under Section 2-719(a) or merely additional to the buyer’s normal Code

1 remedies. Whether the promised remedy is exclusive, and if so whether it has failed
2 its essential purpose, is determined under Section 2-719.

3 Use of the term resolves a statute-of-limitations problem. Under original
4 Section 2-725, a right of action for breach of an express warranty accrued at the
5 time of tender unless the warranty explicitly extended to the future performance of
6 the goods, in which case a discovery rule applied. By contrast, a right of action for
7 breach of an ordinary (nonwarranty) promise accrued when the promise was
8 breached. A number of courts held that commitments by sellers to take remedial
9 action in the event the goods proved to be defective during a specified period of
10 time constituted warranties and applied the time-of-tender rule; other courts used
11 strained reasoning that allowed them to apply the discovery rule even though the
12 promise at issue referred to the future performance of the seller, not the goods.

13 This Act takes the position that a promise by the seller to take remedial
14 action is not a warranty at all and therefore is not subject to either the time-of-tender
15 or discovery rule. Section 2-725(b)(3) separately addresses the accrual of a right of
16 action for a remedial promise. For further explanation, *see* Preliminary Comment 2
17 to Section 2-725.

18 (36) “Sale” means the passing of title to goods from the seller to the
19 buyer for a price.

20 (37) “Seller” means a person that sells or contracts to sell goods.

21 (38) “Termination” means an act by either party pursuant to a power
22 created by agreement or law that puts an end to the contract otherwise than for its
23 breach.

24 (b) The following definitions in other articles apply to this article:

25 (1) “Account” Section 9-102(a)(2).

26 (2) “Chattel paper” Section 9-102(a)(11).

27 (3) “Check” Section 3-104(f).

28 (4) “Deposit account” Section 9-102(a)(29).

29 (5) “Dishonor” Section 3-502.

- 1 (6) “Draft” Section 3-104(e).
2 (7) “General intangible” Section 9-102(a)(42)
3 (8) “Injunction against honor” Section 5-109(b).
4 (9) “Instrument” Section 3-104(b).
5 (10) “Investment property” Section 9-102(a)(49).
6 (11) “Letter of credit” Section 5-102(a)(10).
7 (12) “Letter-of-credit right” Section 9-102(a)(51).

8 (c) In addition Article 1 contains general definitions and principles of
9 construction and interpretation that apply throughout this article.

10 **Preliminary Comment**

11 In this draft, the Preliminary Comments to specific definitions have been
12 placed after those definitions for the convenience of the reader.

13 The definitions in subsection (a) appear in two or more sections of this
14 Article. The words and phrases in subsection (b), which appear infrequently in this
15 Article, are defined in other articles of the Uniform Commercial Code. Subsection
16 (c) affirms that Article 2 is subject to the definitions and principles of construction in
17 Article 1, where applicable.

18 *Legislative Note: In a jurisdiction that has not adopted revised Article 9, the cross-*
19 *references to Article 9 will have to be changed.*

20 **SECTION 2-103. SCOPE.**

21 (a) This article applies to transactions in goods.

22 (b) If a transaction includes computer information and goods, this article
23 applies to the goods but not to the computer information or informational rights in
24 it. However, if a copy of a computer program is contained in and sold or, pursuant

1 to Section 2-313A or 2-313B, leased as part of goods, this article applies to the
2 copy and the computer program unless:

3 (1) the goods are a computer or computer peripheral; or

4 (2) giving the buyer or lessee of the goods access to or use of the

5 program is ordinarily a substantial purpose of transactions in goods of the type sold
6 or leased.

7 (c) In a transaction that includes computer information and goods, then with
8 regard to the goods, including any copy of a computer program constituting goods
9 under Section 2-102(a)(23), the parties may not by agreement alter a result that
10 would otherwise be required by this article.

11 (d) This article does not apply to a foreign exchange transaction.

12 (e) If there is a conflict between this article and another article of [the
13 Uniform Commercial Code], that article governs.

14 [(f) If a transaction includes computer information and goods and there is a
15 conflict between this article and [the Uniform Computer Information Transactions
16 Act] over the extent to which this article applies to a copy of a computer program
17 under subsection (b), [the Uniform Computer Information Transactions Act]
18 governs.]

19 [(g) If there is a conflict between this article and [the Uniform Electronic
20 Transactions Act], this article governs.]

21 **Preliminary Comment**

22 **Changes:** Original Section 2-102 applies to “transactions in goods.” This
23 Article also applies to such transactions (subsection (a)), but it also: specifies the

1 appropriate treatment of mixed transactions involving goods and computer
2 information (subsection (b)); precludes opting out of mandatory rules to the extent
3 that Article 2 applies in mixed transactions involving goods and computer
4 information (subsection (c)); excludes foreign exchange transactions (subsection
5 (d)); and describes the relationship between this Article and other Articles of the
6 Uniform Commercial Code (subsection (e)), between this Article and a law
7 governing computer information transactions (subsection (f)), and between this
8 Article and the Uniform Electronic Transactions Act (UETA) (subsection (g)).

9 **Comments:**

10 **1. Transactions in goods.** The phrase “transactions in goods” in
11 subsection (a) means a contract for the sale of goods in sections where the word
12 “contract” is used. In sections where “contract” is not used, the underlying
13 transaction is usually a contract for sale and, in any event, does not include a lease
14 of goods (*see* Article 2A) or a security interest in goods (*see* Article 9).

15 A “transaction in goods” does not include a bailment or a consignment of
16 goods. These transactions are not contracts within the scope of Article 2, although
17 its rules might be extended by analogy to transactions involving goods that are not
18 specifically covered. This Article does contain provisions governing the rights of
19 certain good faith purchasers for value, including buyers in ordinary course in
20 entrustment situations (Section 2-403).

21 **2. Mixed contracts.** Difficult issues in the application of Article 2 arise in
22 mixed transactions involving the transfer of goods and other property or services.
23 Most courts in these kinds of transactions have used a “predominant purpose” test.
24 That is, if the predominant purpose of the transaction is a sale of goods, the rules of
25 Article 2 are applied, but if the predominant purpose is other than a sale of goods,
26 other law is applied. *Compare, e.g., Insul-Mark Midwest, Inc. v. Modern*
27 *Materials, Inc.*, 21 UCC Rep. Serv. 2d219, 612N.E.2d550 (Ind.App.1993) (not
28 applying Article 2 to a transaction in which coating material was applied to
29 rustproof screws) *with Triangle Underwriters, Inc. v. Honeywell, Inc.*, 24 UCC
30 Rep. Serv. 1088, 457 F.Supp. 765 (E.D. N.Y. 1978) (applying Article 2 to delivery
31 of computer “turn key” system involving both hardware and software).

32 The difficulty with this “all or nothing” approach is that it may impose
33 inappropriate rules on a substantial portion of the transaction; thus courts are more
34 willing to use the test when application of the Code will not affect the result of the
35 case. *See, e.g., Meister v. Arden-Mayfair, Inc.*, 28 UCC Rep. Serv. 841, 276 Ore.
36 517, 555 P.2d 923 (1976)(application of Code would not affect result).

1 In some instances, courts have treated a transaction involving goods and
2 other property or services as divisible or have looked beyond the medium of delivery
3 in order to better reflect their concern about applying inappropriate law. *See, e.g.,*
4 *Dravo Corp. v. White Consol. Industries, Inc.*, 40 UCC Rep. Serv. 362, 602
5 F.Supp. 1136 (W.D. Pa. 1985) (Code not applied where largest single asset was not
6 goods; the significance of the asset was not its physical properties but the ideas
7 conveyed); *Garcia v. Edgewater Hospital*, 21 UCC Rep. Serv. 2d 595, 244 Ill. App.
8 3d 894, 613 N.E.2d 1243 (1993) (supplying a defective heart valve constituted a
9 sale divisible from the services also being performed); and *Grappo v. Alitalia Linee*
10 *Aeree Italiane, S.p.A.*, 26 UCC Rep. Serv. 2d 657, 56 F.3d 427 (2d. Cir. 1995)
11 (license to use customer service training program was not a sale of goods since
12 manuals and other materials were useless absent a legal right to use them). This
13 “gravamen of the action” approach is particularly appropriate in transactions that
14 involve transfers of both goods and computer information and is adopted by this
15 Article.

16 If a copy of a computer program is embedded in goods that are sold, the first
17 sentence of subsection (b) provides that the sale of the goods is governed by this
18 Article. This Article also applies to the copy of the computer program if the test set
19 forth in subsection (b)(2) (described in the following paragraph) is satisfied. The
20 test for application of this Article is never satisfied, however, if the goods
21 themselves are a computer or computer peripheral. Subsection (b)(1). In a
22 transaction involving the sale of a computer with pre-loaded software, the computer
23 is governed by this Article but the software is not because of subsection (b)(1), and
24 that would also be the case with respect to the copy and any documentation or
25 packaging since these are mere incidents to the transfer of the software.

26 When the goods are not a computer or computer peripheral, this Article
27 does not apply to the copy and the computer program if gaining access to or use of
28 the program is ordinarily a substantial purpose in transactions of the type at issue.
29 The test is identical to that used in Section 103(b)(1)(B) of UCITA except that this
30 article uses the term “substantial” rather than “material.” The term “material” comes
31 freighted with much historical baggage and can be interpreted to mean any purpose
32 that is not trivial. The term “substantial” requires that the purpose of gaining access
33 to or use of the program be more than merely nontrivial. The term does not signify
34 that the purpose needs to be dominant in the sense that it supplies more than 50% of
35 the rationale for entering into the transaction.

36 The standard looks at substantiality in an objective sense, centered on
37 transactions of the type, rather than on the subjective goals or intentions of the
38 particular parties. The test deals with ordinary transactions in goods of the type.
39 Courts should examine the commercial context in applying the substantiality test.
40 Factors include the extent to which the computer program’s capabilities are a

1 substantial appeal of the product, the extent to which negotiation focused on those
2 capabilities, the extent to which the agreement made the program's capabilities a
3 separate focus, and the extent to which the program is or could commercially be
4 made available separate and apart from the goods.

5 The fact that ordinary functions of ordinary goods rely on a program
6 embedded in the goods does not indicate that the program is outside the scope of
7 this Article. For example, the computer program that controls the antilock brake
8 system of a car is clearly governed by this Article, as is the copy in which the
9 program is contained. This is true even if having an antilock braking system
10 happens to be a substantial factor in the mind of the average car buyer. On the other
11 hand, an upstream contract to develop or supply the program to the car
12 manufacturer is beyond the scope of this Article, as is a separately licensed program
13 for a digital camera that enables the camera to link to a computer.

14 This section states, with a limited exception, that the rules in Article 2 do not
15 explicitly apply to the computer information aspect of a transaction involving both
16 the sale of goods and the transfer of an interest in computer information. In that
17 case, if the State has not enacted a statute (such as the Uniform Computer
18 Information Transactions Act) specifically dealing with computer information
19 transactions, a court must select an appropriate rule to govern that aspect of the
20 transaction. In determining appropriateness of a rule, a court should consider (i) the
21 particular issue involved, (ii) the context in which the dispute arises, and (iii) any
22 similarities or differences between a sale of goods and a license (or other transfer) of
23 computer information relevant to that issue and to that context.

24 **3. Mandatory rules.** Subsection (c) provides that in a transaction involving
25 goods and computer information, the parties may not by agreement opt out of the
26 application of rules that are mandatory by application of Section 1-102(3). These
27 rules include obligations of good faith, diligence, reasonableness and care imposed
28 by Article 1 and this Article, as well as rules in this Article that state limits on the
29 power of parties to change them by agreement. *See, e.g.,* Section 2-725(a).
30 Subsection (c) is a particularized application of the principle of Section 1-102(3),
31 and does not limit the application of that principle in any way.

32 **4. Exclusion of foreign exchange transactions.** Subsection (d), which is
33 new, excludes "foreign exchange transactions," defined in Section 2-102(a)(20),
34 from the scope of Article 2. Although a contract where currency is the commodity
35 exchanged is a sale of goods and not usually excluded from the scope of this Article,
36 an exchange where delivery is "through funds transfer, book entry accounting, or
37 other form of payment order, or other agreed means to transfer a credit balance" is
38 not governed by Article 2. Rather, Article 4A or other applicable law applies. *See*
39 Section 2-102(a)(23), which excludes the subject matter of foreign exchange

1 transactions from the definition of goods. On the other hand, if the parties agree to
2 a forward transaction where, after January 1, 2002, dollars are to be physically
3 delivered in exchange for the delivery of Euros, the transaction is not within the
4 “foreign exchange” exclusion and Article 2 applies.

5 **5. Relationship with other UCC articles.** Subsection (e) is new and
6 replaces the language in former Section 2-102 that Article 2 “does not apply to any
7 transaction which although in the form of an unconditional contract to sell or
8 present sale is intended to operate only as a secured transaction.” That language
9 applied to “either-or” transactions and did not deal with cases where two or more
10 articles applied to the same transaction. These overlaps occur when the buyer’s
11 payment obligation is represented by a promissory note (Article 3) or is paid by
12 check (Articles 3 and 4), funds transfer (Article 4A), or letter of credit (Article 5).
13 They also occur where either the parties or creditors of the parties create security
14 interests in the goods.

15 There is no tension between articles if, for example, the transaction is a
16 contract for sale and no security interest is created in the goods or if the transaction
17 is exclusively a security agreement. Similarly, if the transaction is a “true lease”
18 rather than a sale of goods or a secured transaction, Article 2A alone applies.

19 In a contract for sale, the most likely overlap is with Article 9. The seller,
20 the buyer, or some third person may create a security interest in the goods sold or a
21 security interest may arise under Article 2. In these cases, Article 9, not Article 2,
22 applies to the creation, perfection, priority and enforcement of the security interest.
23 For example, a security interest arising when the seller ships under reservation
24 (Section 2-505) is subject to Article 9, but Section 9-110 expressly refers some
25 aspects of perfection and enforcement back to Article 2.

26 In cases where Article 2 gives the seller or buyer interests in the goods that
27 are not security interests, Article 2 rather than Article 9 governs the rights and
28 remedies between seller and buyer. These rights, however, may be subject to
29 security interests in the same goods perfected under Article 9 by third persons. For
30 example, a reclaiming seller under Section 2-702 is subject to the rights of a good
31 faith purchaser for value.

32 If payment is by letter of credit, Sections 2-325 and 2-506 deal with the duty
33 of the buyer to provide and the effect of furnishing or not of the letter of credit, but
34 Article 5 defines the critical terms and covers all aspects of the transaction between
35 the seller and buyer until the letter of credit is paid or dishonored. Even then,
36 Article 5 prescribes the effect of payment or dishonor between the issuing bank and
37 its customer, the buyer or seller.

1 Subsection (e) is intended to operate in one direction only; that is, to
2 subordinate Article 2 to any inconsistent rule found in another Article. It should not
3 be construed to permit a provision from Article 2 to be injected into another Article.

4 **6. Relationship with UCITA.** Subsection (f) deal with the relationship
5 between this Article and UCITA. Subsection (f) assumes that UCITA is in effect in
6 the State and defers to its scope provision.

7 **7. Relationship with UETA.** This Article adopts many of the provisions of
8 the Uniform Electronic Transactions Act (UETA), sometimes directly and
9 sometimes with modifications. Because the application of that Act to transactions
10 within the scope of this Article has been carefully considered, it is appropriate that
11 this Article govern in the event of a conflict. Subsection (g). Every effort should be
12 made to construe the relevant provisions in a consistent manner before determining
13 that a conflict exists.

14 *Legislative Note: Subsections (f) and (g) are bracketed because they are not*
15 *necessary unless the State has adopted UCITA (subsection (f)) or UETA*
16 *(subsection (g)). If UCITA or UETA is enacted after the enactment of revised*
17 *Article 2, the relevant subsection should be added at that time. Because UETA*
18 *defers to the Uniform Commercial Code generally but does not defer to current*
19 *Article 2, that Act should be amended to reflect the policy adopted here. See*
20 *UETA Section 3(b)(2).*

21 **SECTION 2-104. TRANSACTION SUBJECT TO OTHER LAW.**

22 (a) Except as otherwise provided in subsections (b) and (c), this article does
23 not impair or repeal:

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

28 (2) any applicable law that establishes a different rule for consumers; or

1 (3) any other statute of this State to which the transaction is subject,
2 such as statutes dealing with:

3 (A) the sale or lease of agricultural products;
4 (B) the transfer of blood, blood products, human tissues, or parts;
5 (C) the consignment or transfer by artists of works of art or fine
6 prints;
7 (D) distribution agreements, franchises, and other relationships
8 through which goods are sold;
9 (E) the misbranding or adulteration of food products or drugs; and
10 (F) dealers in particular products, such as automobiles, motorized
11 wheelchairs, agricultural equipment, and hearing aids.

12 (b) Subject to Section 2-211(c) and except as otherwise provided in [list
13 laws to be exempted from this provision including, in a State that has adopted [the
14 Uniform Electronic Transactions Act], any laws exempted from that Act] or for
15 consumer contracts in subsection (c), if another law of this State applies to a
16 transaction subject to this Article and requires a writing, or that a term, waiver,
17 notice, or disclaimer be in writing, or requires that a writing, term, waiver, notice, or
18 disclaimer be signed, the requirement is satisfied by a record that is not a writing or
19 by an authentication that is not a signing.

20 (c) Subject to Section 2-211(c) and except as otherwise provided in [list
21 laws to be exempted from this provision including, in a State that has adopted [the
22 Uniform Electronic Transactions Act], any laws exempted from that Act], if another

1 law of this State applies to a consumer contract and requires a writing, or that a
2 writing, term, waiver, notice, or disclaimer be in writing, the requirement is satisfied
3 by a record that is not a writing unless the other law requires that the record (i) be
4 posted or displayed in a certain manner, (ii) be sent, communicated, or transmitted
5 by a specified method, or (iii) contain information that is formatted in a certain
6 manner, in which case the following rules apply:

7 (1) The record must be posted or displayed in the manner specified in
8 the other law.

9 (2) The record must be sent, communicated, or transmitted by the
10 method specified in the other law.

11 (3) The record must contain the information formatted in the manner
12 specified in the other law.

13 (d) The requirements of subsection (c) may be varied by agreement only to
14 the extent permitted by the other law.

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

18 (f) For purposes of this article, failure to comply with laws of the kind
19 referred to in subsection (a) has only the effect specified in those laws.

20 **Preliminary Comment**

21 **Changes:** Section 2-104, which is new, builds upon the last clause of
22 original Section 2-102 (beginning with the words “nor does this Article”) and
23 follows the form of Section 2A-104(1).

1 **Comments:**

2 1. In subsection (a), it is assumed that Article 2 is subject to any applicable
3 federal law, such as the United Nations Convention on Contracts for the
4 International Sale of Goods (CISG) or the Magnuson-Moss Warranty Act.

5 2. Subsection (a)(1) permits the States to list any applicable certificate-of-
6 title statutes and provides that Article 2 is subject to their provisions on the transfer
7 and effect of title except for the rights of a buyer in ordinary course of business in
8 certain limited situations. In entrustment situations, subsection (a)(1) overrides
9 those certificate-of-title statutes that provide that a person cannot qualify as an
10 owner unless a certificate has been issued in the person's name. By contrast, in
11 those cases where an owner in whose name a certificate has been issued entrusts a
12 titled asset to a dealer that then sells it to a buyer in ordinary course of business,
13 subsections (a), (e), and (f) provide that the priority issue between the owner and
14 the buyer is to be resolved in the first instance by reference to the certificate-of-title
15 statute.

16 **Illustration #1.** Suppose that a used car is stolen from Owner by Thief and
17 Thief, by fraud, is able to obtain a clean certificate of title from State X. Thief
18 sells the car to Buyer, a good faith purchaser for value but not a buyer in
19 ordinary course of business, and transfers the certificate of title to Buyer. The
20 exception in subsection (a)(1) does not apply to protect Buyer. Further, under
21 Section 2-403(a) Buyer does not get good title from Thief, regardless of the
22 certificate. The same result follows if the applicable state certificate of title law
23 makes the certificate prima facie evidence of ownership. Buyer will prevail,
24 however, if the applicable law conflicts with the result obtained under this
25 Article by making issuance of the certificate conclusive on title.

26 **Illustration #2.** Dealer sells a new car to Buyer #1 and signs a form permitting
27 Buyer #1 to apply for a certificate of title. Buyer #1 leaves the car with Dealer
28 so that Dealer can finish its preparation work on the car. While the car remains
29 in Dealer's possession and before the State issues a certificate of title in Buyer
30 #1's name, Buyer #2 makes Dealer a better offer on the car, which Dealer
31 accepts. Buyer #1 entrusted the car to Dealer, and if Buyer #2 qualifies as a
32 buyer in ordinary course of business its title to the car will be superior to that of
33 Buyer #1.

34 **Illustration #3.** Owner in whose name a certificate of title has been issued
35 leaves a car with Dealer for repair. Dealer sells the car to Buyer, who qualifies
36 as a buyer in ordinary course of business. If the certificate-of-title law in the
37 State resolves the priority contest between Owner and Buyer, that solution
38 should be implemented. Otherwise, Buyer prevails under Section 2-403(b).

1 3. This section also deals with the effect of a conflict or failure to comply
2 with any other state law that might apply to a transaction governed by this Article.
3 Subsection (a) provides that the adoption of this Article should not be construed to
4 impair or repeal such a law, and subsection (d) provides that in the event of a
5 conflict the other law governs (except for the rights of a buyer in ordinary course of
6 business under subsection (a)(1)).

7 Subsection (a)(2) states that Article 2 is subject to “any applicable law that
8 establishes a different rule for consumers.” The relationship between Article 2 and
9 federal and state consumer laws will vary from transaction to transaction and from
10 State to State. For example, the Magnuson-Moss Warranty Act, 15 U.S.C.A.
11 §§ 2301 *et. seq.*, may or may not apply to the consumer dispute in question and the
12 applicable state “lemon law” may provide more or less protection than Magnuson-
13 Moss. To the extent of application, the other laws control. Otherwise, Article 2
14 applies.

15 “Law” as used in subsection (a)(2) is broader than “statute” in subsection
16 (a)(3) and includes judicial decisions. It does not deal with the effect of changes in
17 consumer law upon existing contracts, nor does it resurrect decisional law that was
18 in effect prior to the adoption of original Article 2.

19 Subsection (a)(3) provides an illustrative but not exhaustive list of other
20 applicable state statutes that may preempt all or part of Article 2. For example,
21 franchise contracts may be regulated by state franchise acts, the seller of
22 unmerchantable blood or human tissue may be insulated from warranty liability and
23 disclaimers of the implied warranty of merchantability may be invalidated by non-
24 uniform amendments to Article 2. The existence, scope, and effect of these statutes
25 must be assessed from State to State.

26 Assuming that there is a conflict, subsection (e) deals with the failure of
27 parties to the contract to comply with the applicable law. The failure has the “effect
28 specified” in the law. Thus, the failure to obtain a required license may make the
29 contract illegal, and thus unenforceable, while the nonnegligent supply of
30 unmerchantable blood under a “blood shield” statute may mean only that the
31 supplier is insulated from liability for injury to person or property.

32 4. Subsections (b) and (c) provide an override for some requirements
33 imposed by laws other than this Article that require terms or contracts be in writing
34 or that a writing be signed. This should not, however, be construed as creating a
35 right by one party to insist on an electronic record or electronic authentication.
36 Subsections (b) and (c) must be understood in light of Section 2-211(c), which
37 requires that the parties agree to conduct their transaction by electronic means.

1 **SECTION 2-105. INTEREST AND PART INTEREST IN GOODS.**

2 (a) Goods must be both existing and identified before any interest in them
3 can pass.

4 (b) There may be a sale of a part interest in existing identified goods.

5 (c) A purported present sale of future goods or of any interest therein
6 operates as a contract to sell.

7 (d) An undivided share in an identified bulk of fungible goods is sufficiently
8 identified to be sold although the quantity of the bulk is not determined. Any agreed
9 proportion of such a bulk or any quantity thereof agreed upon by number, weight or
10 other measure may to the extent of the seller's interest in the bulk be sold to the
11 buyer, which then becomes an owner in common.

12 **Reporter's Notes**

13 This section reflects current law.

14 **SECTION 2-106. EFFECT OF TERMINATION AND CANCELLATION.**

15 On termination all obligations that are still executory on both sides are discharged
16 but any right based on prior breach or performance survives. The effect of
17 cancellation is the same as that of termination except that the canceling party also
18 retains any remedy for breach of the whole contract or any unperformed balance.

19 **Preliminary Comment**

20 This section reflects current law except that the definitions of "termination"
21 and "cancellation" have been moved to Section 2-102.

22 In addition to the rights that survive termination or cancellation by statute,
23 other rights survive to the extent necessary to achieve the purposes of the parties.

1 Examples of rights that may survive termination or cancellation include rights based
2 on terms that limit disclosure of information, select a body of law or particular
3 forum, or select a method of dispute resolution other than litigation.

4 **SECTION 2-107. GOODS TO BE SEVERED FROM REALTY:**
5 **RECORDING.**

6 (a) A contract for the sale of minerals or the like, including oil and gas, or a
7 structure or its materials to be removed from realty is a contract for the sale of
8 goods within this article if they are to be severed by the seller but until severance a
9 purported present sale thereof that is not effective as a transfer of an interest in land
10 is effective only as a contract to sell.

11 (b) A contract for the sale apart from the land of growing crops or other
12 things attached to realty and capable of severance without material harm thereto but
13 not described in subsection (a) or of timber to be cut is a contract for the sale of
14 goods within this Article whether the subject matter is to be severed by the buyer or
15 by the seller even though it forms part of the realty at the time of contracting, and
16 the parties can by identification effect a present sale before severance.

17 (c) This section is subject to any third-party rights provided by the law
18 relating to realty records, and the contract for sale may be executed and recorded as
19 a document transferring an interest in land and shall then constitute notice to third
20 parties of the buyer's rights under the contract for sale.

21 **Reporter's Notes**

22 This section reflects current law.

1
2
3

4
5

6
7
8
9
10
11
12

13
14
15
16
17

18
19

20
21
22

PART 2
FORM, FORMATION, TERMS, AND READJUSTMENT
OF CONTRACT; ELECTRONIC CONTRACTING

SECTION 2-201. FORMAL REQUIREMENTS; STATUTE OF
FRAUDS.

(a) A contract for sale for the price of \$5,000 or more is not enforceable by way of action or defense unless there is some record sufficient to indicate that a contract has been made between the parties and authenticated by the party against which enforcement is sought or by its authorized agent or broker. A record is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such record.

(b) Between merchants if within a reasonable time a record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, the record satisfies the requirements of subsection (a) against the party receiving it unless notice of objection to its contents is given in a record within 10 days after it is received.

(c) A contract that does not satisfy the requirements of subsection (a) but which is valid in other respects is enforceable:

(1) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances that

1 reasonably indicate that the goods are for the buyer, has made either a substantial
2 beginning of their manufacture or commitments for their procurement; or

3 (2) if the party against which enforcement is sought admits in the party's
4 pleading, or in the party's testimony or otherwise under oath that a contract for sale
5 was made, but the contract is not enforceable under this paragraph beyond the
6 quantity of goods admitted; or

7 (3) with respect to goods for which payment has been made and
8 accepted or which have been received and accepted.

9 (d) A contract that is enforceable under this section is not rendered
10 unenforceable merely because it is not capable of being performed within one year
11 or any other applicable period after its making.

12 Preliminary Comment

13 **Changes:** Original Section 2-201 has been changed as follows: (1) the
14 threshold for application of the statute has been increased to \$5,000 or more; (2) the
15 introductory phrase to original subsection (1) ("Except as otherwise provided in this
16 section") has been eliminated; (3) in keeping with the principle of medium neutrality,
17 the statute may be satisfied by an authenticated record (rather than a signed writing);
18 (4) subsection (c)(2) has been amended to make it clear that an admission under
19 oath but not made in court satisfies the statute; and (5) subsection (d) renders the
20 one-year provision of the Statute of Frauds inapplicable to contracts for the sale of
21 goods.

22 Comments:

23 1. The required record need not contain all the material terms of the
24 contract and such material terms as are stated need not be precisely stated. All that
25 is required is that the writing afford a basis for believing that the offered oral
26 evidence rests on a real transaction. It may be written in lead pencil on a scratch
27 pad or entered into a laptop computer. It need not indicate which party is the buyer
28 and which the seller. The only term which must appear is the quantity term which
29 need not be accurately stated but recovery is limited to the amount stated. The

1 price, time and place of payment or delivery, the general quality of the goods, or any
2 particular warranties may all be omitted.

3 Special emphasis must be placed on the permissibility of omitting the price
4 term. In many valid contracts for sale the parties do not mention the price in
5 express terms. The buyer is bound to pay and the seller to accept a reasonable
6 price, which the trier of the fact will determine. Frequently the price is not
7 mentioned since the parties have based their agreement on a price list or catalogue
8 known to both of them, and the list or catalogue serves as an efficient safeguard
9 against perjury. Finally, “market” prices and valuations that are current in the
10 vicinity constitute a similar check. Thus, if the price is not stated in the record, it
11 can normally be supplied without danger of fraud. Of course, if the “price” consists
12 of goods rather than money, the quantity of goods must be stated.

13 Only three definite and invariable requirements as to the memorandum are
14 made by subsection (a). First, it must evidence a contract for the sale of goods;
15 second, it must be “authenticated,” a word which includes a signature and also
16 includes any symbol or encryption process executed or adopted for the purpose of
17 identifying the authenticating party (Section 2-102(a)(1)); and third, it must specify
18 a quantity.

19 2. The phrase “Except as otherwise provided in this section” has been
20 deleted from subsection (a). This means that the statement in subsection (c) of three
21 statutory exceptions to subsection (a) does not preclude the possibility that a
22 promisor will be estopped to raise the statute-of-frauds defense in appropriate cases.

23 3. “Partial performance” as a substitute for the required memorandum can
24 validate the contract only for the goods which have been accepted or for which
25 payment has been made and accepted.

26 Receipt and acceptance either of goods or of the price constitutes an
27 unambiguous overt admission by both parties that a contract actually exists. If the
28 court can make a just apportionment, therefore, the agreed price of any goods
29 actually delivered can be recovered without a writing or, if the price has been paid,
30 the seller can be forced to deliver an apportionable part of the goods. The overt
31 actions of the parties make admissible evidence of the other terms of the contract
32 necessary to a just apportionment. This is true even though the actions of the
33 parties are not in themselves inconsistent with a different transaction such as a
34 consignment for resale or a mere loan of money.

35 Part performance by the buyer requires that the buyer deliver something that
36 is accepted by the seller as the performance. Thus, part payment may be made by
37 money or check, accepted by the seller. If the agreed price consists of goods or

1 services, then they must also have been delivered and accepted. When the seller
2 accepts partial payment for a single item the statute is satisfied entirely.

3 4. Between merchants, failure to answer a confirmation of a contract in a
4 record within ten days of receipt is tantamount to a record under subsection (b) and
5 is sufficient against both parties under subsection (a). The only effect, however, is
6 to take away from the party that fails to answer the defense of the Statute of Frauds;
7 the burden of persuading the trier of fact that a contract was in fact made orally
8 prior to the written confirmation is unaffected.

9 A merchant includes a person “that by occupation purports to have
10 knowledge or skill peculiar to the *practices* or goods involved in the transaction.”
11 Section 2-102(a)(30) (emphasis supplied). Thus, a professional or a farmer should
12 be considered a merchant because the practice of objecting to an improper
13 confirmation ought to be familiar to any person in business.

14 4. Failure to satisfy the requirements of this section does not render the
15 contract void for all purposes, but merely prevents it from being judicially enforced
16 in favor of a party to the contract. For example, a buyer that takes possession of
17 goods as provided in an oral contract which the seller has not meanwhile repudiated
18 is not a trespasser. Nor would the statute-of-frauds provisions of this section be a
19 defense to a third person that wrongfully induces a party to refuse to perform an
20 oral contract, even though the injured party cannot maintain an action for damages
21 against the party so refusing to perform.

22 5. It is not necessary that the record be delivered to anybody. It need not be
23 authenticated by both parties, but except as stated in subsection (b) it is not
24 sufficient against a party that has not authenticated it. Prior to a dispute, no one can
25 determine which party's authentication of the memorandum may be necessary, but
26 from the time of contracting each party should be aware that it is the authentication
27 by the other which is important.

28 7. If the making of a contract is admitted in court, either in a written
29 pleading, by stipulation or by oral statement before the court, or is admitted under
30 oath but not in court, as by testimony in a deposition or an affidavit filed with a
31 motion, no additional record is necessary for protection against fraud. Subsection
32 (c)(2) makes it impossible to admit the contract in these contexts and still use the
33 Statute of Frauds as a defense. However, the contract is not thus conclusively
34 established. The admission is evidential against the maker of the truth of the facts
35 admitted and of nothing more; as against the other party, it is not evidential at all.

36 8. Subsection (d), which is new, repeals the “one year” provision of the
37 Statute of Frauds for contracts for the sale of goods. The phrase “any other

applicable period” recognizes that some state statutes apply to periods longer than one year. The confused and contradictory interpretations under the so-called “one year” clause are illustrated in *C.R. Klewin, Inc. v. Flagship Properties, Inc.*, 600 A.2d 772 (Conn. 1991) (Peters, J.).

SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE.

(a) Terms with respect to which the confirmatory records of the parties agree or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be supplemented by evidence of:

(1) course of performance, course of dealing or usage of trade; and

(2) consistent additional terms unless the court finds the record to have been intended also as a complete and exclusive statement of the terms of the agreement.

(b) Terms in a record may be explained by evidence of course of performance, course of dealing, or usage of trade without a preliminary determination by the court that the language used is ambiguous.

Preliminary Comment

Changes: In subsection (a), the word “explained” has been deleted. This makes it clear that subsection (a) applies only to issues of supplementation, not interpretation. Subsection (b), which is new, permits terms in a record to be explained by evidence derived from an implied-in-fact source without a preliminary determination by the court that the language at issue is ambiguous.

Comments:

1. Subsection (a) codifies the parol evidence rule, the operation of which depends upon the intention of both parties that terms in a record are the “final

1 expression of their agreement with respect to the included terms.” Without this
2 mutual intention to integrate the record, the parol evidence rule does not apply to
3 exclude other terms allegedly agreed to prior to or contemporaneously with the
4 writing. Unless there is a final writing, these alleged terms are provable as part of
5 the agreement by relevant evidence from any credible source. Where each party
6 sends a confirmatory record, mutual intention to integrate is presumed with regard
7 to terms “with respect to which the confirmatory records of the parties agree.”

8 2. Because a record is final with respect to the included terms (an
9 integration) does not mean that the parties intended that the record contain all the
10 terms of their agreement (a total integration). If a record is final but not complete
11 and exclusive it cannot be contradicted by evidence of prior agreements reflected in
12 a record or prior or contemporaneous oral agreements, but it can be supplemented
13 by evidence, drawn from any source, of consistent additional terms. Even if the
14 record is final, complete and exclusive it can be supplemented by evidence of
15 noncontradictory terms drawn from an applicable course of performance, course of
16 dealing, or usage of trade unless those sources are carefully negated by a term in the
17 record. If the record is final, complete and exclusive it cannot be supplemented by
18 evidence of terms drawn from other sources, even terms that are consistent with the
19 record.

20 3. Whether a writing is final, and whether a final writing is also complete,
21 are issues for the court. This section rejects any assumption that because a record
22 has been worked out which is final on some matters, it is to be taken as including all
23 the matters agreed upon. If the additional terms are such that, if agreed upon, they
24 would certainly have been included in the document in the view of the court, then
25 evidence of their alleged making must be kept from the trier of fact. This section
26 takes no position on the evidentiary strength of a merger clause as evidence of a
27 mutual intent that the record be final and complete since that depends upon the
28 particular circumstances involved.

29 4. This section does not exclude evidence introduced to show that the
30 contract is avoidable for misrepresentation, mistake, or duress, or that the contract
31 or a term is unenforceable because of unconscionability. Similarly, this section does
32 not operate to exclude evidence of a subsequent modification or evidence that, for
33 the purpose of claiming excuse, both parties assumed that a certain event would not
34 occur.

35 5. Issues of interpretation are generally left to the courts. In interpreting
36 terms in a record, subsection (b) permits either party to introduce evidence drawn
37 from an applicable implied-in-fact source without any preliminary determination by
38 the court that the term at issue is ambiguous. The subsection deals with that
39 circumstance and no other. It takes no position on whether a preliminary

determination of ambiguity is a condition to the admissibility of evidence drawn from any other source or on whether a contract clause can exclude an otherwise applicable implied-in-fact source.

SECTION 2-203. SEALS INOPERATIVE. The affixing of a seal to a record evidencing a contract for sale or an offer to buy or sell goods does not constitute the record a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

Reporter's Notes

This section reflects current law except that “writing” has been changed to “record”.

SECTION 2-204. FORMATION IN GENERAL.

(a) A contract for sale may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of such contract, or the interaction of electronic agents.

(b) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(c) Even though one or more terms are left open a contract does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

(d) Except as otherwise provided in Sections 2-211 through 2-213, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement that the individual has reason to know will:

(A) cause the electronic agent to complete the transaction or performance; or

(B) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react.

(3) If an offer evokes an electronic record in response, a contract is formed, if at all:

(A) if the electronic record operates as an acceptance under Section 2-206, when the record is received; or

(B) if the offer is accepted under Section 2-206 by an electronic performance, when the electronic performance is received.

Preliminary Comment

Changes: There is no change from the general policies of existing law; however, the text now expressly recognizes electronic modes of contracting. Subsections (d)(1) and (2) are derived from Section 14(a) and (b) of the Uniform Electronic Transactions Act (UETA). Since UETA does not contain substantive contract rules, it has no counterpart to subsection (d)(3), which is introduced for the first time in this Act.

Comments:

1 1. Subsection (a) sets forth the basic policy of recognizing any manner of
2 expression of agreement. In addition to traditional contract formation by oral or
3 written agreement, or by performance, subsection (a) now provides that an
4 agreement may be made by electronic means. Regardless of how the agreement is
5 formed under this section, the legal effect of the agreement is subject to the other
6 provisions of this Article.

7 2. Under subsection (a) appropriate conduct by the parties may be sufficient
8 to establish an agreement. Subsection (b) is directed primarily to the situation when
9 the interchanged correspondence does not disclose the exact point at which the deal
10 was closed, but the actions of the parties indicate that a binding obligation has been
11 undertaken.

12 3. Subsection (c) states the principle as to “open terms” underlying later
13 sections of the Article. If the parties intend to enter into a binding agreement, this
14 subsection recognizes that agreement as valid in law, despite missing terms, if there
15 is any reasonably certain basis for granting a remedy. The test is not certainty as to
16 what the parties were to do nor as to the exact amount of damages due the plaintiff.
17 Nor is the fact that one or more terms are left to be agreed upon enough of itself to
18 defeat an otherwise adequate agreement. Rather, commercial standards on the point
19 of “indefiniteness” are intended to be applied, this Act making provision elsewhere
20 for missing terms needed for performance, open price, remedies and the like.

21 The more terms the parties leave open, the less likely it is that they have
22 intended to conclude a binding agreement, but their actions frequently may be
23 conclusive on the matter despite the omissions.

24 4. Subsection (d)(1) confirms that contracts may be formed by machines
25 functioning as electronic agents for parties to a transaction. This subsection is
26 intended to negate any claim that lack of human intent, at the time of contract
27 formation, prevents contract formation. When machines are involved, the requisite
28 intention to contract flows from the programming and use of the machine. This
29 provision, along with Sections 2-211, 2-212, and 2-213, is intended to remove
30 barriers to electronic contract formation.

31 5. Subsection (d)(2) validates contracts formed by an individual and an
32 electronic agent. This subsection substantiates an anonymous click-through
33 transaction. As with subsection (d)(1), the intent to contract by the electronic agent
34 flows from the programming and use of the machine. The requisite intent to contract
35 by the individual is found by the acts of the individual that the individual has reason
36 to know will be interpreted by the machine as allowing the machine to complete the
37 transaction or performance, or that will be interpreted by the machine as signifying
38 acceptance on the part of the individual. This intent is only found, though, when the

individual is free to refuse to take the actions that the machine will interpret as acceptance or allowance to complete the transaction. For example, if A goes to a website that provides for purchasing goods over the Internet, and after choosing items to be purchased is confronted by a screen which advises her that the transaction will be completed if A clicks “I agree” then A will be bound by the click as long as A was free to refuse the click.

6. Consistent with the policy adopted by UETA, subsection (d)(3) places the risk of transmission of an acceptance in an electronic transaction on the sender. Contrary to general contract principles, *see, e.g.*, Restatement 2d of Contracts § 63, in an electronic transaction the offer is accepted at the time the acceptance is received, not the time it is dispatched.

7. Nothing in this section is intended to restrict equitable defenses, such as fraud or mistake, in electronic contract formation. However, because the law of electronic mistake is not well developed, and because factual issues may arise that are not easily resolved by legal standards developed for nonelectronic transactions, courts should not automatically apply standards developed in other contexts. Courts should also factor in the specific differences between electronic and nonelectronic transactions in resolving equitable claims in electronic contracts.

SECTION 2-205. FIRM OFFERS. An offer by a merchant to buy or sell goods in an authenticated record that by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance in a form record supplied by the offeree must be separately authenticated by the offeror.

Reporter's Notes

This section reflects current law except that “signed writing” is changed to “authenticated record” and “form” is changed to “form record”.

SECTION 2-206. OFFER AND ACCEPTANCE.

1 (a) Unless otherwise unambiguously indicated by the language or
2 circumstances:

3 (1) an offer to make a contract shall be construed as inviting acceptance
4 in any manner and by any medium reasonable under the circumstances;

5 (2) an order or other offer to buy goods for prompt or current shipment
6 shall be construed as inviting acceptance either by a prompt promise to ship or by
7 the prompt or current shipment of conforming or nonconforming goods, but such a
8 shipment of nonconforming goods does not constitute an acceptance if the seller
9 seasonably notifies the buyer that the shipment is offered only as an accommodation
10 to the buyer.

11 (b) Where the beginning of a requested performance is a reasonable mode of
12 acceptance an offeror that is not notified of acceptance within a reasonable time may
13 treat the offer as having lapsed before acceptance.

14 (c) A definite and seasonable expression of acceptance in a record operates
15 as an acceptance even if it contains terms additional to or different from the offer.

16 **Preliminary Comment**

17 **Changes:** Subsections (a) and (b) are unchanged. Subsection (c) is adapted
18 from original Section 2-207(1).

19 **Comments:**

20 1. Any reasonable manner of acceptance is intended to be regarded as
21 available unless the offeror has made it quite clear that it will not be acceptable.
22 Former technical rules as to acceptance, such as requiring that telegraphic offers be
23 accepted by telegraphed acceptance, etc., are rejected and a criterion that the
24 acceptance be “in any manner and by any medium reasonable under the
25 circumstances” is substituted. This section is intended to remain flexible and its

1 applicability to be enlarged as new media of communication develop or as the more
2 time-saving present day media come into general use.

3 2. Either shipment or a prompt promise to ship is made a proper means of
4 acceptance of an offer looking to current shipment. In accordance with ordinary
5 commercial understanding the section interprets an order looking to current
6 shipment as allowing acceptance either by actual shipment or by a prompt promise
7 to ship and rejects the artificial theory that only a single mode of acceptance is
8 normally envisaged by an offer. This is true even though the language of the offer
9 happens to be “ship at once” or the like. “Shipment” is used here in the same sense
10 as in Section 2-504; it does not include the beginning of delivery by the seller’s own
11 truck or by messenger. But loading on the seller’s own truck might be a beginning
12 of performance under subsection (b).

13 3. The beginning of performance by an offeree can be effective as
14 acceptance so as to bind the offeror only if followed within a reasonable time by
15 notice to the offeror. Such a beginning of performance must unambiguously express
16 the offeree’s intention to engage himself. For the protection of both parties, it is
17 essential that notice follow in due course to constitute acceptance. Nothing in this
18 section however bars the possibility that under the common law performance begun
19 may have an intermediate effect of temporarily barring revocation of the offer, or at
20 the offeror’s option, final effect in constituting acceptance.

21 4. Subsection (a)(2) deals with the situation where a shipment made
22 following an order is shown by a notification of shipment to be referable to that
23 order but has a defect. Such a nonconforming shipment is normally to be
24 understood as intended to close the bargain, even though it proves to have been at
25 the same time a breach. However, the seller by stating that the shipment is
26 nonconforming and is offered only as an accommodation to the buyer keeps the
27 shipment of notification from operating as an acceptance.

28 5. The “unless” clause that appeared at the end of the sentence that is now
29 subsection (c) when that sentence was a part of original Section 2-207(1) has been
30 omitted as unnecessary. Subsection (c) rejects the mirror image rule, but any
31 responsive record must still be fairly regarded as an “acceptance” and not as a
32 proposal for such a different transaction that it should be construed to be a rejection
33 of the offer.

34 **SECTION 2-207. TERMS OF CONTRACT; EFFECT OF**

35 **CONFIRMATION.** If (i) conduct by both parties recognizes the existence of a

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

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

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

7 (3) terms supplied or incorporated under any provision of [the Uniform
8 Commercial Code].

9 **Preliminary Comment**

10 **Changes:** This section has been thoroughly revised. It states the terms of
11 all contracts for sale, not just those as to which there has been a “battle of the
12 forms.”

13 **Comments:**

14 1. This section applies only when a contract has been formed under other
15 provisions of Article 2. Its function is to define the terms of that contract. Where
16 forms are exchanged before or during performance, the subsection differs from
17 original Section 2-207 and the common law in that it gives no preference to the first
18 or the last form; it applies the same test to the terms in each. Terms in a record that
19 insist on all of that record’s terms and no others as a condition of contract formation
20 have no effect on the operation of this section. (Of course where one party’s record
21 insists on its own terms as a condition to contract formation, where that party does
22 not thereafter perform or otherwise acknowledge the existence of a contract, and
23 where the other party does not agree to those terms, the record’s insistence on its
24 own terms will keep a contract from being formed under Section 2-204 or 2-206,
25 and Section 2-207 will not be applicable.) As with original Section 2-207, courts
26 will have to distinguish between “confirmations” that are addressed in Section 2-207
27 and “modifications” that are addressed in Section 2-209.

28 2. By inviting a court to determine whether a party “agrees” to the other
29 party’s terms, the text recognizes the enormous variety of circumstances that may be
30 presented to a court under this section, and the section gives the court greater
31 discretion to include or exclude certain terms than original Section 2-207 did. In
32 many cases mere performance should not be construed to be agreement to terms in

1 another's record by one that has sent or will send its own record with additional or
2 different terms. Thus a party that sends a record (however labeled or characterized,
3 including an offer, counteroffer, acceptance, acknowledgment, purchase order,
4 confirmation or invoice) with additional or different terms should not be regarded as
5 having agreed to any of the other's additional or different terms by performance; in
6 that case the terms are found under paragraph (1) (terms in both records) and
7 paragraph (3) (supplied by this Act). By the same reasoning performance after an
8 original agreement between the parties (orally, electronically or otherwise) should
9 not normally be construed to be agreement to terms in the other's record unless that
10 record is part of the original agreement.

11 The rule would be different where no agreement precedes the performance
12 and only one party sends a record. If, for example, a buyer sends a purchase order,
13 there is no oral or other agreement and the seller delivers in response to the
14 purchase order but does not send its own acknowledgment or acceptance, the seller
15 should normally be treated as having agreed to the terms of the purchase order.

16 Of course, an offeree's unqualified verbal response, such as "I accept," to an
17 offer that contained many terms would show agreement to all of the offer's terms.
18 In some cases an expression of acceptance accompanied by one or more additional
19 terms also might demonstrate the offeree's agreement to the terms of the offer. For
20 example, consider a buyer that sends a purchase order with technical specifications
21 and a seller that responds with a record stating "Thank you for your order. We will
22 fill it promptly. Note that we do not make deliveries after 3:00 p.m. on Fridays."
23 Here a court could find that both parties agreed to the technical specifications.

24 In some cases a court might find nonverbal agreement to additional or
25 different terms that appear in only one record. If, for example, both parties' forms
26 called for the sale of 700,000 nuts and bolts but the purchase order or another
27 record of the buyer conditioned the sale on a test of a sample to see if the nuts and
28 bolts would perform properly, the seller's sending a small sample to the buyer might
29 be construed to be an agreement to buyer's condition. A court could find that the
30 contract called for arbitration where both forms provided for arbitration but each
31 contained immaterially different arbitration provisions. It is possible that trade
32 practice in a particular trade or course of dealing between contracting parties might
33 treat the offeree's performance as acceptance of the offeror's terms even when the
34 offeree sent its own record; conversely trade practice or course of dealing might
35 bind the offeror to terms in the offeree's form when the expectation in the trade or
36 in the course of dealing so directs.

37 In a rare case terms in the records of both parties might not become part of
38 the contract; that might happen where the parties contemplated agreement to a
39 single negotiated record, each exchanged similar proposals and commenced interim

1 performance but never reached a negotiated agreement because of differences over
2 crucial terms. There is a limitless variety of verbal and nonverbal behavior that may
3 be claimed to be an agreement to another's record. The section leaves the
4 interpretation of that behavior to the wise discretion of the courts.

5 3. The section omits any specific treatment of terms on or in the container in
6 which the goods are delivered. Revised Article 2 takes no position on the question
7 whether a court should follow the reasoning in *Hill v. Gateway 2000*, 105 F.3d
8 1147 (7th Cir. 1997) (Section 2-207 does not apply to such cases; the "rolling
9 contract" is not made until acceptance of the seller's terms after the goods and terms
10 are delivered) or the contrary reasoning in *Step-Saver Data Systems, Inc. v. Wyse*
11 *Technology*, 939 F.2d 91 (3d Cir.1991) (contract is made at time of oral or other
12 bargain and "shrink wrap" terms or those in the container become part of the
13 contract only if they comply with provisions like Section 2-207).

14 **SECTION 2-208. COURSE OF PERFORMANCE OR PRACTICAL**
15 **CONSTRUCTION.**

16 (a) Where the contract for sale involves repeated occasions for performance
17 by either party with knowledge of the nature of the performance and opportunity for
18 objection to it by the other, any course of performance accepted or acquiesced in
19 without objection shall be relevant to determine the meaning of the agreement.

20 (b) The express terms of the agreement and any such course of
21 performance, as well as any course of dealing and usage of trade, shall be construed
22 whenever reasonable as consistent with each other; but when such construction is
23 unreasonable, express terms shall control course of performance and course of
24 performance shall control both course of dealing and usage of trade.

25 (c) Subject to Section 2-209, such course of performance shall be relevant
26 to show a waiver or modification of any term inconsistent with such course of
27 performance.

1
2
3
4

5

6
7

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

Reporter’s Notes

This section reflects current law. A legislative note might be placed here to indicate that this section will be deleted upon adoption of revised Article 1, which will cover this area.

SECTION 2-209. MODIFICATION, RESCISSION AND WAIVER.

- (a) An agreement modifying a contract subject to this article needs no consideration to be binding.
- (b) An agreement in an authenticated record which excludes modification or rescission except by an authenticated record cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form record supplied by a merchant must be separately authenticated by the other party.
- (c) Section 2-201 must be satisfied if the contract as modified is subject to its provisions.
- (d) Although an attempt at modification or rescission does not satisfy the requirements of subsection (b) or (c) it can operate as a waiver.
- (e) A party that has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Preliminary Comment

Changes: Subsection (b) acknowledges electronic transactions by replacing “signed writings” with “authenticated records.”

1 **Comments:**

2 1. This section seeks to protect and make effective all necessary and
3 desirable modifications of sales contracts without undue regard for technicalities.

4 2. Subsection (a) provides that an agreement modifying a sales contract
5 needs no consideration to be binding. However, modifications made thereunder
6 must meet the test of good faith imposed by this Act. Section 1-203. The argument
7 that a contract modification is not a “performance or enforcement” of a contract
8 under that section is rejected and the reasoning of cases such as *Roth Steel Products*
9 *v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983) is adopted.

10 The effective use of bad faith to escape performance on the original contract
11 terms is barred, and the extortion of a “modification” without legitimate commercial
12 reason is ineffective as a violation of the duty of good faith. Nominal consideration
13 cannot support a modification made in bad faith. The test of “good faith” includes
14 “observance of reasonable commercial standards of fair dealing” (Section
15 2-102(a)(22)), and may in some situations require an objectively demonstrable
16 reason for seeking a modification. But such matters as a market shift which makes
17 performance come to involve a loss may provide such a reason even though there is
18 no such unforeseen difficulty as would make out a legal excuse from performance
19 under Sections 2-615 and 2-616.

20 3. Subsections (b) and (c) are intended to protect against false allegations of
21 oral modifications. “Modification or rescission” includes abandonment or other
22 change by mutual consent; it does not include unilateral “termination” or
23 “cancellation” of the contract.

24 The Statute of Frauds provisions of this Article (Section 2-201) are
25 expressly made applicable to modifications by subsection (c). Under those
26 provisions the “delivery and acceptance” test is limited to the goods which have
27 been accepted; that is, it is limited to the past. “Modification” for the future cannot
28 therefore be conjured up by oral testimony if the price involved is \$5,000.00 or more
29 since such modification must be shown at least by an authenticated record. And
30 since a record is limited in its effect to the quantity of goods set forth in it there is a
31 safeguard against oral evidence.

32 Subsection (b) permits the parties in effect to make their own Statute of
33 Frauds as regards any future modification of the contract by giving effect to a term
34 in an authenticated record (sometimes called a no-oral-modification, or NOM,
35 clause) which expressly requires that any modification be by an authenticated
36 record. However, if a nonmerchant is to be held to such a clause on a form supplied
37 by a merchant it must be separately authenticated.

1 4. Subsection (d) is intended, despite the provisions of subsections (b) and
2 (c), to prevent statutory or contractual provisions precluding effective modification
3 except by an authenticated record from limiting in other respects the legal effect of
4 the parties' actual later conduct. Whether this conduct amounts to a waiver is
5 further regulated by subsection (e).

6 As an example of the interplay between these sections, suppose that a buyer
7 insists on a no-oral-modification clause to control the extra work of a seller of
8 manufactured goods. The buyer asks the seller to make a change to increase the
9 quality of an important component and indicates a willingness to pay for the change.
10 If the buyer tells the seller "not to worry about getting a change order" the NOM
11 clause has clearly been waived, but the waiver can be retracted unless the retraction
12 would be unjust in view of a material change of position by the seller. If the buyer
13 does not expressly waive the condition, the clause stands waived by conduct if a
14 material change of position by the seller would render a contrary result unjust.
15 Decisions such as *C.I.T. Corp. v. Jonnet*, 3 U.C.C. Rep. Serv. 321 (Pa. C.P. 1965),
16 *aff'd* 3 U.C.C. Rep. Serv. 968, 419 Pa. 435, 214 A.2d 620 (1965) holding that
17 waiver requires that a no-oral-modification clause be addressed directly by the party
18 in whose favor it operates are disapproved.

19 5. Subsection (e) is broader than subsection (d) and applies to any waiver
20 that affects an executory portion of the contract. The waiver, which can be either
21 express or conduct-based, may be retracted until such time as a retraction would be
22 unjust in view of a material change of position by the other party. The limitation to
23 executory terms leaves undisturbed the doctrine of waiver by election, which occurs
24 when a party proceeds to perform despite being aware of the fact that the
25 performance has been excused by the failure of a condition. Such a waiver is
26 generally deemed irrevocable and does not depend on any reliance by the other
27 party.

28 **SECTION 2-210. ASSIGNMENT OF RIGHTS; DELEGATION OF**
29 **PERFORMANCE.**

30 (a) If the seller or buyer assigns its rights under a contract, the following
31 rules apply:

32 (1) Subject to paragraph (2) and except as otherwise provided in
33 Section 9-406 or as otherwise agreed, all rights of either seller or buyer may be

1 assigned unless the assignment would materially change the duty of the other party,
2 increase materially the burden or risk imposed on that party by the contract, or
3 impair materially that party's chance of obtaining return performance. A right to
4 damages for breach of the whole contract or a right arising out of the assignor's due
5 performance of its entire obligation can be assigned despite an agreement otherwise.

6 (2) The creation, attachment, perfection, or enforcement of a security
7 interest in the seller's interest under a contract is not an assignment that materially
8 changes the duty of or materially increases the burden or risk imposed on the buyer
9 or materially impairs the buyer's chance of obtaining return performance within
10 paragraph (1) unless, and then only to the extent that, enforcement of the security
11 interest results in a delegation of a material performance of the seller. Even in that
12 event, the creation, attachment, perfection, and enforcement of the security interest
13 remain effective. However, the seller is liable to the buyer for damages caused by
14 the delegation to the extent that the damages could not reasonably be prevented by
15 the buyer, and a court having jurisdiction may grant other appropriate relief,
16 including cancellation of the contract or an injunction against enforcement of the
17 security interest or consummation of the enforcement.

18 (b) If the seller or buyer delegates performance of its duties under a
19 contract, the following rules apply:

20 (1) A party may perform its duties through a delegate unless otherwise
21 agreed or unless the other party has a substantial interest in having its original
22 promisor perform or control the acts required by the contract. No delegation of

1 performance relieves the party delegating of any duty to perform or any liability for
2 breach.

3 (2) Acceptance of a delegation of duties by the assignee constitutes a
4 promise by it to perform those duties. This promise is enforceable by either the
5 assignor or the other party to the original contract.

6 (3) The other party may treat any delegation of duties as creating
7 reasonable grounds for insecurity and may without prejudice to its rights against the
8 assignor demand assurances from the assignee under Section 2-609.

9 (4) A contractual term prohibiting the delegation of duties otherwise
10 delegable under paragraph (1) is enforceable, and an attempted delegation is not
11 effective.

12 (c) An assignment of “the contract” or of “all my rights under the contract”
13 or an assignment in similar general terms is an assignment of rights and unless the
14 language or the circumstances, as in an assignment for security, indicate the
15 contrary, it is also a delegation of performance of the duties of the assignor.

16 (d) Unless the circumstances indicate the contrary a prohibition of
17 assignment of “the contract” is to be construed as barring only the delegation to the
18 assignee of the assignor’s performance.

19 Preliminary Comment

20 **Changes:** This section is consistent with original Section 2-210 but follows
21 a different organizational approach. Subsection (a) deals with the assignment of
22 rights, subsection (b) deals with the delegation of duties, and subsections (c) and (d)
23 are interpretive rules of general applicability. The section has also been changed to
24 conform with revised Article 9.

1 **Comments:**

2 1. Generally, this section recognizes both the assignment of rights and the
3 delegation of duties as normal and permissible incidents of a contract for the sale of
4 goods.

5 2. Subsection (a) treats the effect of an assignment by either the seller or the
6 buyer of the rights but not the duties arising under the contract for sale. These
7 rights may be effectively assigned to a third person even if the contract prohibits the
8 assignment. Subsection (a)(1). Although the assignment to a third person is
9 effective, between the parties the assignment may be a breach for which damages
10 can be recovered. *See* Section 2A-303. If the assignment creates reasonable
11 grounds for insecurity the other party may demand adequate assurance from the
12 assignor of rights that the retained duties will be duly performed. Section 2-609.

13 An assignment, however, is not effective if it would “materially change the
14 duty of the other party, increase materially the burden or risk imposed on that party
15 by the contract, or increase materially that party’s likelihood of obtaining return
16 performance.” Subsection (a)(1). The cases where these limitations apply are rare.
17 For example, a seller that has fully performed the contract should always be able to
18 assign the right to payment. This is the basis for most accounts receivable financing.
19 If, however, the contract is still executory, the assignment of the right to payment to
20 a third person might decrease the seller’s incentive to perform and, thus, increase the
21 buyer’s risk. Similarly, the buyer’s assignment of the right to receive a fixed
22 quantity of goods should not usually be objectionable but if the parties have a
23 “requirements” contract, the assignment could increase materially the seller’s risk.

24 Subsection (a)(1) is subject to Section 9-406 of revised Article 9. That
25 provision makes rights to payment for goods sold (“accounts”), whether or not
26 earned, freely alienable by invalidating anti-assignment terms in agreements between
27 account debtors and seller-assignors, and also by invalidating terms that render such
28 assignments a breach.

29 3. Subsection (a)(1) is subject to subsection (a)(2), which conforms with
30 revised Article 9. If an assignment of rights creates a security interest in the seller’s
31 interest under the contract, including a right to future payments, subsection (a)(2)
32 states that there is no material impairment under subsection (a)(1) unless the
33 creation, attachment, perfection and enforcement “results in a delegation of material
34 performance of the seller.” This is not likely in most assignments, and the buyer’s
35 basic protection is to demand adequate assurance of due performance from the seller
36 if the assignment creates reasonable grounds for insecurity.

1 4. Occasionally a seller or buyer will delegate duties under the contract
2 without also assigning rights. For example, a dealer might delegate its duty to
3 procure and deliver a fixed quantity of goods to the buyer to a third party. In these
4 cases, subsection (b) states the limitations on that power.

5 First, unlike an assignment of rights, a contract term prohibiting the
6 delegation of duties renders an attempted delegation ineffective. Subsection (b)(4).

7 Second, if the third person accepts the delegation, an enforceable promise is
8 made to both the delegator and the person entitled under the contract to perform
9 those duties. Subsection (b)(2). In short, as to the person entitled under the
10 contract a third party beneficiary contract is created. However, the delegator's duty
11 to perform under the contract is not discharged unless the person entitled to
12 performance agrees to substitute the delegatee for the delegator (a novation). *See*
13 subsection (b)(1), last sentence.

14 Third, the person entitled under the contract may treat any delegation of
15 duties as reasonable grounds for insecurity and may demand adequate assurance of
16 due performance for the assignee-delegatee. Subsection (b)(3).

17 Finally, in any event, a delegation of duties is not effective if the person
18 entitled under the contract has a "substantial interest in having the original promisor
19 perform or control the performance required by the contract." Subsection (b)(1).

20 5. Subsection (c) provides rules of interpretation as to when one party to a
21 contract has both assigned rights and delegated duties arising from the contract. If
22 the intention to transfer the entire contract is clear, the treatment of the rights
23 assigned and the duties delegated is covered by subsections (a) and (b). In cases
24 where ambiguous language is used, such as an "assignment for security," the
25 preference is to construe the language to cover an assignment of rights only.

26 6. This section is not intended as a complete statement of the law of
27 delegation and assignment but is limited to clarifying a few points doubtful under the
28 case law. Particularly, neither this section nor this Article touches directly on such
29 questions as the need or effect of notice of the assignment, the rights of successive
30 assignees, or any question of the form of an assignment, either as between the
31 parties or as against any third parties. Some of these questions are dealt with in
32 Article 9.

33 **SECTION 2-211. LEGAL RECOGNITION OF ELECTRONIC**
34 **CONTRACTS, RECORDS AND AUTHENTICATIONS.**

1 (a) A record or authentication may not be denied legal effect or
2 enforceability solely because it is in electronic form.

3 (b) A contract may not be denied legal effect or enforceability solely
4 because an electronic record was used in its formation.

5 (c) Subsection (a) and Section 2-104(b) and (c) only apply to transactions
6 between parties each of which agrees to conduct transactions by electronic means.
7 Whether the parties agree to conduct transactions by electronic means is determined
8 from the context and surrounding circumstances, including the parties' conduct.

9 (d) This article does not require a record or authentication to be created,
10 generated, sent, communicated, received, stored, or otherwise processed by
11 electronic means or in electronic form.

12 (e) A contract formed by the interaction of an individual and an electronic
13 agent under Section 2-204(d)(2) does not include terms provided by the individual if
14 the individual had reason to know that the agent could not react to the terms as
15 provided.

16 Preliminary Comment

17 **Changes:** This section is new. Subsections (a) and (b) are derived from
18 Section 7(a) and (b) of the Uniform Electronic Transactions Act (UETA).
19 Subsections (c) and (d) are derived from Section 5(a) and (b) of UETA. Subsection
20 (e) is based on Section 206(c) of the Uniform Computer Information Transactions
21 Act (UCITA).

22 Comments:

23 1. This section sets forth the premise that the medium in which a record,
24 authentication, or contract is created, presented or retained does not affect its legal
25 significance. Subsections (a) and (b) are designed to eliminate the single element of
26 medium as a reason to deny effect or enforceability to a record, authentication, or

1 contract. The fact that the information is set forth in an electronic, as opposed to
2 paper, medium is irrelevant.

3 2. A contract may have legal effect and yet be unenforceable. *See*
4 Restatement 2d Contracts Section 8. To the extent that a contract in electronic
5 form may have legal effect but be unenforceable, subsection (b) validates its legality.
6 Likewise, to the extent that a record or authentication in electronic form may have
7 legal effect but be unenforceable, subsection (a) validates the legality of the record
8 or authentication.

9 For example, though a contract may be unenforceable, the parties' electronic
10 records may have collateral effects, as in the case of a buyer that insures goods
11 purchased under a contract that is unenforceable under Section 2-201. The
12 insurance company may not deny a claim on the ground that the buyer is not the
13 owner, though the buyer may have no direct remedy against the seller for failure to
14 deliver. *See* Restatement 2d Contracts, Section 8, Illustration 4. Whether an
15 electronic record or authentication is valid under other law is not addressed by this
16 Act.

17 3. While subsection (b) validates the legality of an electronic contract, it
18 does not in any way diminish the requirements of Sections 2-204 and 2-206
19 regarding the formation of contracts, and the requirements of those sections, where
20 applicable, must be met for contract formation.

21 4. Subsection (c) applies only to subsection (a) and is intended to prevent
22 unfair surprise. For example, if a contract formed entirely by nonelectronic means
23 requires that a certain notice be given, subsection (a) standing alone would permit
24 the notice to be sent electronically. Without subsection (a), a court would have to
25 determine whether the electronic notice was effective, and this Article takes no
26 position on that issue. The effect of subsection (c) is to preclude the operation of
27 subsection (a) if the parties have not agreed to conduct their transaction by
28 electronic means. Subsection (c) does not impose any formal requirements on the
29 parties, and agreement may be inferred from context and surrounding circumstances,
30 including conduct. If, for example, an individual orders goods by electronic mail,
31 that individual has agreed to conduct the transaction by electronic means.

32 **SECTION 2-212. ATTRIBUTION.** An electronic record or electronic
33 authentication is attributed to a person if the record was created by or the

1 authentication was the act of the person or the person's electronic agent or the
2 person is otherwise bound by the act under the law.

3 **Preliminary Comment**

4 **Changes:** This section is new. It is based on Section 9 of the Uniform
5 Electronic Transactions Act (UETA).

6 **Comments:**

7 1. As long as the electronic record was created by a person or the electronic
8 authentication resulted from a person's action it will be attributed to that person.
9 The legal effect of the attribution is to be derived from other provisions of this Act
10 or from other law. This section simply assures that these rules will be applied in the
11 electronic environment. A person's actions include actions taken by a human agent
12 of the person as well as actions taken by an electronic agent, *i.e.*, the tool, of the
13 person. Although this section may appear to state the obvious, it assures that the
14 record or authentication is not ascribed to a machine, as opposed to the person
15 operating or programming the machine.

16 2. In each of the following cases, both the electronic record and electronic
17 authentication would be attributable to a person under this section:

18 A. The person types his/her name as part of an e-mail purchase order;

19 B. The person's employee, pursuant to authority, types the person's name as
20 part of an e-mail purchase order;

21 C. The person's computer, programmed to order goods upon receipt of
22 inventory information within particular parameters, issues a purchase order
23 which includes the person's name, or other identifying information, as part of the
24 order.

25 In each of these cases, other law would ascribe both the authentication and the
26 action to the person if done in a paper medium. This section expressly provides that
27 the same result will occur when an electronic medium is used.

28 3. Nothing in this section affects the use of an electronic authentication as a
29 means of attributing a record to a person. *See* Section 2-102(a)(1). Once an
30 electronic authentication is attributed to the person, the electronic record with which
31 it is associated would also be attributed to the person unless the person established
32 fraud, forgery, or other invalidating cause. However, an electronic authentication is
33 not the only method for attribution of a record.

1 4. In the context of attribution of records, normally the content of the
2 record will provide the necessary information for a finding of attribution. It is also
3 possible that an established course of dealing between parties may result in a finding
4 of attribution. Just as with a paper record, evidence of forgery or counterfeiting
5 may be introduced to rebut the evidence of attribution. The use of facsimile
6 transmissions provides a number of examples of attribution using information other
7 than a signature. A facsimile may be attributed to a person because of the
8 information printed across the top of the page that indicates the machine from which
9 it was sent. Similarly, the transmission may contain a letterhead which identifies the
10 sender. Some cases have held that the letterhead actually constituted a signature
11 because it was a symbol adopted by the sender with intent to authenticate the
12 facsimile. However, the signature determination resulted from the necessary finding
13 of intention in that case. Other cases have found facsimile letterheads NOT to be
14 signatures because the requisite intention was not present. The critical point is that
15 with or without a signature, information within the electronic record may well
16 suffice to provide the facts resulting in attribution of an electronic record to a
17 particular party.

18 5. Certain information may be present in an electronic environment that
19 does not appear to attribute but which clearly links a person to a particular record.
20 Numerical codes, personal identification numbers, public and private key
21 combinations, all serve to establish the party to which an electronic record should be
22 attributed. Security procedures will be another piece of evidence available to
23 establish attribution.

24 6. Once it is established that a record or authentication is attributable to a
25 particular person, the effect of the record or authentication must be determined in
26 light of the context and surrounding circumstances, including the parties' agreement,
27 if any. This will primarily be governed by other sections of this article. *See, e.g.,*
28 Sections 2-201, 2-202, 2-204, 2-206, 2-207, and 2-209.

29 **SECTION 2-213. ELECTRONIC RECORD.**

30 (a) An electronic record is effective when received even if no individual is
31 aware of its receipt.

32 (b) Receipt of an electronic acknowledgment of an electronic record
33 establishes that the record was received but, in itself, does not establish that the
34 content sent corresponds to the content received.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

Preliminary Comment

Changes: This section is new. Its provisions are adapted from Section 15(e) and (f) of the Uniform Electronic Transactions Act (UETA).

Comments:

1. Subsection (a) makes clear that receipt is not dependent on a person having notice that the record is in the person’s electronic system. Receipt occurs when the record reaches the designated system whether or not the recipient ever retrieves the record. The paper analog is the recipient who never reads a mail notice.
2. Subsection (b) provides legal certainty regarding the effect of an electronic acknowledgment. It only addresses the fact of receipt, not the quality of the content, nor whether the electronic record was read or “opened.”
3. This section does not address the question of whether the exchange of electronic records constitutes the formation of a contract. Questions of formation are addressed by Sections 2-204 and 2-206.
4. This section does not resolve the questions of when or where electronic records are determined to be sent or received; nor does it indicate that a record has any particular substantive legal effect. This Article determines the time of receipt (Section 2-102(a)(32)).

1
2
3

4

5
6
7
8

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

PART 3
GENERAL OBLIGATION AND
CONSTRUCTION OF CONTRACT

SECTION 2-301. GENERAL OBLIGATIONS OF PARTIES. The
obligation of the seller is to transfer and deliver and that of the buyer is to accept
and pay in accordance with the contract.

Reporter’s Notes

This section reflects current law.

SECTION 2-302. UNCONSCIONABLE CONTRACT OR TERM.

(a) If the court as a matter of law finds the contract or any term of the
contract to have been unconscionable at the time it was made the court may refuse
to enforce the contract, or it may enforce the remainder of the contract without the
unconscionable term, or it may so limit the application of any unconscionable term
as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any term
thereof may be unconscionable the parties shall be afforded a reasonable opportunity
to present evidence as to its commercial setting, purpose and effect to aid the court
in making the determination.

Preliminary Comment

Changes: The only textual change is the substitution of “term” for “clause.”

Comments:

1. This section is intended to make it possible for the courts to police
explicitly against the contracts or terms which they find to be unconscionable instead

1 of by adverse construction of language, by manipulation of the rules of offer and
2 acceptance or by determinations that the term is contrary to public policy or to the
3 dominant purpose of the contract. The section is intended to allow a court to pass
4 directly on the unconscionability of the contract or a particular term of the contract
5 and to make a conclusion of law as to its unconscionability. The underlying
6 principle is the prevention of oppression and unfair surprise. The basic test is
7 whether, in the light of the general commercial background and the commercial
8 needs of the particular trade or case, the term or contract involved is so one-sided as
9 to be unconscionable under the circumstances existing at the time of the making of
10 the contract. However, a court ought not, on the basis of substantive
11 unconscionability alone, refuse to enforce a term disclaiming an implied warranty
12 that complies with the requirements of Section 2-316 or a term that provides for a
13 remedy that is exclusive under Section 2-719 (as long as that term provides a
14 minimum adequate remedy). *See, e.g., Hornberger v. General Motors Corp.*, 929
15 F. Supp. 884 (E.D. Pa. 1996) (limitation of remedy to repair not unconscionable
16 where consumer lessee, who incurred repair costs after expiration of express
17 warranty, based claim on breach of implied warranty of merchantability); *Moore v.*
18 *Coachmen Industries*, 499 S.E.2d 772 (N.C. 1998) (conspicuous term limiting
19 warranty coverage on recreational vehicle to one year or 15,000 miles not
20 unconscionable).

21 Generally a finding of unconscionability requires that a court find both
22 “procedural” and “substantive” unconscionability. Accordingly, courts also should
23 seldom invalidate a contract, or a term of a contract, that is not substantively
24 unconscionable solely on the basis of one party’s conduct. Unconscionability is not
25 intended to allow disturbance of allocation of risks because of superior bargaining
26 power, and in those cases that call out for relief the conduct will often constitute an
27 invalidating cause, such as fraud or duress. Consistent with the provisions of
28 Section 2A-108(2) and the Uniform Consumer Credit Code (Section 5.108),
29 however, in an appropriate case a court may invoke procedural unconscionability to
30 invalidate a term or contract. For example, a court might invalidate a contract
31 because of high pressure sales tactics used in a consumer buyer’s home even though
32 the conduct does not constitute fraud or duress. Similarly, a court might in an
33 unusual case invalidate a term of a contract on the basis of substantive
34 unconscionability alone. *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569
35 (N.Y.A.D. 1998) (term requiring arbitration in Chicago pursuant to rules requiring
36 \$4,000 advance fee, of which \$2,000 was nonrefundable even if claimant prevailed,
37 substantively unconscionable as applied to consumer, even if consumer was aware
38 of the term).

39 As stated, the principle underlying unconscionability is one of the prevention
40 of oppression and unfair surprise. *Cf. Campbell Soup Co. v. Wentz*, 172 F.2d 80

(3d Cir. 1948). The operation of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d 1272 (1937) (where a term limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis); *Brower v. Gateway 2000, Inc.*, *supra*; *New Prague Flouring Mill Co. v. G. A. Spears*, 194 Iowa 417, 189 N.W. 815 (1922) (holding that a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer's breach, to the seller's advantage); *Green v. Arcos, Ltd.* (1931 CA) 47 T.L.R. 336 (blanket clause prohibiting rejection of shipments by the buyer restricted to apply to shipments where discrepancies represented merely mercantile variations); *Austin Co. v. J. H. Tillman Co.*, 104 Or. 541, 209 P. 131 (1922) (clause limiting the buyer's remedy to return held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description).

These cases are but a small number of the cases decided prior to the Code and after its enactment; they nonetheless indicate how various courts have applied the concept of unconscionability in various contexts. A researcher desiring a more elaborate study of the meaning of the doctrine as derived from the numerous decisions should consult the many sources available.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single term or group of terms which are so tainted or which are contrary to the essential purpose of the agreement or to material terms to which the parties have expressly agreed, or it may simply limit unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general trier of the facts.

SECTION 2-303. ALLOCATION OR DIVISION OF RISKS. Where this article allocates a risk or a burden as between the parties "unless otherwise agreed,"

1 the agreement may not only shift the allocation but may also divide the risk or
2 burden.

3 **Reporter's Notes**

4 This section reflects current law.

5 **SECTION 2-304. PRICE PAYABLE IN MONEY, GOODS, REALTY,**
6 **OR OTHERWISE.**

7 (a) The price can be made payable in money or otherwise. If it is payable in
8 whole or in part in goods each party is a seller of the goods that party is to transfer.

9 (b) Even though all or part of the price is payable in an interest in realty the
10 transfer of the goods and the seller's obligations with reference to them are subject
11 to this article, but not the transfer of the interest in realty or the transferor's
12 obligations in connection therewith.

13 **Reporter's Notes**

14 This section reflects current law.

15 **SECTION 2-305. OPEN PRICE TERM.**

16 (a) The parties if they so intend can conclude a contract for sale even
17 though the price is not settled. In such a case the price is a reasonable price at the
18 time for delivery if

19 (1) nothing is said as to price; or

20 (2) the price is left to be agreed by the parties and they fail to agree; or

(3) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(b) A price to be fixed by the seller or by the buyer means a price to be fixed in good faith.

(c) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at its option treat the contract as canceled or itself fix a reasonable price.

(d) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

Reporter's Notes

This section reflects current law.

SECTION 2-306. OUTPUT, REQUIREMENTS AND EXCLUSIVE DEALINGS.

(a) A term that measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

1 (b) A lawful agreement by either the seller or the buyer for exclusive dealing
2 in the kind of goods concerned imposes unless otherwise agreed an obligation by the
3 seller to use best efforts to supply the goods and by the buyer to use best efforts to
4 promote their sale.

5 **Reporter's Notes**

6 This section reflects current law.

7 **SECTION 2-307. DELIVERY IN SINGLE LOT OR SEVERAL LOTS.**

8 Unless otherwise agreed all goods called for by a contract for sale must be tendered
9 in a single delivery and payment is due only on such tender but where the
10 circumstances give either party the right to make or demand delivery in lots the price
11 if it can be apportioned may be demanded for each lot.

12 **Reporter's Notes**

13 This section reflects current law.

14 **SECTION 2-308. ABSENCE OF SPECIFIED PLACE FOR DELIVERY.**

15 Unless otherwise agreed:

16 (1) the place for delivery of goods is the seller's place of business or if the
17 seller has none, its residence; but

18 (2) in a contract for sale of identified goods that to the knowledge of the
19 parties at the time of contracting are in some other place, that place is the place for
20 their delivery; and

21 (3) documents of title may be delivered through customary banking channels.

1
2

3
4

5
6

7
8
9
10
11
12
13
14
15
16
17

18
19
20
21
22

Reporter’s Notes

This section reflects current law.

**SECTION 2-309. ABSENCE OF SPECIFIC TIME PROVISIONS;
NOTICE OF TERMINATION.**

(a) The time for shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time.

(b) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(c) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable. However, a term specifying standards for the nature and timing of notice is enforceable if the standards are not manifestly unreasonable.

Reporter’s Notes

This section reflects current law except for the last of subsection (c), which provides for greater party autonomy.

**SECTION 2-310. OPEN TIME FOR PAYMENT OR RUNNING OF
CREDIT; AUTHORITY TO SHIP UNDER RESERVATION.** Unless

otherwise agreed:

(1) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(2) if the seller is required or authorized to send the goods it may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract; and

(3) if tender of delivery is agreed to be made by way of documents of title otherwise than pursuant to paragraph (2) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(4) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

Reporter's Notes

Paragraph (2) has been changed from current Article 2 so that it applies when the seller is “required or authorized” to send the goods. The added language makes this section consistent with other usages throughout Article 2 and with the common understanding of business practice.

Although no substantive change is intended, paragraph (3) has been modified for clarification.

SECTION 2-311. OPTIONS AND COOPERATION RESPECTING PERFORMANCE.

(a) An agreement for sale which is otherwise sufficiently definite to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

1 (b) Unless otherwise agreed specifications relating to assortment of the
2 goods are at the buyer's option and specifications or arrangements relating to
3 shipment are at the seller's option.

4 (c) Where such specification would materially affect the other party's
5 performance but is not seasonably made or where one party's cooperation is
6 necessary to the agreed performance of the other but is not seasonably forthcoming,
7 the other party in addition to all other remedies

8 (1) is excused for any resulting delay in its own performance; and

9 (2) may also either proceed to perform in any reasonable manner or after
10 the time for a material part of its own performance treat the failure to specify or to
11 cooperate as a breach by failure to deliver or accept the goods.

12 **Reporter's Notes**

13 In subsection (b), the cross-reference in current Article 2 to various
14 subsections of Section 2-319 has been deleted as those provisions no longer exist.
15 The introductory phrase "Unless otherwise agreed" is sufficient to make the point.

16 **SECTION 2-312. WARRANTY OF TITLE AND AGAINST**
17 **INFRINGEMENT; BUYER'S OBLIGATION AGAINST INFRINGEMENT.**

18 (a) Subject to subsection (c) there is in a contract for sale a warranty by the
19 seller that:

20 (1) the title conveyed shall be good and its transfer rightful and shall not,
21 because of any colorable claim to or interest in the goods, unreasonably expose the
22 buyer to litigation; and

(2) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(b) Unless otherwise agreed a seller that is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer that furnishes specifications to the seller must hold the seller harmless against any such claim that arises out of compliance with the specifications.

(c) A warranty under this section may be disclaimed or modified only by specific language or by circumstances that give the buyer reason to know that the person selling does not claim title in itself, that it is purporting to sell only such right or title as the party or a third person may have, or that it is selling subject to any claims of infringement or the like.

Preliminary Comment

Changes: Subsection (a) extends the warranty to protect against “colorable claims” to the goods. The order of subsections (b) and (c) has been reversed for logical clarity.

Comments:

1. Subsection (a) makes provision for a buyer's basic needs for a title which the buyer in good faith expects to acquire by the purchase, namely, that the buyer receive a good, clean title transferred also in a rightful manner so that the buyer will not be exposed to a lawsuit in order to protect it. Under subsection (a), the seller warrants that (1) the title conveyed is good, (2) the transfer is rightful, and (3) the transfer does not unreasonably expose the buyer to litigation because a third person has or asserts a "colorable claim" to or interest in the goods.

In addition to sales in which there is an actual cloud on the title, a warranty that the “title conveyed is good and its transfer rightful” also covers cases where the

1 title is good but the transfer is not rightful. For example, a wrongful transfer with
2 good title occurs where a merchant bailee to which goods are entrusted for repair
3 sells them without authority to a buyer in the ordinary course of business. *See*
4 Section 2-403(b); *Sumner v. Fel-Air, Inc.*, 680 P.2d 1109 (Alaska 1984).

5 The subsection now expressly states what the courts have long recognized;
6 further protection for the buyer is needed when the title is burdened by colorable
7 claims that affect the value of the goods. *See Frank Arnold KRS, Inc. v. L.S. Meier*
8 *Auction Co., Inc.*, 806 F.2d 462 (3d Cir. 1986) (two lawsuits contest title);
9 *Jeanneret v. Vichey*, 693 F.2d 259 (2d Cir. 1982) (export restrictions in country
10 from which painting was taken affect value); *Colton v. Decker*, 540 N.W.2d 172
11 (S.D. 1995) (conflicting vehicle identification numbers). Therefore, not only is the
12 buyer entitled to a good title, but the buyer is also entitled to a marketable title, and
13 until the colorable claim is resolved the market for the goods is impaired. *See*
14 *Wright v. Vickaryous*, 611 P.2d 20 (Alaska 1980).

15 The justification for this rule is that the buyer of goods that are warranted as
16 to title has a right to rely on the fact that there will be no need later to have to
17 contest ownership. The mere casting of a substantial shadow over the buyer's title,
18 regardless of the ultimate outcome, violates the warranty of good title. *See*
19 *American Container Corp. v. Hanley Trucking Corp.*, 111 N.J. Super. 322, 268
20 A.2d 313, 318 (1970). It should be noted that not any assertion of a claim by a third
21 party will constitute a breach of the warranty of title. The claim must be reasonable
22 and colorable. *See C.F. Sales, Inc. v. Amfert*, 344 N.W.2d 543 (Iowa 1983).

23 The warranty of title extends to a buyer whether or not the seller was in
24 possession of the goods at the time the sale or contract to sell was made.

25 Consistent with original Article 2, this section does not provide for a
26 separate warranty of quiet possession in addition to the warranty of title.
27 Disturbance of quiet possession, although not mentioned specifically, is one way,
28 among many, in which the breach of the warranty of title might be established.

29 The "knowledge" referred to in subsection (a)(2) is actual knowledge as
30 distinct from notice.

31 2. The provisions of this Article requiring notification to the seller within a
32 reasonable time after the buyer's discovery of a breach (Section 2-607(c)(1)) apply
33 to notice of a breach of the warranty of title when the seller's breach was innocent.
34 However, if the seller's breach was in bad faith, the seller cannot claim prejudice by
35 the delay in giving notice.

1 3. Subsection (b) provides the warranty against infringement. Unlike the
2 warranty of title, for this warranty the seller must be a merchant that is “regularly
3 dealing in goods of the kind” sold.

4 When the goods are part of the seller’s normal stock and are sold in the
5 normal course of business, it is the seller’s duty to see that no claim of infringement
6 of a patent or trademark by a third party will mar the buyer’s title. A sale by a
7 person other than a dealer, however, raises no implication in its circumstances of
8 such a warranty. Nor is there such an implication when the buyer orders goods to
9 be assembled, prepared or manufactured on the buyer’s own specifications. If, in
10 such a case, the resulting product infringes a patent or trademark, the liability will
11 run from buyer to seller. There is, under such circumstances, a tacit representation
12 on the part of the buyer that the seller will be safe in manufacturing according to the
13 specifications, and the buyer is under an obligation in good faith to indemnify the
14 seller for any loss suffered.

15 4. Subsection (c) deals with the disclaimer or modification of the warranties
16 of title or against infringement. This is a self-contained provision governing the
17 modification or disclaimer of warranties under this section; the warranties in this
18 section are not designated as “implied” warranties, and hence are not subject to the
19 modification and disclaimer provisions of Section 2-316(b) and (c). Unlike Section
20 2-316, subsection (c) of this section does not have any specific requirements that the
21 disclaimer or modification be contained in a record or be conspicuous.

22 Subsection (c) recognizes that sales by sheriffs, executors, certain
23 foreclosing lienors and persons similarly situated may be so out of the ordinary
24 commercial course that their peculiar character is immediately apparent to the buyer
25 and therefore no personal obligation is imposed upon the seller that is purporting to
26 sell only an unknown or limited right. This subsection does not touch upon and
27 leaves open all questions of restitution arising in such cases, when a unique article so
28 sold is reclaimed by a third party as the rightful owner.

29 Foreclosure sales under Article 9 are another matter. Section 9-610 of
30 revised Article 9 provides that a disposition of collateral under that section includes
31 warranties such as those imposed by this section on a voluntary disposition of
32 property of the kind involved. Consequently, unless properly excluded under
33 subsection (c) or under the special provisions for exclusion in Section 9-610, a
34 disposition under that section of collateral consisting of goods includes the
35 warranties imposed by subsection (a) and, if applicable, subsection (b).

36 6. The statute of limitations for a breach of warranty under this section is
37 determined under the provisions set out in Section 2-725(a) and (c)(3).

1 **SECTION 2-313. EXPRESS WARRANTIES BY AFFIRMATION,**
2 **PROMISE, DESCRIPTION, SAMPLE, MODEL; REMEDIAL PROMISE.**

3 (a) In this section, “immediate buyer” means a buyer that enters into a
4 contract with the seller.

5 (b) Express warranties by the seller to the immediate buyer are created as
6 follows:

7 (1) Any affirmation of fact or promise made by the seller which relates
8 to the goods and becomes part of the basis of the bargain creates an express
9 warranty that the goods shall conform to the affirmation or promise.

10 (2) Any description of the goods which is made part of the basis of the
11 bargain creates an express warranty that the goods shall conform to the description.

12 (3) Any sample or model that is made part of the basis of the bargain
13 creates an express warranty that the whole of the goods shall conform to the sample
14 or model.

15 (c) It is not necessary to the creation of an express warranty that the seller
16 use formal words such as “warrant” or “guarantee” or that the seller have a specific
17 intention to make a warranty, but an affirmation merely of the value of the goods or
18 a statement purporting to be merely the seller's opinion or commendation of the
19 goods does not create a warranty.

20 (d) Any remedial promise made by the seller to the immediate buyer creates
21 an obligation that the promise will be performed upon the happening of the specified
22 event.

1 **Preliminary Comment**

2 **Changes:** Subsections (a) through (c) are identical to original Article 2
3 except that the term “immediate buyer” is used to make clear that the section is
4 limited to express warranties and remedial promises made by a seller to a buyer with
5 which the seller has a contractual relationship. Sections 2-313A and 2-313B
6 address obligations that run directly from a seller to a remote purchaser.

7 Subsection (d) introduces the term “remedial promise,” which was not used
8 in original Article 2. This section deals with remedial promises to immediate buyers;
9 Sections 2-313A and 2-313B deal with remedial promises running directly from a
10 seller to a remote purchaser. Remedial promise is defined in Section 2-102(a)(35).

11 **Comments:**

12 1. “Express” warranties rest on “dickered” aspects of the individual bargain,
13 and go so clearly to the essence of that bargain that words of disclaimer in a form
14 are repugnant to the basic dickered terms. “Implied” warranties rest so clearly on a
15 common factual situation or set of conditions that no particular language or action is
16 necessary to evidence them and they will arise in such a situation unless
17 unmistakably negated. As with original Article 2, warranties of description and
18 sample are designated “express” rather than “implied”.

19 2. This section is limited in its scope and direct purpose to express
20 warranties and remedial promises made by the seller to the immediate buyer as part
21 of a contract for sale. It is not designed in any way to disturb those lines of case law
22 growth which have recognized that warranties need not be confined to contracts
23 within the scope of this Article.

24 Section 2-313B recognizes that a seller may incur an obligation to a remote
25 purchaser through a medium for communication to the public, such as advertising.
26 An express warranty to an immediate buyer may also arise through a medium for
27 communication to the public if the elements of this section are satisfied.

28 The fact that a buyer has rights against an immediate seller under this section
29 does not preclude the buyer from also asserting rights against a remote seller under
30 Section 2-313A or 2-313B.

31 3. The present section deals with affirmations of fact or promises made by
32 the seller, descriptions of the goods, or exhibitions of samples or models, exactly as
33 any other part of a negotiation which ends in a contract is dealt with. No specific
34 intention to make a warranty is necessary if any of these factors is made part of the
35 basis of the bargain. In actual practice affirmations of fact and promises made by
36 the seller about the goods during a bargain are regarded as part of the description of

1 those goods; hence no particular reliance on such statements need be shown in order
2 to weave them into the fabric of the agreement. Rather, any fact which is to take
3 such affirmations or promises, once made, out of the agreement requires clear
4 affirmative proof. The issue normally is one of fact.

5 4. In view of the principle that the whole purpose of the law of warranty is
6 to determine what it is that the seller has in essence agreed to sell, the policy is
7 adopted of those cases which refuse except in unusual circumstances to recognize a
8 material deletion of the seller's obligation. Thus, a contract is normally a contract
9 for a sale of something describable and described. A clause generally disclaiming
10 "all warranties, express or implied" cannot reduce the seller's obligation with respect
11 to such description and therefore cannot be given literal effect under Section 2-316.

12 This is not intended to mean that the parties, if they consciously desire,
13 cannot make their own bargain as they wish. But in determining what they have
14 agreed upon good faith is a factor and consideration should be given to the fact that
15 the probability is small that a real price is intended to be exchanged for a pseudo-
16 obligation.

17 5. Paragraph (1)(b) makes specific some of the principles set forth above
18 when a description of the goods is given by the seller.

19 A description need not be by words. Technical specifications, blueprints and
20 the like can afford more exact description than mere language and if made part of
21 the basis of the bargain goods must conform with them. Past deliveries may set the
22 description of quality, either expressly or impliedly by course of dealing. Of course,
23 all descriptions by merchants must be read against the applicable trade usages with
24 the general rules as to merchantability resolving any doubts.

25 6. The basic situation as to statements affecting the true essence of the
26 bargain is no different when a sample or model is involved in the transaction. This
27 section includes both a "sample" actually drawn from the bulk of goods which is the
28 subject matter of the sale, and a "model" which is offered for inspection when the
29 subject matter is not at hand and which has not been drawn from the bulk of the
30 goods.

31 Although the underlying principles are unchanged, the facts are often
32 ambiguous when something is shown as illustrative, rather than as a straight sample.
33 In general, the presumption is that any sample or model, just as any affirmation of
34 fact, is intended to become a basis of the bargain. But there is no escape from the
35 question of fact. When the seller exhibits a sample purporting to be drawn from an
36 existing bulk, good faith of course requires that the sample be fairly drawn. But in
37 mercantile experience the mere exhibition of a "sample" does not of itself show

1 whether it is merely intended to “suggest” or to “be” the character of the subject-
2 matter of the contract. The question is whether the seller has so acted with
3 reference to the sample as to become responsible that the whole shall have at least
4 the values shown by it. The circumstances aid in answering this question. If the
5 sample has been drawn from an existing bulk, it must be regarded as describing
6 values of the goods contracted for unless it is accompanied by an unmistakable
7 denial of such responsibility. If, on the other hand, a model of merchandise not on
8 hand is offered, the mercantile presumption that it has become a literal description of
9 the subject matter is not so strong, and particularly so if modification on the buyer's
10 initiative impairs any feature of the model.

11 7. The precise time when words of description or affirmation are made or
12 samples are shown is not material. The sole question is whether the language or
13 samples or models are fairly to be regarded as part of the contract. If language that
14 would otherwise create an obligation under this section is used after the closing of
15 the deal (as when the buyer when taking delivery asks and receives an additional
16 assurance), an obligation will arise if the requirements for a modification are
17 satisfied. *See Downie v. Abex Corp.*, 741 F.2d 1235 (10th Cir. 1984).

18 8. Concerning affirmations of value or a seller’s opinion or commendation
19 under subsection (2), the basic question remains the same: What statements of the
20 seller have in the circumstances and in objective judgment become part of the basis
21 of the bargain? As indicated above, all of the statements of the seller do so unless
22 good reason is shown to the contrary. The provisions of subsection (c) are
23 included, however, since common experience discloses that some statements or
24 predictions cannot fairly be viewed as entering into the bargain. Even as to false
25 statements of value, however, the possibility is left open that a remedy may be
26 provided by the law relating to fraud or misrepresentation.

27 There are a number of factors relevant to determining whether an expression
28 creates a warranty under this section or is merely puffing. For example, the relevant
29 factors may include whether the seller’s representations taken in context, (1) were
30 general rather than specific, (2) related to the consequences of buying rather than
31 the goods themselves, (3) were “hedged” in some way, (4) were related to
32 experimental rather than standard goods, (5) were concerned some aspects of the
33 goods but not a hidden or unexpected non-conformity, (6) were informal statements
34 made in a formal contracting process, (7) were phrased in terms of opinion rather
35 than fact, or (8) were not capable of objective measurement. *See Federal Signal*
36 *Corp. v. Safety Factors, Inc.*, 886 P.2d 172 (Wash. 1994), where the court held that
37 the trial court erred in not making findings of fact where the seller stated that a new
38 product was “better than” an earlier, comparable model. *See also Jordan v. Pascas,*
39 *Inc.*, 37 F.3d 1181 (6th Cir. 1994) (representations about strength of fiberglass roof

1 which shattered and caused personal injury when the truck rolled over were
2 “puffing” as a matter of law).

3 9. The use of the word “promise” in subsection (a)(1) is unusual in that it
4 refers to statements about the quality or performance characteristics of the goods.
5 For example, a seller might make an affirmation of fact to the buyer that the goods
6 are of a certain quality, or may promise that the goods when delivered will be of a
7 certain quality, or may promise that the goods will perform in a certain manner after
8 delivery. In normal usage, “promise” refers to a what a person, not goods, will do;
9 that is, a promise is a commitment to act, or refrain from acting, in a certain manner
10 in the future. A promise about the quality or performance characteristics of the
11 goods creates an express warranty if the other elements of such a warranty are
12 present whereas a promise by which the seller commits itself to take remedial action
13 upon the happening of a specified event is a remedial promise. The distinction has
14 meaning in the context of the statute of limitations. A right of action for breach of
15 an express warranty accrues when the goods are tendered to the immediate buyer
16 (Section 2-725(c)(1)) unless the warranty consists of a promise that explicitly
17 extends to the future performance of the goods and discovery must await the time
18 for performance, in which case accrual occurs when the immediate buyer discovers
19 or should have discovered the breach (Section 2-725(c)(4)). Section 2-725(b)(3)
20 separately addresses the accrual of a right of action for breach of a remedial
21 promise.

22 Remedial promise is dealt with in a separate subsection to make clear that it
23 is a concept separate and apart from express warranty and that the elements of
24 warranty, such as basis of the bargain, are not applicable.

25 **SECTION 2-313A. OBLIGATION TO REMOTE PURCHASER**
26 **CREATED BY RECORD PACKAGED WITH OR ACCOMPANYING**
27 **GOODS.**

28 (a) In this section:

29 (1) “Goods” means new goods and goods sold or leased as new goods
30 unless the transaction of purchase does not occur in the normal chain of distribution.

31 (2) “Immediate buyer” means a buyer that enters into a contract with the
32 seller.

1 (3) “Remote purchaser” means a person that buys or leases goods from
2 an immediate buyer or other person in the normal chain of distribution.

3 (b) If a seller makes an affirmation of fact or promise that relates to the
4 goods, provides a description that relates to the goods, or makes a remedial
5 promise, in a record packaged with or accompanying the goods, and the seller
6 reasonably expects the record to be, and the record is, furnished to the remote
7 purchaser, the seller has an obligation to the remote purchaser that:

8 (1) the goods will conform to the affirmation of fact, promise or
9 description unless a reasonable person in the position of the remote purchaser would
10 not believe that the affirmation of fact, promise or description created an obligation;
11 and

12 (2) the seller will perform the remedial promise.

13 (c) It is not necessary to the creation of an obligation under this section that
14 the seller use formal words such as “warrant” or “guarantee” or that the seller have
15 a specific intention to undertake an obligation, but an affirmation merely of the value
16 of the goods or a statement purporting to be merely the seller's opinion or
17 commendation of the goods does not create an obligation.

18 (d) The following rules apply to the remedies for breach of an obligation
19 created under this section:

20 (1) The seller may modify or limit the remedies available to the remote
21 purchaser if the modification or limitation is furnished to the remote purchaser no

1 later than the time of purchase or if the modification or limitation is contained in the
2 record that contains the affirmation of fact, promise or description.

3 (2) Subject to a modification or limitation of remedy, a seller in breach is
4 liable for incidental or consequential damages under Section 2-715, but the seller is
5 not liable for lost profits.

6 (3) The remote purchaser may recover as damages for breach of a
7 seller's obligation arising under subsection (b) the loss resulting in the ordinary
8 course of events as determined in any manner that is reasonable.

9 (e) An obligation that is not a remedial promise is breached if the goods did
10 not conform to the affirmation of fact, promise or description creating the obligation
11 when the goods left the seller's control.

12 **Preliminary Comment**

13 **Changes:** This section is new.

14 **Comments:**

15 1. Sections 2-313A and 2-313B are new, and they follow case law and
16 practice in extending a seller's obligations regarding new goods to remote
17 purchasers. This section deals with what are commonly called "pass-through
18 warranties." In the paradigm situation, a manufacturer will sell goods in a package
19 to a retailer and include in the package a record that sets forth the obligations that
20 the manufacturer is willing to undertake in favor of the ultimate party in the
21 distributive chain, the person that buys or leases the goods from the retailer. If the
22 manufacturer had sold the goods directly to the ultimate party the statements in the
23 record might amount to an express warranty or remedial promise under Section
24 2-313.

25 No direct contract exists between the seller and the remote purchaser, and
26 thus the seller's obligation under this section is not referred to as an "express
27 warranty." Use of "obligation" rather than "express warranty" avoids any inference
28 that the basis of the bargain test is applicable here. The test for whether an
29 obligation other than a remedial promise arises is similar in some respects to the

1 basis of the bargain test, but the test set forth in this section is exclusive. Because
2 “remedial promise” in Section 2-313 is not subject to the basis of the bargain test,
3 that term is used in this section.

4 2. The party to which an obligation runs under this section may either buy
5 or lease the goods, and thus the term “remote purchaser” is used. The term is more
6 limited than “purchaser” in Article 1, however, and does not include a donee or any
7 voluntary transferee who is not a buyer or lessee. Moreover, the remote purchaser
8 must be part of the normal chain of distribution for the particular product. That
9 chain will by definition include at least three parties and may well include more – for
10 example, the manufacturer might sell first to a wholesaler, that would then resell the
11 goods to a retailer for sale or lease to the public. A buyer or lessee from the retailer
12 would qualify as a remote purchaser and could invoke this section against either the
13 manufacturer or the wholesaler (if the wholesaler provided a record to the retailer to
14 be furnished to the ultimate party), but no subsequent transferee, such as a used-
15 goods buyer or sublessee, could qualify. The law governing assignment and third-
16 party beneficiary, including Section 2-318, must be consulted to determine whether
17 a party other than the remote purchaser can enforce an obligation created under this
18 section.

19 3. The application of this section is limited to new goods and goods sold or
20 leased as new goods within the normal chain of distribution. It does not apply to
21 goods that are sold outside the normal chain, such as “gray” goods or salvaged
22 goods, nor does it apply if the goods are unused but sold as seconds. The concept is
23 flexible, and determining whether goods have been sold or leased in the normal
24 chain of distribution requires consideration of the seller’s expectations with regard
25 to the manner in which its goods will reach the remote purchaser. For example, a
26 car manufacturer may be aware that its dealers frequently transfer cars among
27 themselves, and a new car sold initially to one dealer but leased to the remote
28 purchaser by another dealer would have been leased in the normal chain of
29 distribution. The concept may also include such practices as door-to-door sales and
30 distribution through a nonprofit organization (*e.g.*, Girl Scout cookies).

31 4. This section applies only to obligations set forth on a record that is
32 packaged with the goods or otherwise accompanies them (subsection (b)).
33 Examples include a label affixed to the outside of a container, a card inside a
34 container, or a booklet handed to the remote purchaser at the time of purchase.
35 Moreover, the seller must be able to anticipate that the remote purchaser will
36 acquire the record, and thus the section is limited to records that the seller
37 reasonably expects to be furnished, and that are in fact furnished, to the remote
38 purchaser.

1 Neither this section nor Section 2-313B are intended to overrule cases that
2 impose liability on facts that are similar to those within the direct scope of one of the
3 sections. For example, the sections are not intended to overrule a decision imposing
4 liability on a seller that distributes a sample to a remote purchaser.

5 5. Obligations other than remedial promises created under this section are
6 analogous to express warranties and are subject to a test that is akin to the basis of
7 the bargain test of Section 2-313(b). The seller is entitled to shape the scope of the
8 obligation, and the seller's language must be considered in context. If a reasonable
9 person in the position of the remote purchaser, reading the seller's language as a
10 whole, would not believe that an affirmation of fact, promise or description created
11 an obligation, there is no liability under this section.

12 6. There is no difference between remedial promise as used in this section
13 (and Section 2-313B) and the same term as used in Section 2-313. Subsection
14 (d)(1) makes clear that the seller may employ the provisions of Section 2-719 to
15 modify or limit the remedies available to the remote purchaser for breach of the
16 seller's obligation hereunder. The modification or limitation may appear on the
17 same record as the one which creates the obligation, or it may be provided to the
18 remote purchaser separately, but in no event may it be furnished to the remote
19 purchaser any later than the time of purchase. The requirements and limitations set
20 forth in Section 2-719, such as the requirement of an express statement of
21 exclusivity and the test for failure of essential purpose, are applicable to a
22 modification or limitation of remedy under this section.

23 7. As with express warranties, no specific language or intention is necessary
24 to create an obligation, and whether an obligation exists is normally an issue of fact.
25 Subsection (c) is virtually identical to Section 2-313(c), and the tests developed
26 under the common law and under that section to determine whether a statement
27 creates an obligation or is mere puffing are directly applicable to this section.

28 Just as a seller can limit the extent to which its language creates an express
29 warranty under Section 2-313 by placing that language in a broader context, so too
30 can a seller under this section or Section 2-313B limit the extent of its liability to a
31 remote purchaser. In other words, the seller, in undertaking an obligation under
32 these sections, can spell out the scope and limits of that obligation.

33 8. As a rule, a remote purchaser may recover monetary damages measured
34 in the same manner as in the case of an aggrieved buyer under Section 2-714,
35 including incidental and consequential damages to the extent they would be available
36 to an aggrieved buyer. Subsection (d)(3) parallels Section 2-714(a) in allowing the
37 buyer to recover for loss resulting in the ordinary course of events as determined in
38 any manner which is reasonable. In the case of an obligation that is not a remedial

1 promise, the normal measure of damages would be the difference between the value
2 of the goods if they had conformed to the seller's statements and their actual value,
3 and the normal measure of damages for breach of a remedial promise would be the
4 difference between the value of the promised remedial performance and the value of
5 the actual performance received.

6 Subsection (d)(2) precludes a remote purchaser from recovering
7 consequential damages that take the form of lost profits.

8 *Legislative Note: In order to maintain their relative positions in this Act, Sections*
9 *2-313A and 2-313B may have to be renumbered according to the convention used*
10 *by a particular State. For example, in some States they may be designated as*
11 *2-313.1 and 2-313.2.*

12 **SECTION 2-313B. OBLIGATION TO REMOTE PURCHASER**
13 **CREATED BY COMMUNICATION TO PUBLIC.**

14 (a) In this section:

15 (1) "Goods" means new goods and goods sold or leased as new goods
16 in a transaction of purchase that occurs in the normal chain of distribution.

17 (2) "Immediate buyer" means a buyer that enters into a contract with the
18 seller.

19 (3) "Remote purchaser" means a person that buys or leases goods from
20 an immediate buyer or other person in the normal chain of distribution.

21 (b) If a seller makes an affirmation of fact or promise that relates to the
22 goods, provides a description that relates to the goods, or makes a remedial promise
23 in advertising or a similar communication to the public and the remote purchaser
24 enters into a transaction of purchase with knowledge of and with the expectation
25 that the goods will conform to the affirmation of fact, promise, or description, or

1 that the seller will perform the remedial promise, the seller has an obligation to the
2 remote purchaser that:

3 (1) the goods will conform to the affirmation of fact, promise or
4 description unless a reasonable person in the position of the remote purchaser would
5 not believe that the affirmation of fact, promise or description created an obligation;
6 and

7 (2) the seller will perform the remedial promise.

8 (c) It is not necessary to the creation of an obligation under this section that
9 the seller use formal words such as “warrant” or “guarantee” or that the seller have
10 a specific intention to undertake an obligation, but an affirmation merely of the value
11 of the goods or a statement purporting to be merely the seller's opinion or
12 commendation of the goods does not create an obligation.

13 (d) The following rules apply to the remedies for breach of an obligation
14 created under this section:

15 (1) The seller may modify or limit the remedies available to the remote
16 purchaser if the modification or limitation is furnished to the remote purchaser no
17 later than the time of purchase. The modification or limitation may be furnished as
18 part of the communication that contains the affirmation of fact, promise or
19 description.

20 (2) Subject to a modification or limitation of remedy, a seller in breach is
21 liable for incidental or consequential damages under Section 2-715, but the seller is
22 not liable for lost profits.

1 (3) The remote purchaser may recover as damages for breach of a
2 seller's obligation arising under subsection (b) the loss resulting in the ordinary
3 course of events as determined in any manner that is reasonable.

4 (e) An obligation that is not a remedial promise is breached if the goods did
5 not conform to the affirmation of fact, promise or description creating the obligation
6 when the goods left the seller's control.

7 **Preliminary Comment**

8 **Changes:** This section is new.

9 **Comments:**

10 1. Sections 2-313B and 2-313A are new, and they follow case law and
11 practice in extending a seller's obligations regarding new goods to remote
12 purchasers. This section deals with obligations to a remote purchaser created
13 through a medium for communication with the public, and that means primarily
14 advertising. In the paradigm situation, a manufacturer will engage in an advertising
15 campaign directed towards all or part of the market for its product and will make
16 statements that if made to an immediate buyer would amount to an express warranty
17 or remedial promise under Section 2-313. The goods, however, are sold to
18 someone other than the recipient of the advertising and are then resold or leased to
19 the recipient. By imposing liability on the seller, this section adopts the approach of
20 cases such as *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 226
21 N.Y.S.2d 363, 181 N.E.2d 399 (Ct. App. 1962).

22 If the seller's communication is made to an immediate buyer, whether the
23 seller incurs liability is determined by Section 2-313 and this section is inapplicable.

24 2. This section parallels Section 2-313A in most respects, and the Official
25 Comments to that section should be consulted. In particular, the reasoning of
26 Comment 1 (scope and terminology), Comment 2 (definition of remote purchaser),
27 Comment 3 (new goods and goods sold as new goods in the normal chain of
28 distribution), Comment 4 (reasonable person in the position of the remote
29 purchaser), Comment 6 (modification or limitation of remedy), Comment 7 (puffing
30 and limitations on extent of obligation) and Comment 8 (damages) is adopted here.

31 3. This section provides an additional test for enforceability not found in
32 Section 2-313A. In order to be held liable, the remote purchaser must, at the time

1 of purchase, have knowledge of the affirmation of fact, promise, description or
2 remedial promise and must also have an expectation that the goods will conform or
3 that the seller will comply. This test is entirely subjective, while the reasonable
4 person test in subsection (b) is objective in nature.

5 Put another way, the seller will incur no liability to the remote purchaser if: i)
6 the purchaser did not have knowledge of the seller's statement at the time of
7 purchase; ii) the remote purchaser knew of the seller's statement at the time of
8 purchase but did not expect the goods to conform or the seller to comply; iii) a
9 reasonable person in the position of the remote purchaser would not believe that the
10 seller's statement created an obligation (this test does not apply to remedial
11 promises), or iv) the seller's statement is puffing.

12 4. Section 2-318 deals with the extension of obligations to certain third-
13 party beneficiaries. Of course, no extension is necessary if the goods are purchased
14 by an agent. In such a case, the knowledge and expectation of the principal, not the
15 agent, are relevant in determining whether an obligation arises under this section.
16 Nothing in this Act precludes a court from determining that a household operates as
17 a buying unit under the law of agency.

18 *Legislative Note: In order to maintain their relative positions in this Act, Sections*
19 *2-313A and 2-313B may have to be renumbered according to the convention used*
20 *by a particular State. For example, in some States they may be designated as*
21 *Sections 2-313.1 and 2-313.2.*

22 **SECTION 2-314. IMPLIED WARRANTY: MERCHANTABILITY;**
23 **USAGE OF TRADE.**

24 (a) Unless excluded or modified under Section 2-316, a warranty that the
25 goods shall be merchantable is implied in a contract for their sale if the seller is a
26 merchant with respect to goods of that kind. Under this section the serving for
27 value of food or drink to be consumed either on the premises or elsewhere is a sale.

28 (b) Goods to be merchantable must be at least such as:

29 (1) pass without objection in the trade under the contract description;

(2) in the case of fungible goods, are of fair average quality within the description;

(3) are fit for the ordinary purposes for which goods of that description are used;

(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;

(5) are adequately contained, packaged, and labeled as the agreement may require; and

(6) conform to the promises or affirmations of fact made on the container or label if any.

(c) Unless excluded or modified under Section 2-316 other implied warranties may arise from course of dealing or usage of trade.

Preliminary Comment

Change: The phrase “goods of that description” rather than “for which such goods are used” is used in subsection (b)(3). This emphasizes the importance of the agreed description in determining fitness for ordinary purposes.

Comments:

1. The seller's obligation applies to present sales as well as to contracts to sell subject to the effects of any examination of specific goods. (Subsection (2) of Section 2-316). Also, the warranty of merchantability applies to sales for use as well as to sales for resale.

2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant-seller.

1 3. A specific designation of goods by the buyer does not exclude the seller's
2 obligation that they be fit for the general purposes appropriate to such goods. A
3 contract for the sale of second-hand goods, however, involves only such obligation
4 as is appropriate to such goods for that is their contract description. A person
5 making an isolated sale of goods is not a “merchant” within the meaning of the full
6 scope of this section and, thus, no warranty of merchantability would apply. The
7 seller’s knowledge of any defects not apparent on inspection would, however,
8 without need for express agreement and in keeping with the underlying reason of the
9 present section and the provisions on good faith, impose an obligation that known
10 material but hidden defects be fully disclosed.

11 4. Although a seller may not be a “merchant” as to the goods in question, if
12 the seller states generally that the goods are “guaranteed” the provisions of this
13 section may furnish a guide to the content of the resulting express warranty. This
14 has particular significance in the case of second-hand sales, and has further
15 significance in limiting the effect of fine-print disclaimer clauses where their effect
16 would be inconsistent with large-print assertions of “guarantee”.

17 5. The second sentence of subsection (a) covers the warranty with respect
18 to food and drink. The serving for value of food or drink for consumption on the
19 premises or elsewhere is treated as a sale. Thus, both the patron in a restaurant and
20 a buyer of “take out” food are protected by the implied warranty of merchantability.

21 6. Suppose that an unmerchantable lawn mower causes personal injury to
22 the buyer, who is operating the mower. Without more, the buyer can sue the seller
23 for breach of the implied warranty of merchantability and recover for injury to
24 person “proximately resulting” from the breach. Section 2-715(b)(2).

25 This opportunity does not resolve the tension between warranty law and tort
26 law where goods cause personal injury or property damage. The primary source of
27 that tension arises from disagreement over whether the concept of defect in tort and
28 the concept of merchantability in Article 2 are coextensive where personal injuries
29 are involved, *i.e.*, if goods are merchantable under warranty law can they still be
30 defective under tort law, and if goods are not defective under tort law can they be
31 unmerchantable under warranty law? The answer to both questions should be no,
32 and the tension between merchantability in warranty and defect in tort where
33 personal injury or property damage is involved should be resolved as follows:

34 When recovery is sought for injury to person or property, whether goods are
35 merchantable is to be determined by applicable state products liability law.
36 When, however, a claim for injury to person or property is based on an implied
37 warranty of fitness under Section 2-315 or an express warranty under Section
38 2-313 or an obligation arising under Section 2-313A or 2-313B, this Article

1 determines whether an implied warranty of fitness or an express warranty was
2 made and breached, as well as what damages are recoverable under Section
3 2-715.

4 To illustrate, suppose that the seller makes a representation about the safety
5 of a lawn mower that becomes part of the basis of the buyer's bargain. The buyer is
6 injured when the gas tank cracks and a fire breaks out. If the lawnmower without
7 the representation is not defective under applicable tort law, it is not unmerchantable
8 under this section. On the other hand, if the lawnmower did not conform to the
9 representation about safety, the seller made and breached an express warranty and
10 the buyer may sue under Article 2.

11 7. Subsection (b) does not purport to exhaust the meaning of
12 "merchantable" nor to negate any of its attributes not specifically mentioned in the
13 text of the statute, but arising by usage of trade or through case law. The language
14 used is "must be at least such as . . .," and the intention is to leave open other
15 possible attributes of merchantability.

16 8. Paragraphs (1) and (2) of subsection (b) are to be read together. Both
17 refer, as indicated above, to the standards of that line of the trade which fits the
18 transaction and the seller's business. "Fair average" is a term directly appropriate to
19 agricultural bulk products and means goods centering around the middle belt of
20 quality, not the least or the worst that can be understood in the particular trade by
21 the designation, but such as can pass "without objection." Of course a fair
22 percentage of the least is permissible but the goods are not "fair average" if they are
23 all of the least or worst quality possible under the description. In cases of doubt as
24 to what quality is intended, the price at which a merchant closes a contract is an
25 excellent index of the nature and scope of the merchant's obligation under the
26 present section.

27 9. Fitness for the ordinary purposes for which goods of the type are used is
28 a fundamental concept of the present section and is covered in paragraph (b)(3). As
29 stated above, merchantability is also a part of the obligation owing to the buyer for
30 use. Correspondingly, protection, under this aspect of the warranty, of the person
31 buying for resale to the ultimate consumer is equally necessary, and merchantable
32 goods must therefore be "honestly" resalable in the normal course of business
33 because they are what they purport to be.

34 10. Paragraph (b)(4) on evenness of kind, quality and quantity follows case
35 law. But precautionary language has been added as a remainder of the frequent
36 usages of trade which permit substantial variations both with and without an
37 allowance or an obligation to replace the varying units.

1 11. Paragraph (b)(5) applies only where the nature of the goods and of the
2 transaction require a certain type of container, package or label. Paragraph (b)(6)
3 applies, on the other hand, wherever there is a label or container on which
4 representations are made, even though the original contract, either by express terms
5 or usage of trade, may not have required either the labeling or the representation.
6 This follows from the general obligation of good faith which requires that a buyer
7 should not be placed in the position of reselling or using goods delivered under false
8 representations appearing on the package or container. No problem of extra
9 consideration arises in this connection since, under this Article, an obligation is
10 imposed by the original contract not to deliver mislabeled articles, and the obligation
11 is imposed where mercantile good faith so requires and without reference to the
12 doctrine of consideration.

13 12. Exclusion or modification of the warranty of merchantability, or of any
14 part of it, is dealt with in Section 2-316. That section must be read with particular
15 reference to its subsection (f) on limitation of remedies. The warranty of
16 merchantability, wherever it is normal, is so commonly taken for granted that its
17 exclusion from the contract is a matter threatening surprise and therefore requiring
18 special precaution.

19 13. Subsection (c) is to make explicit that usage of trade and course of
20 dealing can create warranties and that they are implied rather than express
21 warranties and thus subject to exclusion or modification under Section 2-316. A
22 typical instance would be the obligation to provide pedigree papers to evidence
23 conformity of the animal to the contract in the case of a pedigreed dog or blooded
24 bull.

25 14. In an action based on breach of warranty, it is of course necessary to
26 show not only the existence of the warranty but the fact that the warranty was
27 broken and that the breach of the warranty was the proximate cause of the loss
28 sustained. In such an action an affirmative showing by the seller that the loss
29 resulted from some action or event following the seller's delivery of the goods can
30 operate as a defense. Equally, evidence indicating that the seller exercised care in
31 the manufacture, processing or selection of the goods is relevant to the issue of
32 whether the warranty was in fact broken. Action by the buyer following an
33 examination of the goods which ought to have indicated the defect complained of
34 can be shown as matter bearing on whether the breach itself was the cause of the
35 injury.

36 **SECTION 2-315. IMPLIED WARRANTY: FITNESS FOR**
37 **PARTICULAR PURPOSE.** Where the seller at the time of contracting has reason

1 to know any particular purpose for which the goods are required and that the buyer
2 is relying on the seller's skill or judgment to select or furnish suitable goods, there is
3 unless excluded or modified under Section 2-316 an implied warranty that the goods
4 shall be fit for such purpose.

5 Preliminary Comment

6 **Changes:** None.

7 **Comments:**

8 1. Whether or not this warranty arises in any individual case is basically a
9 question of fact to be determined by the circumstances of the contracting. Under
10 this section the buyer need not bring home to the seller actual knowledge of the
11 particular purpose for which the goods are intended or of the buyer's reliance on the
12 seller's skill and judgment, if the circumstances are such that the seller has reason to
13 realize the purpose intended or that the reliance exists. The buyer, of course, must
14 actually be relying on the seller.

15 2. A "particular purpose" differs from the ordinary purpose for which the
16 goods are used in that it envisages a specific use by the buyer which is peculiar to
17 the nature of the buyer's business whereas the ordinary purposes for which goods
18 are used are those envisaged in the concept of merchantability and go to uses which
19 are customarily made of the goods in question. For example, shoes are generally
20 used for the purpose of walking upon ordinary ground, but a seller may know that a
21 particular pair was selected to be used for climbing mountains.

22 A contract may of course include both a warranty of merchantability and one
23 of fitness for a particular purpose.

24 The provisions of this Article on the cumulation and conflict of express and
25 implied warranties must be considered on the question of inconsistency between or
26 among warranties. In such a case any question of fact as to which warranty was
27 intended by the parties to apply must be resolved in favor of the warranty of fitness
28 for particular purpose as against all other warranties except where the buyer has
29 assumed the responsibility of furnishing the technical specifications.

30 3. In connection with the warranty of fitness for a particular purpose the
31 provisions of this Article on the allocation or division of risks are particularly
32 applicable in any transaction in which the purpose for which the goods are to be
33 used combines requirements both as to the quality of the goods themselves and

1 compliance with certain laws or regulations. How the risks are divided is a question
2 of fact to be determined, where not expressly contained in the agreement, from the
3 circumstances of contracting, usage of trade, course of performance and the like,
4 matters which may constitute the “otherwise agreement” of the parties by which
5 they may divide the risk or burden.

6 4. Although normally the warranty will arise only where the seller is a
7 merchant with the appropriate “skill or judgment,” it can arise as to nonmerchants
8 where this is justified by the particular circumstances.

9 5. The existence of a patent or other trade name and the designation of the
10 article by that name, or indeed in any other definite manner, is only one of the facts
11 to be considered on the question of whether the buyer actually relied on the seller,
12 but it is not of itself decisive of the issue. A buyer who is insisting on a particular
13 brand is not relying on the seller's skill and judgment and so no warranty results.
14 But the mere fact that the article purchased has a particular patent or trade name is
15 not sufficient to indicate nonreliance if the article has been recommended by the
16 seller as adequate for the buyer's purposes.

17 6. The specific reference in this section to Section 2-316 on exclusion or
18 modification of warranties is to call attention to the possibility of eliminating the
19 warranty in any given case.

20 **SECTION 2-316. EXCLUSION OR MODIFICATION OF**
21 **WARRANTIES.**

22 (a) Words or conduct relevant to the creation of an express warranty and
23 words or conduct tending to negate or limit warranty shall be construed wherever
24 reasonable as consistent with each other; but subject to Section 2-202 negation or
25 limitation is inoperative to the extent that such construction is unreasonable.

26 (b) Notwithstanding subsection (c), unless the circumstances indicate
27 otherwise, all implied warranties are excluded by expressions such as “as is” or
28 “with all faults” or similar language or conduct that in common understanding make
29 it clear to the buyer that the seller assumes no responsibility for the quality or fitness

1 of the goods. In a consumer contract evidenced by a record, the requirements of
2 this subsection must be satisfied by conspicuous language in the record.

3 (c) Subject to subsection (b), to exclude or modify an implied warranty of
4 merchantability or fitness, or any part of either implied warranty, the following rules
5 apply:

6 (1) In a consumer contract, the language must be in a record and be
7 conspicuous and:

8 (A) in the case of an implied warranty of merchantability, state “The
9 seller undertakes no responsibility for the quality of the goods except as otherwise
10 provided in this contract”; and

11 (B) in the case of an implied warranty of fitness, state “The seller
12 assumes no responsibility that the goods will be fit for any particular purpose for
13 which you may be buying these goods, except as otherwise provided in the
14 contract.”

15 (2) In a contract other than a consumer contract, the language is
16 sufficient if:

17 (A) in the case of an implied warranty of merchantability, it mentions
18 merchantability; and

19 (B) in the case of an implied warranty of fitness, it states, for
20 example, “There are no warranties that extend beyond the description on the face
21 hereof.”

22 (3) Language that satisfies paragraph (1) also satisfies paragraph (2).

1 (d) An implied warranty may also be excluded or modified by course of
2 performance, course of dealing, or usage of trade.

3 (e) If before entering into the contract the buyer has examined the goods or
4 the sample or model as fully as desired or has refused to examine the goods, there is
5 no implied warranty with regard to defects that an examination ought in the
6 circumstances to have revealed to the buyer.

7 (f) Remedies for breach of warranty may be limited in accordance with this
8 article with respect to liquidation or limitation of damages and contractual
9 modification of remedy.

10 **Preliminary Comment**

11 **Changes:** The subsections have been rearranged so that the general test for
12 disclaimers of implied warranties, found in original subsection (3)(a) and subsection
13 (b) of this revision, precedes the more specific tests of original subsection (2).
14 Subsection (b) adds a requirement not found in original subsection (3)(a) that in a
15 consumer contract evidenced by a record a disclaimer that would otherwise be
16 effective under the subsection must be conspicuous.

17 Subsection (c), which corresponds with original subsection (2), distinguishes
18 between commercial and consumer contracts. In a commercial contract, language
19 that is within the contemplation of the subsection need not be in a record, but if it is
20 in a record it must be conspicuous. Both record and conspicuousness are required
21 for consumer contracts. In addition, in consumer contracts the language necessary
22 to comply with the subsection differs from that required in original Section
23 2-316(2).

24 **Comments:**

25 1. This section is designed principally to deal with those frequent clauses in
26 sales contracts which seek to exclude “all warranties, express or implied.” It seeks
27 to protect a buyer from unexpected and unbargained language of disclaimer by
28 denying effect to such language when inconsistent with language of express
29 warranty and permitting the exclusion of implied warranties only by language or
30 other circumstances which protect the buyer from surprise.

1 2. The seller is protected under this Article against false allegations of oral
2 warranties by its provisions on parol and extrinsic evidence and against unauthorized
3 representations by the customary “lack of authority” clauses. This Article treats the
4 limitation or avoidance of consequential damages as a matter of limiting remedies
5 for breach, separate from the matter of creation of liability under a warranty. If no
6 warranty exists, there is of course no problem of limiting remedies for breach of
7 warranty. Under subsection (f) the question of limitation of remedy is governed by
8 the sections referred to rather than by this section.

9 3. Subsection (b) deals with general terms such as “as is,” “as they stand,”
10 “with all faults,” and the like. Such terms in ordinary commercial usage are
11 understood to mean that the buyer takes the entire risk as to the quality of the goods
12 involved. The terms covered by the subsection are in fact merely a particularization
13 of subsection (d) which provides for exclusion or modification of implied warranties
14 by usage of trade.

15 Subsection (b) clarifies that a disclaimer that otherwise satisfies its
16 requirements need not be in a record. This is true in both commercial and consumer
17 contracts. Further, in a commercial contract such a disclaimer need not be
18 conspicuous even if it is contained in a record; however, a disclaimer in a consumer
19 contract evidenced by a record must be conspicuous to be effective.

20 4. Subsection (c) is a particularized application of the general rule of
21 subsection (b). To be within the subsection in a consumer contract, the disclaimer
22 must be set forth in a record and must be conspicuous. Moreover, the language
23 required of a seller in a consumer contract communicates more information than the
24 language required of a seller under original Section 2-316(2). Use of the word
25 “must” does not indicate that implied warranties cannot be disclaimed in another
26 manner, such as under subsection (b). In a commercial contract, there is no
27 requirement that the appropriate language be in a record or be conspicuous. Of
28 course, evidence of an oral disclaimer might be inadmissible under Section 2-202.

29 5. Whether or not oral language of disclaimer satisfies the requirements of
30 subsection (b) or, in a commercial contract, subsection (c), such language may be
31 relevant under other sections to the question whether the warranty was ever in fact
32 created. Thus, unless the provisions of this Article on parol and extrinsic evidence
33 prevent, oral language of disclaimer may raise issues of fact as to whether reliance
34 by the buyer occurred and whether the seller had “reason to know” under the
35 section on implied warranty of fitness for a particular purpose.

36 6. The exceptions to the general rule set forth in subsections (d) and (e) are
37 common factual situations in which the circumstances surrounding the transaction

1 are in themselves sufficient to call the buyer's attention to the fact that no implied
2 warranties are made or that a certain implied warranty is being excluded.

3 Under subsection (d) warranties may be excluded or modified by the
4 circumstances where the buyer examines the goods or a sample or model of them
5 before entering into the contract. "Examination" as used in this paragraph is not
6 synonymous with inspection before acceptance or at any other time after the
7 contract has been made. It goes rather to the nature of the responsibility assumed
8 by the seller at the time of the making of the contract. Of course if the buyer
9 discovers the defect and uses the goods anyway, or if the buyer unreasonably fails to
10 examine the goods before using them, resulting injuries may be found to result from
11 the buyer's own action rather than proximately from a breach of warranty. *See*
12 Sections 2-314 and 2-715.

13 In order to bring the transaction within the scope of "refused to examine" in
14 subsection (d), it is not sufficient that the goods are available for inspection. There
15 must in addition be a demand by the seller that the buyer examine the goods fully.
16 The seller by the demand puts the buyer on notice that the buyer is assuming the risk
17 of defects which the examination ought to reveal. The language "refused to
18 examine" in this paragraph is intended to make clear the necessity for such demand.

19 Application of the doctrine of "caveat emptor" in all cases where the buyer
20 examines the goods regardless of statements made by the seller is, however, rejected
21 by this Article. Thus, if the offer of examination is accompanied by words as to
22 their merchantability or specific attributes and the buyer indicates clearly a reliance
23 on those words rather than on the buyer's examination, they give rise to an
24 "express" warranty. In such cases the question is one of fact as to whether a
25 warranty of merchantability has been expressly incorporated in the agreement.
26 Disclaimer of such an express warranty is governed by subsection (a) of this section.

27 The particular buyer's skill and the normal method of examining goods in the
28 circumstances determine what defects are excluded by the examination. A failure to
29 notice defects which are obvious cannot excuse the buyer. However, an
30 examination under circumstances which do not permit chemical or other testing of
31 the goods would not exclude defects which could be ascertained only by such
32 testing. Nor can latent defects be excluded by a simple examination. A professional
33 buyer examining a product in the buyer's field will be held to have assumed the risk
34 as to all defects which a professional in the field ought to observe, while a
35 nonprofessional buyer will be held to have assumed the risk only for such defects as
36 a layperson might be expected to observe.

37 7. The situation in which the buyer gives precise and complete specifications
38 to the seller is not explicitly covered in this section, but this is a frequent

1 circumstance by which the implied warranties may be excluded. The warranty of
2 fitness for a particular purpose would not normally arise since in such a situation
3 there is usually no reliance on the seller by the buyer. The warranty of
4 merchantability in such a transaction, however, must be considered in connection
5 with the next section on the cumulation and conflict of warranties. Under paragraph
6 (3) of that section in case of such an inconsistency the implied warranty of
7 merchantability is displaced by the express warranty that the goods will comply with
8 the specifications. Thus, where the buyer gives detailed specifications as to the
9 goods, neither of the implied warranties as to quality will normally apply to the
10 transaction unless consistent with the specifications.

11 **SECTION 2-317. CUMULATION AND CONFLICT OF WARRANTIES**

12 **EXPRESS OR IMPLIED.** Warranties whether express or implied shall be
13 construed as consistent with each other and as cumulative, but if such construction
14 is unreasonable the intention of the parties shall determine which warranty is
15 dominant. In ascertaining that intention the following rules apply:

16 (1) Exact or technical specifications displace an inconsistent sample or
17 model or general language of description.

18 (2) A sample from an existing bulk displaces inconsistent general language
19 of description.

20 (3) Express warranties displace inconsistent implied warranties other than
21 an implied warranty of fitness for a particular purpose.

22 **Preliminary Comment**

23 **Changes:** None.

24 **Comments:**

25 1. This section rests on the basic policy of this Article that no warranty is
26 created except by some conduct (either affirmative action or failure to disclose) on
27 the part of the seller. Therefore, all warranties are made cumulative unless this
28 construction of the contract is impossible or unreasonable.

1 2. The rules of this section are designed to aid in determining the intention
2 of the parties as to which of inconsistent warranties which have arisen from the
3 circumstances of their transaction shall prevail. These rules of intention are to be
4 applied only where factors making for an equitable estoppel of the seller do not exist
5 and where the seller has in perfect good faith made warranties which later turn out
6 to be inconsistent. To the extent that the seller has led the buyer to believe that all
7 of the warranties can be performed, the seller is estopped from setting up any
8 essential inconsistency as a defense.

9 3. The rules in paragraphs (1)-(3) are designed to ascertain the intention of
10 the parties by reference to the factor which probably claimed the attention of the
11 parties in the first instance. These rules are not absolute but may be changed by
12 evidence showing that the conditions which existed at the time of contracting make
13 the construction called for by the section inconsistent or unreasonable.

14 **SECTION 2-318. THIRD-PARTY BENEFICIARIES OF WARRANTIES**
15 **EXPRESS OR IMPLIED, WARRANTY OBLIGATIONS, AND REMEDIAL**
16 **PROMISES.**

17 (a) In this section:

18 (1) "Immediate buyer" means a buyer that enters into a contract with the
19 seller.

20 (2) "Remote purchaser" means a person that buys or leases goods from
21 an immediate buyer or other person in the normal chain of distribution.

22 **Alternative A to Subsection (b)**

23 (b) A seller's warranty whether express or implied to an immediate buyer, a
24 seller's remedial promise to an immediate buyer, or a seller's obligation to a remote
25 purchaser under Section 2-313A or 2-313B extends to any natural person who is in
26 the family or household of such immediate buyer or such remote purchaser or who
27 is a guest in the home of either if it is reasonable to expect that such person may use,

1 consume or be affected by the goods and who is injured in person by breach of the
2 warranty, remedial promise or obligation. A seller may not exclude or limit the
3 operation of this section.

4 **Alternative B to Subsection (b)**

5 (b) A seller's warranty whether express or implied to an immediate buyer, a
6 seller's remedial promise to an immediate buyer, or a seller's obligation to a remote
7 purchaser under Section 2-313A or 2-313B extends to any natural person who may
8 reasonably be expected to use, consume or be affected by the goods and who is
9 injured in person by breach of the warranty, remedial promise or obligation. A seller
10 may not exclude or limit the operation of this section.

11 **Alternative C to Subsection (b)**

12 (b) A seller's warranty whether express or implied to an immediate buyer, a
13 seller's remedial promise to an immediate buyer, or a seller's obligation to a remote
14 purchaser under Section 2-313A or 2-313B extends to any person that may
15 reasonably be expected to use, consume or be affected by the goods and that is
16 injured by breach of the warranty, remedial promise or obligation. A seller may not
17 exclude or limit the operation of this section with respect to injury to the person of
18 an individual to whom the warranty, remedial promise or obligation extends.

19 **Preliminary Comment**

20 **Changes:** This section retains former Article 2's alternative approaches but
21 expands each alternative to cover obligations arising under Sections 2-313A and
22 2-313B and remedial promises.

23 **Comments:**

1 1. The last sentence of each alternative to subsection (b) does not mean that
2 a seller is precluded from excluding or disclaiming a warranty which might
3 otherwise arise in connection with the sale provided such exclusion or modification
4 is permitted by Section 2-316. Nor does that sentence preclude the seller from
5 limiting the remedies of the immediate buyer or remote purchaser in any manner
6 provided in Section 2-718 or 2-719. To the extent that the contract of sale contains
7 provisions under which warranties are excluded or modified, or remedies for breach
8 are limited, such provisions are equally operative against beneficiaries of warranties
9 under this section. What this last sentence forbids is exclusion of liability by the
10 seller to the persons to whom the warranties, obligations and remedial promises
11 accruing to the immediate buyer or remote purchaser would extend under this
12 section.

13 The last sentence of Alternative C permits a seller to reduce its obligations to
14 third-party beneficiaries to a level commensurate with that imposed on the seller
15 under Alternative B – that is, to eliminate liability to persons that are not individuals
16 and to eliminate liability for damages other than personal injury.

17 2. As used in this section, the term “remote purchaser” refers to the party to
18 whom an obligation initially runs under Section 2-313A or 2-313B. It does not refer
19 to any subsequent purchaser of the goods.

20 3. As applied to warranties and remedial promises arising under Sections
21 2-313, 2-314, and 2-315, the purpose of this section is to give certain beneficiaries
22 the benefit of the warranties and remedial promises which the immediate buyer
23 received in the contract of sale, thereby freeing any such beneficiaries from any
24 technical rules as to “privity.” It seeks to accomplish this purpose without any
25 derogation of any right or remedy arising under the law of torts. Implicit in the
26 section is that any beneficiary of a warranty may bring a direct action for breach of
27 warranty against the seller whose warranty extends to him.

28 Obligations and remedial promises under Sections 2-313A and 2-313B arise
29 initially in a nonprivity context but are extended under this section to the same
30 extent as warranties and remedial promises running to a buyer in privity.

31 3. The first alternative expressly includes as beneficiaries within its
32 provisions the family, household and guests of the immediate buyer or remote
33 purchaser. Beyond this, the section in this form is neutral and is not intended to
34 enlarge or restrict the developing case law on whether the seller's warranties, given
35 to an immediate buyer who resells, extend to other persons in the distributive chain.

36 The second alternative is designed for States where the case law has already
37 developed further and for those that desire to expand the class of beneficiaries. The

1 third alternative goes further, following the trend of modern decisions as indicated
2 by Restatement of Torts 2d § 402A.

3 **SECTIONS 2-319 THROUGH 2-324. RESERVED**

4 **SECTION 2-325. FAILURE TO PAY BY AGREED LETTER OF**

5 **CREDIT.** If the parties agree that the primary method of payment will be by letter
6 of credit, the following rules apply:

7 (1) The buyer's obligation to pay is suspended by seasonable delivery to the
8 seller of a letter of credit issued or confirmed by a financing agency of good repute
9 in which the issuer and any confirmer undertake to pay against presentation of
10 documents evidencing delivery.

11 (2) Failure of a party seasonably to furnish a letter of credit as agreed is a
12 breach of the contract for sale.

13 (3) If the letter of credit is dishonored or repudiated, the seller on
14 seasonable notification may require payment directly from the buyer.

15 **Reporter's Notes**

16 This section has been modified to conform to revised Article 5.

17 **SECTION 2-326. SALE ON APPROVAL AND SALE OR RETURN.**

18 (a) Unless otherwise agreed, if delivered goods may be returned by the
19 buyer even though they conform to the contract, the transaction is:

20 (1) a "sale on approval" if the goods are delivered primarily for use; or

21 (2) a "sale or return" if the goods are delivered primarily for resale.

1 (b) Goods held on approval are not subject to the claims of the buyer's
2 creditors until acceptance; goods held on sale or return are subject to such claims
3 while in the buyer's possession.

4 (c) Any "or return" term of a contract for sale is to be treated as a separate
5 contract for sale under Section 2-201 and as contradicting the sale aspect of the
6 contract under Section 2-202).

7 **Reporter's Notes**

8 This section has been modified to conform to revised Article 9.

9 **SECTION 2-327. SPECIAL INCIDENTS OF SALE ON APPROVAL**
10 **AND SALE OR RETURN.**

11 (a) Under a sale on approval unless otherwise agreed:

12 (1) although the goods are identified to the contract the risk of loss and
13 the title do not pass to the buyer until acceptance;

14 (2) use of the goods consistent with the purpose of trial is not acceptance
15 but failure seasonably to notify the seller of election to return the goods is
16 acceptance, and if the goods conform to the contract acceptance of any part is
17 acceptance of the whole; and

18 (3) after due notification of election to return, the return is at the seller's
19 risk and expense but a merchant buyer must follow any reasonable instructions.

20 (b) Under a sale or return unless otherwise agreed:

(1) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(2) the return is at the buyer's risk and expense.

Reporter's Notes

This section reflects current law.

SECTION 2-328. SALE BY AUCTION.

(a) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(b) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made during the process of completing the sale but before a previous bid is accepted, the auctioneer has discretion to reopen the bidding or to declare the goods sold under the previous bid.

(c) A sale by auction is subject to the seller's right to withdraw the goods unless at the time the goods are put up or during the course of the auction it is announced in express terms that the right to withdraw the goods is not reserved. In an auction in which the right to withdraw the goods is reserved, the auctioneer may withdraw the goods at any time until completion of the sale is announced by the auctioneer. In an auction in which the right to withdraw the goods is not reserved, after the auctioneer calls for bids on an article or lot, the article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder

may retract a bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(d) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at its option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at an auction required by law.

Reporter's Notes

This section is an amalgamation of current Article 2 and the July 1999 Draft. Stylistically, current Article 2 is followed whenever possible. Retained from the revision draft are “process of completing the sale” rather than “hammer falling” (subsection (b)), “right to withdraw the goods” rather than “with reserve” (subsection (c)), and “sale required by law” rather than “forced sale” (subsection (d)).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

PART 4
TITLE, CREDITORS AND GOOD FAITH PURCHASERS

SECTION 2-401. PASSING OF TITLE; RESERVATION FOR SECURITY; LIMITED APPLICATION OF THIS SECTION. Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract, and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by [the Uniform Commercial Code]. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to this paragraph and to Article 9, title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes performance with reference to the delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading:

(A) if the contract requires or authorizes the seller to send the goods to the buyer but does not require the seller to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(B) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods:

(A) if the seller is to deliver a document of title, title passes at the time when and the place where the seller delivers such documents; or

(B) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a sale.

Reporter's Notes

This section reflects current law except that “physical delivery” has been changed to “delivery” in Paragraph 2 because “delivery” is now defined in Section 2-102(a)(15) as “the voluntary transfer of physical possession or control of goods.”

**SECTION 2-402. RIGHTS OF SELLER'S CREDITORS AGAINST
SOLD GOODS.**

(a) Except as provided in subsections (b) and (c), rights of unsecured creditors of the seller with respect to goods that have been identified to a contract

1 for sale are subject to the buyer's rights to recover the goods under Sections 2-502
2 and 2-716.

3 (b) A creditor of the seller may treat a sale or an identification of goods to a
4 contract for sale as void if as against the creditor a retention of possession by the
5 seller is fraudulent under any rule of law of the State where the goods are situated,
6 except that retention of possession in good faith and current course of trade by a
7 merchant-seller for a commercially reasonable time after a sale or identification is
8 not fraudulent.

9 (c) Except as provided in Section 2-403(b), nothing in this Article shall be
10 deemed to impair the rights of creditors of the seller:

11 (1) under Article 9; or

12 (2) where identification to the contract or delivery is made not in current
13 course of trade but in satisfaction of or as security for a preexisting claim for money,
14 security or the like and is made under circumstances that under any rule of law of
15 the State where the goods are situated would apart from this article constitute the
16 transaction a fraudulent transfer or voidable preference.

17 **Reporter's Notes**

18 This section reflects current law except that the introductory phrase in
19 subsection (c) has been added because a change in Section 2-403(b) (required for
20 conformity with revised Article 9) can impair the rights of a secured party.

1 **SECTION 2-403. POWER TO TRANSFER; GOOD FAITH PURCHASE**
2 **OF GOODS; ENTRUSTING.**

3 (a) A purchaser of goods acquires all title that the purchaser's transferor
4 had or had power to transfer except that a purchaser of a limited interest acquires
5 rights only to the extent of the interest purchased. A person with voidable title has
6 power to transfer a good title to a good-faith purchaser for value. When goods
7 have been delivered under a transaction of purchase the purchaser has such power
8 even though:

- 9 (1) the transferor was deceived as to the identity of the purchaser;
10 (2) the delivery was in exchange for a check which is later dishonored;
11 (3) it was agreed that the transaction was to be a "cash sale"; or
12 (4) the delivery was procured through criminal fraud.

13 (b) Any entrusting of goods to a merchant that deals in goods of that kind
14 gives the merchant power to transfer all of the entruster's rights to the goods and to
15 transfer the goods free of any interest of the entruster to a buyer in ordinary course
16 of business.

17 (c) "Entrusting" includes any delivery and any acquiescence in retention of
18 possession regardless of any condition expressed between the parties to the delivery
19 or acquiescence and regardless of whether the procurement of the entrusting or the
20 possessor's disposition of the goods have been such as to be punishable under the
21 criminal law.

1 (d) The rights of other purchasers of goods and of lien creditors are
2 governed by Article 9 [,Article 6 [if the State has not repealed Article 6],] and
3 Article 7.

4 **Reporter's Notes**

5 References to "larceny," a somewhat dated term, have been replaced in
6 subsections (a) and (c) by more general language referring to "criminal fraud"
7 (subsection (a)) and conduct "punishable under the criminal law" (subsection (c)).

8 Subsection (b) has been modified to conform with revised Article 9.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

PART 5
PERFORMANCE

SECTION 2-501. INSURABLE INTEREST IN GOODS; MANNER OF IDENTIFICATION OF GOODS.

(a) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and the buyer has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs:

(1) when the contract is made if it is for the sale of goods already existing and identified;

(2) if the contract is for the sale of future goods other than those described in paragraph (3), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers; and

(3) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within 12 months after contracting or for the sale of crops to be harvested within 12 months or the next normal harvest season after contracting whichever is longer.

(b) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in the seller and where the identification is by

1 the seller alone the seller may until default or insolvency or notification to the buyer
2 that the identification is final substitute other goods for those identified.

3 (c) This section does not impair any insurable interest recognized under any
4 other statute or rule of law.

5 **Reporter's Notes**

6 This section reflects current law.

7 **SECTION 2-502. BUYER'S RIGHT TO GOODS ON SELLER'S**
8 **REPUDIATION, FAILURE TO DELIVER OR INSOLVENCY.**

9 (a) Subject to subsections (b) and (c) and even though the goods have not
10 been shipped a buyer that has paid a part or all of the price of goods in which the
11 buyer has a special property under Section 2-501 may on making and keeping good
12 a tender of any unpaid portion of their price recover them from the seller if:

13 (1) in the case of goods bought for personal, family, or household
14 purposes, the seller repudiates or fails to deliver as required by the contract; or

15 (2) in all cases, the seller becomes insolvent within 10 days after receipt
16 of the first installment on their price.

17 (b) The buyer's right to recover the goods under subsection (a) vests upon
18 acquisition of a special property, even if the seller had not then repudiated or failed
19 to deliver.

20 (c) If the identification creating the special property has been made by the
21 buyer, the buyer acquires the right to recover the goods only if they conform to the
22 contract for sale.

1 **Reporter's Notes**

2 This section is derived from a conforming amendment to Article 2 that was
3 promulgated as part of the Article 9 revision process. The vesting rule in subsection
4 (b) is broader than the conforming amendment, which made it applicable only to
5 subsection (a)(1). The same vesting rule also appears in Section 2-716(d).

6 Because Section 2-402 is limited to the rights of unsecured creditors, a
7 Comment along the following lines may be helpful: "This rule assumes application of
8 a 'first in time' priority rule. In other words, if the buyer's rights vest under this rule
9 before a creditor acquires an in rem right to the goods, including an Article 9
10 security interest and a lien created by levy, the buyer should prevail." This
11 Comment appears in the Preliminary Comments to Section 2-716.

12 **SECTION 2-503. MANNER OF SELLER'S TENDER OF DELIVERY.**

13 (a) Tender of delivery requires that the seller put and hold conforming
14 goods at the buyer's disposition and give the buyer any notification reasonably
15 necessary to enable the buyer to take delivery. The manner, time and place for
16 tender are determined by the agreement and this article, and in particular:

17 (1) tender must be at a reasonable hour, and if it is of goods they must be
18 kept available for the period reasonably necessary to enable the buyer to take
19 possession; but

20 (2) unless otherwise agreed the buyer must furnish facilities reasonably
21 suited to the receipt of the goods.

22 (b) Where Section 2-504 applies tender requires that the seller comply with
23 its provisions.

24 (c) Where the seller is required to deliver at a particular destination tender
25 requires that the seller comply with subsection (a) and also in any appropriate case
26 tender documents as described in subsections (d) and (e).

(d) Where goods are in the possession of a bailee and are to be delivered without being moved:

(1) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee to the buyer of the buyer's right to possession of the goods; but

(2) tender to the buyer of a nonnegotiable document of title or of a record directing the bailee to deliver is sufficient tender unless the buyer seasonably objects, and except as otherwise provided in Article 9 receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(e) Where the contract requires the seller to deliver documents:

(1) the seller must tender all such documents in correct form; and

(2) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection.

Reporter's Notes

Subsection (d)(1) clarifies that the bailee’s acknowledgment must be made to the buyer. *See Jason’s Foods, Inc. v. Peter Eckrick & Sons, Inc.*, 774 F.2d 214 (7th Cir. 1985). There is a similar amendment to Section 2-509(b)(2).

1 In subsection (d)(2), “of a written direction to the bailee” is changed to “a
2 record directing the bailee” and “except as otherwise provided in Article 9” has been
3 added to conform to revised Article 9.

4 The current version of what is now designated as subsection (e)(2) has the
5 language “except as provided in this Article with respect to bills of lading in a set
6 (subsection (2) of Section 2-323). This has been deleted because of the deletion of
7 Section 2-323. However, a Comment will refer to bills in a set and indicate that if
8 they are used they must be in “correct form” (emphasizing the language of
9 subsection (e)(1)).

10 **SECTION 2-504. SHIPMENT BY SELLER.** Where the seller is required or
11 authorized to send the goods to the buyer and the contract does not require the
12 seller to deliver them at a particular destination, then unless otherwise agreed the
13 seller must:

14 (1) put conforming goods in the possession of such a carrier and make such
15 a contract for their transportation as may be reasonable having regard to the nature
16 of the goods and other circumstances of the case;

17 (2) obtain and promptly deliver or tender in due form any document
18 necessary to enable the buyer to obtain possession of the goods or otherwise
19 required by the agreement or by usage of trade; and

20 (3) promptly notify the buyer of the shipment.

21 Failure to notify the buyer under paragraph (3) or to make a proper contract under
22 paragraph (1) is a ground for rejection only if material delay or loss ensues.

23 **Reporter’s Notes**

24 This section reflects current law except for the addition of “conforming” in
25 paragraph (1), which clarifies the application of the perfect tender rule in the context
26 of a seller’s obligations under a shipment contract.

SECTION 2-505. SELLER'S SHIPMENT UNDER RESERVATION.

(a) Where the seller has identified goods to the contract by or before shipment:

(1) the seller's procurement of a negotiable bill of lading to the seller's own order or otherwise reserves in the seller a security interest in the goods. The seller's procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(2) a nonnegotiable bill of lading to the seller or the seller's nominee reserves possession of the goods as security but except in a case where a seller has a right to reclaim the goods under Section 2-507(b) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(b) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within Section 2-505 but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

Reporter's Notes

The change in subsection (a)(2) corresponds with a change in Section 2-507, which no longer uses the language of conditional delivery but instead grants a right of reclamation.

1 demand made within a reasonable time after the seller discovers or should have
2 discovered that payment was not made.

3 (c) The seller's right to reclaim under subsection (b) is subject to the rights
4 of a buyer in ordinary course or other good-faith purchaser for value.

5 **Reporter's Notes**

6 Subsection (a) reflects current law. A Comment might state: "If the seller
7 has agreed to assemble or install the tendered goods, completion of that
8 performance is also a condition to the buyer's duty to accept and pay for the
9 goods."

10 Subsection (b) has been changed to state more directly the seller's right of
11 reclamation from a nonpaying buyer in a cash-sale transaction. The subsection now
12 parallels Section 2-702(b), which conforms to the original intent.

13 A Comment will clarify that "due and demanded" in subsection (b) refers to
14 the situation where the seller takes a check. The Comment will also explain the
15 relationship between subsection (b) and Section 2-403.

16 **SECTION 2-508. CURE BY SELLER OF IMPROPER TENDER OR**
17 **DELIVERY; REPLACEMENT.**

18 (a) Where the buyer rejects goods or a tender of delivery under Section
19 2-601 or 2-612 or except in a consumer contract justifiably revokes acceptance
20 under Section 2-608(a)(2) and the agreed time for performance has not expired, a
21 seller that has performed in good faith, upon reasonable notice to the buyer and at
22 the seller's own expense, may cure the breach of contract by making a conforming
23 tender of delivery within the agreed time. The seller shall compensate the buyer for
24 all of the buyer's reasonable expenses caused by the seller's breach of contract and
25 subsequent cure.

(b) Where the buyer rejects goods or a tender of delivery under Section 2-601 or 2-612 or except in a consumer contract justifiably revokes acceptance under Section 2-608(a)(2) and the agreed time for performance has expired, a seller that has performed in good faith, upon seasonable notice to the buyer and at the seller's own expense, may cure the breach of contract, if the cure is appropriate and timely under the circumstances, by making a tender of conforming goods. The seller shall compensate the buyer for all of the buyer's reasonable expenses caused by the seller's breach of contract and subsequent cure.

Preliminary Comment

Changes: This section contains many changes from original Section 2-508:

(1) In some instances the seller in a nonconsumer contract has a right to cure following the buyer's revocation of acceptance. The revocation, however, must be because of nondiscovery of the nonconformity under Section 2-608(a)(2) and not because of a failure to cure under Section 2-608(a)(1). The section makes clear that in a consumer contract there is no right to cure following revocation of acceptance.

(2) If the time for contract performance has expired, the requirement under original Section 2-508(2) that the seller have reasonable grounds to believe that the nonconforming tender would be acceptable has been deleted. In its place are two requirements: 1) the original tender must have been made in good faith; and 2) the cure must be "appropriate and timely under the circumstances".

(3) The section makes explicit that the cure is at the seller's expense and must either be a conforming tender of delivery (subsection (a)) or a tender of conforming goods (subsection (b)). The seller cannot make a conforming tender of delivery in a situation addressed by subsection (b) because the time for performance will have expired.

(4) Both subsections now provide that the seller has an obligation to compensate the buyer for the buyer's reasonable expenses. This obligation is not part of the action required to have an effective cure under this section but rather imposed on the seller in order to compensate the buyer for the expenses the seller's breach and cure may have caused.

1 (5) Both subsections contain a cross-reference to the provision on
2 installment contracts (Section 2-612), which has been amended to make clear its
3 relationship with this section.

4 **Comments:**

5 1. Subsection (a) permits a seller that has made a nonconforming tender in
6 any case to make a conforming tender within the contract time upon seasonable
7 notification to the buyer. It presumes that the buyer has rightfully rejected or
8 justifiably revoked acceptance under Section 2-608(a)(2) through timely notification
9 to the seller and has complied with any particularization requirements imposed by
10 Section 2-605(a). The subsection applies even where the seller has taken back the
11 nonconforming goods and refunded the purchase price. The seller may still make a
12 good tender within the contract period. The closer, however, it is to the contract
13 date, the greater is the necessity for extreme promptness on the seller's part in
14 notifying of the intention to cure, if such notification is to be "seasonable" under this
15 subsection.

16 The rule of this subsection, moreover, is qualified by its underlying reasons.
17 Thus if, after contracting for June delivery, a buyer later makes known to the seller a
18 need for shipment early in the month and the seller ships accordingly, the "contract
19 time" has been cut down by the supervening modification and the time for cure of
20 tender must be referred to this modified time term.

21 2. Cure after a justifiable revocation of acceptance is not available as a
22 matter of right in a consumer contract. Further, even in a nonconsumer contract no
23 cure is available if the revocation is predicated on Section 2-608(a)(1). If the buyer
24 is rejecting because of a known defect that the seller has not been willing or able to
25 cure, there is no justification for giving the seller a second chance to cure.

26 3. Subsection (b) expands the seller's right to cure after the time for
27 performance has expired. As under subsection (a), the buyer's rightful rejection or
28 in a nonconsumer contract justifiable revocation of acceptance under Section
29 2-608(a)(2) trigger the seller's right to cure. Original Section 2-508(2) was directed
30 toward preventing surprise rejections by requiring the seller to have "reasonable
31 grounds to believe" the nonconforming tender was acceptable. Although this test
32 has been abandoned, the requirement that the initial tender be made in good faith
33 prevents a seller from deliberately tendering goods that it knows the buyer cannot
34 use in order to save its contract and then, upon rejection, insisting on a second bite
35 at the apple. The good faith standard applies under both subsection (a) and
36 subsection (b).

1 4. The seller's cure under both subsection (a) and subsection (b) must be of
2 conforming goods. Conforming goods includes not only conformity to the
3 contracted-for quality but also as to quantity or assortment or other similar
4 obligations under the contract. Since the time for performance has expired in a case
5 governed by subsection (b), however, the seller's tender of conforming goods
6 required to effect a cure under this section could not conform to the contracted time
7 for performance. Thus, subsection (a) requires that cure be tendered "within the
8 agreed time" while subsection (b) requires that the tender be "appropriate and timely
9 under the circumstances."

10 The requirement that the cure be "appropriate and timely under the
11 circumstances" provides important protection for the buyer. If the buyer is
12 acquiring inventory on a just-in-time basis and needs to procure substitute goods
13 from another supplier in order to keep the buyer's process moving, the cure would
14 not be timely. If the seller knows from the circumstances that strict compliance with
15 the contract obligations is expected, the seller's cure would not be appropriate. If
16 the seller attempts to cure by repair, the cure would not be appropriate if it resulted
17 in goods that did not conform in every respect to the requirements of the contract.
18 The standard for quality on the second tender is still governed by Section 2-601.
19 Whether a cure is appropriate and timely should be tested based upon the
20 circumstances and needs of the buyer. Seasonable notice to the buyer and timely
21 cure incorporate the idea that the notice and offered cure would be untimely if the
22 buyer has reasonably changed its position in good faith reliance on the
23 nonconforming tender.

24 5. Cure is at the seller's expense, and the seller is obligated to compensate
25 the buyer for all the buyer's reasonable expenses caused by the breach and the cure.
26 The term "reasonable expenses" is not limited to expenses that would qualify as
27 incidental damages.

28 **SECTION 2-509. RISK OF LOSS IN THE ABSENCE OF BREACH.**

29 (a) Where the contract requires or authorizes the seller to ship the goods by
30 carrier:

31 (1) if the contract does not require the seller to deliver them at a
32 particular destination, the risk of loss passes to the buyer when the goods are

1 delivered to the carrier even though the shipment is under reservation as provided in
2 Section 2-505; but

3 (2) if the contract does require the seller to deliver them at a particular
4 destination and the goods are there tendered while in the possession of the carrier,
5 the risk of loss passes to the buyer when the goods are there so tendered as to
6 enable the buyer to take delivery.

7 (b) Where the goods are held by a bailee to be delivered without being
8 moved, the risk of loss passes to the buyer:

9 (1) on the buyer's receipt of a negotiable document of title covering the
10 goods;

11 (2) on acknowledgment by the bailee to the buyer of the buyer's right to
12 possession of the goods; or

13 (3) after the buyer's receipt of a nonnegotiable document of title or other
14 written direction to deliver, as provided in Section 2-503(d)(2).

15 (c) In any case not within subsection (a) or (b), the risk of loss passes to the
16 buyer on the buyer's receipt of the goods.

17 (d) This section is subject to contrary agreement of the parties and to
18 Sections 2-327 and 2-510.

19 **Reporter's Notes**

20 This section reflects current law except that subsection (b)(2) clarifies that
21 the bailee's acknowledgment must be to the buyer (see similar change in Section
22 2-503(d)(1)), and "duly" has been deleted from subsection (a)(1) and (2).

23 **SECTION 2-510. EFFECT OF BREACH ON RISK OF LOSS.**

(a) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(b) Where the buyer rightfully revokes acceptance the buyer may to the extent of any deficiency in its effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(c) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to the buyer, the seller may to the extent of any deficiency in its effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

Reporter's Notes

This section reflects current law.

SECTION 2-511. TENDER OF PAYMENT BY BUYER; PAYMENT BY CHECK.

(a) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(b) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(c) Subject to Section 3-310, payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

1
2

3
4
5
6
7
8
9
10
11
12

13
14
15
16
17
18
19
20

Reporter’s Notes

This section reflects current law.

SECTION 2-512. PAYMENT BY BUYER BEFORE INSPECTION.

(a) Where the contract requires payment before inspection nonconformity of the goods does not excuse the buyer from so making payment unless

(1) the nonconformity appears without inspection; or

(2) despite tender of the required documents the circumstances would justify injunction against honor under Section 5-109(b).

(b) Payment pursuant to subsection (a) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of the buyer’s remedies.

Reporter’s Notes

This section reflects current law.

SECTION 2-513. BUYER'S RIGHT TO INSPECTION OF GOODS.

(a) Unless otherwise agreed and subject to subsection (c), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(b) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

1 (c) Unless otherwise agreed the buyer is not entitled to inspect the goods
2 before payment of the price when the contract provides

3 (1) for delivery on terms that under applicable course of performance,
4 course of dealing, or usage of trade are interpreted to preclude inspection before
5 payment; or

6 (2) for payment against documents of title, except where such payment is
7 due only after the goods are to become available for inspection.

8 (d) A place, method or standard of inspection fixed by the parties is
9 presumed to be exclusive but unless otherwise expressly agreed it does not postpone
10 identification or shift the place for delivery or for passing the risk of loss. If
11 compliance becomes impossible, inspection shall be as provided in this section unless
12 the place, method or standard fixed was clearly intended as an indispensable
13 condition failure of which avoids the contract.

14 **Reporter's Notes**

15 Subsection (d) now provides that, in addition to the place and method of
16 inspection, the parties may provide for the standard of inspection. This addition
17 reflects the large number of cases where there is a dispute about the standard of
18 inspection anticipated by the parties. The second sentence of subsection (d) is
19 unchanged from current law. The Comments will note that the word "compliance"
20 in that sentence includes compliance with an agreed standard of inspection.

21 Subsection (c)(1) has been modified in light of the deletion of the sections on
22 shipping terms (Sections 2-319 to 2-324).

23 **SECTION 2-514. WHEN DOCUMENTS DELIVERABLE ON**
24 **ACCEPTANCE; WHEN ON PAYMENT.** Unless otherwise agreed and except
25 as provided by Article 5, documents against which a draft is drawn are to be

1 delivered to the drawee on acceptance of the draft if it is payable more than three
2 days after presentment; otherwise, only on payment.

3 **Reporter's Notes**

4 The phrase "except as provide by Article 5" is new. This section is designed
5 to track Section 4-503, which states that it is subject to Article 5. The specific
6 question is what constitutes a time draft as opposed to a sight draft. Under Article
7 5, because an issuer may have up to seven days to determine compliance of
8 documents (Section 5-108), the delay beyond three days may not necessarily
9 indicate that the draft should be treated as a time draft.

10 **SECTION 2-515. PRESERVING EVIDENCE OF GOODS IN DISPUTE.**

11 In furtherance of the adjustment of any claim or dispute:

12 (1) either party on reasonable notification to the other and for the purpose of
13 ascertaining the facts and preserving evidence has the right to inspect, test and
14 sample the goods including such of them as may be in the possession or control of
15 the other; and

16 (2) the parties may agree to a third-party inspection or survey to determine
17 the conformity or condition of the goods and may agree that the findings shall be
18 binding upon them in any subsequent litigation or adjustment.

19 **Reporter's Notes**

20 This section reflects current law.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

PART 6
BREACH, REPUDIATION AND EXCUSE

SECTION 2-601. BUYER'S RIGHTS ON IMPROPER DELIVERY.

Subject to Sections 2-504 and 2-612 and unless otherwise agreed under Sections 2-718 and 2-719, if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

- (1) reject the whole;
- (2) accept the whole; or
- (3) accept any commercial unit or units and reject the rest.

Reporter's Notes

This section reflects current law. The cross-reference to Section 2-504 has been added because that section, like Section 2-612, contains a limitation on the perfect tender rule.

SECTION 2-602. MANNER AND EFFECT OF REJECTION.

- (a) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
- (b) Subject to Sections 2-603, 2-604, and 2-608(d):
 - (1) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller;
 - (2) if the buyer has before rejection taken physical possession of goods in which the buyer does not have a security interest under Section 2-711(c), the buyer

1 is under a duty after rejection to hold them with reasonable care at the seller's
2 disposition for a time sufficient to permit the seller to remove them; but

3 (3) the buyer has no further obligations with regard to goods rightfully
4 rejected.

5 (c) The seller's rights with respect to goods wrongfully rejected are
6 governed by the provisions of this article on seller's remedies in general.

7 **Reporter's Notes**

8 This section reflects current law except for the cross-reference to Section
9 2-608(d), which contains the rule governing reasonable post-rejection and post-
10 revocation use. The title has been changed to eliminate the word "rightful" before
11 "rejection" since the section deals with both rightful rejections and rejections that
12 are wrongful but effective.

13 **SECTION 2-603. MERCHANT BUYER'S DUTIES AS TO REJECTED** 14 **GOODS.**

15 (a) Subject to any security interest in the buyer under Section 2-711(c),
16 when the seller has no agent or place of business at the market of rejection a
17 merchant buyer is under a duty after rejection of goods in its possession or control
18 to follow any reasonable instructions received from the seller with respect to the
19 goods and in the absence of such instructions to make reasonable efforts to sell them
20 for the seller's account if they are perishable or threaten to decline in value speedily.
21 In the case of a rightful rejection instructions are not reasonable if on demand
22 indemnity for expenses is not forthcoming.

23 (b) When the buyer sells goods under subsection (a) following a rightful
24 rejection, the buyer is entitled to reimbursement from the seller or out of the

1 proceeds for reasonable expenses of caring for and selling them, and if the expenses
2 include no selling commission then to such commission as is usual in the trade or if
3 there is none to a reasonable sum not exceeding 10 percent on the gross proceeds.

4 (c) In complying with this section the buyer is held only to good faith and
5 good-faith conduct hereunder is neither acceptance nor conversion nor the basis of
6 an action for damages.

7 **Reporter's Notes**

8 "Rightful" has been eliminated from the title (see Reporter's Notes to
9 Section 2-602) and the text has been modified to make it clear that a buyer is not
10 entitled to indemnity for expenses (subsection (a)) or to a commission (subsection
11 (b)) following a wrongful rejection.

12 Rather than incorporate references to revocation of acceptance in this
13 section, this draft continues the practice of tying the revoking buyer's rights to those
14 of the rejecting buyer. Note that Section 2-608(c) contains an expanded cross-
15 reference that includes Sections 2-603 and 2-604.

16 **SECTION 2-604. BUYER'S OPTIONS AS TO SALVAGE OF**

17 **REJECTED GOODS.** Subject to Section 2-603, the buyer may store the rejected
18 goods for the seller's account or reship them to the seller or resell them for the
19 seller's account with reimbursement as provided in Section 2-603. Such action is
20 not acceptance or conversion.

21 **Reporter's Notes**

22 The format (but not the effect) of the introductory clause has been changed
23 to emphasize that this section is available to all buyers, including nonmerchants.

24 **SECTION 2-605. WAIVER OF BUYER'S OBJECTIONS BY FAILURE**
25 **TO PARTICULARIZE.**

1 (a) The buyer's failure to state in connection with rejection a particular
2 defect or in connection with revocation of acceptance a defect that justifies
3 revocation precludes the buyer from relying on the unstated defect to justify
4 rejection or revocation of acceptance if the defect is ascertainable by reasonable
5 inspection:

6 (1) where the seller had a right to cure the defect and could have cured it
7 if stated seasonably; or

8 (2) between merchants when the seller has after rejection or revocation
9 of acceptance made a request in a record for a full and final written statement of all
10 defects on which the buyer proposes to rely.

11 (b) A buyer's payment against documents tendered to the buyer made
12 without reservation of rights precludes recovery of the payment for defects apparent
13 on the face of the documents.

14 Preliminary Comment

15 **Changes:** Subsection (a) is revised so that a failure to particularize waives
16 only the right to rely on the unstated defect to justify the remedies of rejection and
17 revocation of acceptance, not other remedies. The scope of subsection (a) is
18 expanded to include revocation of acceptance as well as rejection. Subsection (a)(1)
19 is revised to make clear that the seller must have had both the right and the ability to
20 cure. Subsection (b) has been revised to make clear that a buyer that makes
21 payment upon presentation of the documents to the buyer may waive defects, but a
22 person that is not the buyer (*e.g.*, a letter-of-credit issuer) does not waive the
23 buyer's right to assert defects in the documents as against the seller.

24 Comments:

25 1. This section rests upon a policy of permitting the buyer to give a quick
26 and informal notice of defects in a tender without penalizing the buyer for omissions,
27 while at the same time protecting a seller that is reasonably misled by the buyer's
28 failure to state curable defects. Where the defect in a tender is one which could

1 have been cured by the seller, a buyer that merely rejects the delivery without stating
2 any objections to the tender is probably acting in commercial bad faith and seeking
3 to get out of a deal which has become unprofitable. Following the general policy of
4 this Article to preserve the deal wherever possible, subsection (a)(1) requires that
5 the seller's right to correct the tender in such circumstances be protected.

6 Subsection (a) as revised makes three substantive changes. First, failure to
7 particularize affects only the buyer's right to reject or revoke acceptance, not the
8 buyer's right to establish breach. Waiver of a right to damages for breach because
9 of a failure properly to notify the seller is governed by Section 2-607(c).

10 Second, subsection (a) now requires the seller to have had a right to cure
11 under Section 2-508 in addition to having the ability to cure. This point was
12 perhaps implicit in the prior provision, but it is now expressly stated to avoid any
13 question of whether this section creates a seller's right to cure independent of the
14 right enumerated in Section 2-508. Thus if the defect is one that could be cured
15 under Section 2-508, the buyer will have waived that defect as a basis for rejecting
16 the goods, or possibly revoking acceptance, if the buyer fails to state the defect with
17 sufficient particularity to facilitate the seller's exercise of its right to cure as
18 provided in Section 2-508.

19 Subsection (a) as revised has been extended to include not only rejection but
20 also revocation of acceptance. This is necessitated by the expansion of the right to
21 cure (Section 2-508) to cover revocation of acceptance in nonconsumer contracts.
22 The application of the subsection to revocation cases is limited in the following
23 ways: (1) because a revocation under Section 2-608(a)(1) does not trigger a right to
24 cure under Section 2-508, such a revocation does not trigger subsection (a); (2)
25 because Section 2-608(a)(2) involves defects that are by definition difficult to
26 discover, there is no waiver under subsection (a) unless the defect at issue justifies
27 the revocation and the buyer has notice of it; and (3) because the right to cure
28 following revocation of acceptance is restricted under Section 2-508 to
29 nonconsumer contracts, this section cannot be asserted against a consumer who is
30 seeking to revoke acceptance. The consequences of a consumer's failure to give
31 proper notice are governed by Section 2-607(c).

32 2. When the time for cure is past, subsection (a)(2) makes plain that a
33 merchant seller is entitled upon request to a final statement of objections by a
34 merchant buyer upon which the seller can rely. What is needed is a clear statement
35 to the buyer of exactly what is being sought. A formal demand will be sufficient in
36 the case of a merchant-buyer.

37 3. Subsection (b) has been revised to make clear that the buyer that makes
38 payment upon presentation of the documents to the buyer may waive defects, but

1 that a person that is not the buyer, such as the issuer of a letter of credit, that pays as
2 against documents is not waiving the buyer's right to assert defects in the
3 documents as against the seller.

4 Subsection (b) applies to documents the same principle contained in Section
5 2-606(a)(1) for the acceptance of goods; that is, if the buyer accepts documents that
6 have apparent defects, the buyer is presumed to have waived the defects as a basis
7 for rejecting the documents. Subsection (b) is limited to defects which are apparent
8 on the face of the documents. When payment is required against documents, the
9 documents must be inspected before the payment, and the payment constitutes
10 acceptance of the documents. When the documents are delivered without requiring
11 a contemporary payment by the buyer, the acceptance of the documents by
12 nonobjection is postponed until after a reasonable time for the buyer to inspect the
13 documents. In either situation, however, the buyer "waives" only what is apparent
14 on the face of the documents. Moreover, in either case, the acceptance of the
15 documents does not constitute an acceptance of the goods and does not impair any
16 options or remedies of the buyer for improper delivery of the goods. *See* Section
17 2-512(b).

18 **SECTION 2-606. WHAT CONSTITUTES ACCEPTANCE OF GOODS.**

19 (a) Acceptance of goods occurs when the buyer:

20 (1) after a reasonable opportunity to inspect the goods signifies to the
21 seller that the goods are conforming or will be taken or retained in spite of their
22 nonconformity;

23 (2) fails to make an effective rejection, but such acceptance does not
24 occur until the buyer has had a reasonable opportunity to inspect them; or

25 (3) except as otherwise provided in Section 2-608(d), does any act
26 inconsistent with the seller's ownership; but if such act is ratified by the seller it is an
27 acceptance.

28 (b) Acceptance of a part of any commercial unit is acceptance of that entire
29 unit.

1
2
3

4
5
6

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

Reporter’s Notes

The only substantive change is a cross-reference to Section 2-608(d), which deals with reasonable use following rejection or revocation of acceptance.

**SECTION 2-607. EFFECT OF ACCEPTANCE; NOTICE OF BREACH;
BURDEN OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE
OF CLAIM OR LITIGATION TO PERSON ANSWERABLE OVER.**

(a) The buyer must pay at the contract rate for any goods accepted.

(b) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this article for nonconformity.

(c) Where a tender has been accepted

(1) the buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller; however, failure to give timely notice bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure.

(2) if the claim is one for infringement or the like and the buyer is sued as a result of such a breach it must so notify the seller within a reasonable time after the buyer receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

1 (d) The burden is on the buyer to establish any breach with respect to the
2 goods accepted.

3 (e) Where the buyer is sued for indemnity, breach of a warranty or other
4 obligation for which another party is answerable over

5 (1) the buyer may give the other party notice of the litigation in a record.
6 If the notice states that the other party may come in and defend and that if the other
7 party does not do so it will be bound in any action against it by the buyer by any
8 determination of fact common to the two litigations, then unless the other party after
9 seasonable receipt of the notice does come in and defend it is so bound.

10 (2) if the claim is one for infringement or the like the original seller may
11 demand in a record that its buyer turn over to it control of the litigation including
12 settlement or else be barred from any remedy over and if it also agrees to bear all
13 expense and to satisfy any adverse judgment, then unless the buyer after seasonable
14 receipt of the demand does turn over control the buyer is so barred.

15 (f) Subsections (c), (d), and (e) apply to any obligation of a buyer to hold
16 the seller harmless against infringement or the like.

17 **Reporter's Notes**

18 There is a change in subsection (c)(1), where the effect of a failure to give
19 timely notice is reduced to a prejudice rule instead of an absolute bar to any
20 recovery as under the original provision. A Comment will specify that the buyer
21 must be in good faith in not giving notice, and that the buyer cannot come back after
22 the buyer's own default and claim that the seller was in breach.

23 The vouching-in procedure in subsection (e) has been expanded to include
24 indemnity actions and persons other than the seller that are answerable over.

1 **SECTION 2-608. REVOCATION OF ACCEPTANCE IN WHOLE OR**
2 **IN PART; USE OF GOODS FOLLOWING RIGHTFUL REJECTION OR**
3 **JUSTIFIABLE REVOCATION OF ACCEPTANCE.**

4 (a) The buyer may revoke acceptance of a lot or commercial unit whose
5 nonconformity substantially impairs its value to the buyer if the buyer has accepted it

6 (1) on the reasonable assumption that its nonconformity would be cured
7 and it has not been seasonably cured; or

8 (2) without discovery of such nonconformity if the buyer's acceptance
9 was reasonably induced either by the difficulty of discovery before acceptance or by
10 the seller's assurances.

11 (b) Revocation of acceptance must occur within a reasonable time after the
12 buyer discovers or should have discovered the ground for it and before any
13 substantial change in condition of the goods which is not caused by their own
14 defects. It is not effective until the buyer notifies the seller of it.

15 (c) A buyer that so revokes has the same rights and duties with regard to the
16 goods involved as if the buyer had rejected them.

17 (d) If a buyer uses the goods after a rightful rejection or justifiable
18 revocation of acceptance, the following rules apply:

19 (1) Any use by the buyer that is unreasonable under the circumstances is
20 wrongful as against the seller and is an acceptance only if ratified by the seller.

1 (2) Any use of the goods that is reasonable under the circumstances is
2 not wrongful as against the seller and is not an acceptance, but in an appropriate
3 case the buyer shall be obligated to the seller for the value of the use to the buyer.

4 **Preliminary Comment**

5 **Changes:** Subsection (d) is new. Otherwise the section remains unchanged
6 except that subsection (c) contains an expanded cross-reference to provisions that
7 by their explicit terms deal with rejection.

8 **Comments:**

9 1. Revocation of acceptance does not prevent the buyer from exercising
10 other remedies for the seller's breach of contract and is not a rescission or
11 cancellation of the contract, although an aggrieved buyer may also cancel a contract
12 as part of the buyer's available remedies for breach. As with rejection, revocation of
13 acceptance is by lot or commercial unit.

14 2. Revocation of acceptance is possible only where the nonconformity
15 substantially impairs the value of the goods to the buyer. For this purpose the test is
16 not what the seller had reason to know at the time of contracting; the question is
17 whether the nonconformity is such as will in fact cause a substantial impairment of
18 value to the buyer though the seller had no advance knowledge as to the buyer's
19 particular circumstances.

20 3. "Assurances" by the seller under subsection (a)(2) can rest as well in the
21 circumstances or in the contract as in explicit language used at the time of delivery.
22 The reason for recognizing such assurances is that they induce the buyer to delay
23 discovery. These are the only assurances involved in subsection (a)(2). Explicit
24 assurances may be made either in good faith or bad faith. In either case any remedy
25 accorded by this Article is available to the buyer under the Section 2-721 on
26 remedies for fraud.

27 4. Subsection (b) continues the rule that a buyer must notify a seller to make
28 an effective revocation and that a revocation must be within a reasonable time after
29 discovery. Since this remedy will be generally resorted to only after attempts at
30 adjustment have failed, the reasonable time period should extend in most cases
31 beyond the time for notification of breach, beyond the time for discovery of
32 nonconformity after acceptance, and beyond the time for rejection after tender. The
33 parties may provide in their agreement the time periods for revocation subject to
34 Section 1-204. Except as provided in Section 2-605(a), the contents of the notice
35 must be determined based upon considerations of good faith, prevention of surprise

1 and reasonable adjustment. More is required than mere notice of a breach under
2 Section 2-607. The requirements for notification should be applied less stringently
3 in the case of a nonmerchant buyer. Section 2-605(a) on waiver of the buyer's
4 objections operates only in the circumstance where the seller in a nonconsumer
5 contract has a right to cure under Section 2-508 after a revocation of acceptance
6 pursuant to subsection (a)(2).

7 5. Under subsection (b), the buyer's ability to revoke is limited to those
8 circumstances where the goods have not materially deteriorated unless that
9 deterioration is caused by the nonconformity of the goods. Worthless goods,
10 however, need not be offered back and minor defects in the goods should be
11 ignored.

12 6. Subsection (c) provides that the buyer that justifiably revokes acceptance
13 under this section must comply with Sections 2-602, 2-603, and 2-604 in regard to
14 the care of the goods after the revocation. A buyer that is not justified in its
15 revocation under subsection (a) or that does not act effectively under subsection (b)
16 to revoke acceptance has not undone the acceptance and thus may do what it wants
17 with the goods and is not subject to the provisions of those sections.

18 7. Subsection (d), which is new, deals with the problem of post-rejection or
19 revocation use of the goods. The courts have developed several alternative
20 approaches. Under original Article 2, a buyer's post-rejection or revocation use of
21 the goods could be treated as an acceptance, thus undoing the rejection or
22 revocation, could be a violation of the buyer's obligation of reasonable care, or
23 could be a reasonable use for which the buyer must compensate the seller.
24 Subsection (d) adopts the third approach. If the buyer's use after an effective
25 rejection or a justified revocation of acceptance is unreasonable under the
26 circumstances, it is inconsistent with the rejection or revocation of acceptance and is
27 wrongful as against the seller. This gives the seller the option of ratifying the use,
28 thereby treating it as an acceptance, or pursuing a non-Code remedy for conversion.

29 If the buyer's use is reasonable under the circumstances, the buyer's actions
30 cannot be treated as an acceptance. The buyer must compensate the seller for the
31 value of the use of the goods to the buyer. Determining the appropriate level of
32 compensation requires a consideration of the buyer's particular circumstances and
33 should take into account the defective condition of the goods. There may be
34 circumstances, such as where the use is solely for the purpose of protecting the
35 buyer's security interest in the goods, where no compensation is due the seller. In
36 other circumstances, the seller's right to compensation must be netted out against
37 any right of the buyer to damages.

SECTION 2-609. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.

(a) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in a record demand adequate assurance of due performance and until the party receives such assurance may if commercially reasonable suspend any performance for which it has not already received the agreed return.

(b) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(c) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(d) After receipt of a justified demand failure to provide within a reasonable time not exceeding 30 days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

Reporter's Notes

This section reflects current law.

SECTION 2-610. ANTICIPATORY REPUDIATION.

(a) When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

1 (1) for a commercially reasonable time await performance by the
2 repudiating party; or

3 (2) resort to any remedy for breach, even though the aggrieved party has
4 notified the repudiating party that it would await the latter's performance and has
5 urged retraction; and

6 (3) in either case suspend performance or proceed in accordance with the
7 provisions of this Article on the seller's right to identify goods to the contract
8 notwithstanding breach or to salvage unfinished goods (Section 2-704).

9 (b) Repudiation includes language that a reasonable party would interpret to
10 mean that the other party will not or cannot make a performance still due under the
11 contract or voluntary, affirmative conduct that would appear to a reasonable party
12 to make a future performance by the other party impossible.

13 **Reporter's Notes**

14 Subsection (a) reflects current law. Subsection (b) is new.

15 **SECTION 2-611. RETRACTION OF ANTICIPATORY REPUDIATION.**

16 (a) Until the repudiating party's next performance is due that party can
17 retract its repudiation unless the aggrieved party has since the repudiation canceled
18 or materially changed position or otherwise indicated that the repudiation is final.

19 (b) Retraction may be by any method that clearly indicates to the aggrieved
20 party that the repudiating party intends to perform, but must include any assurance
21 justifiably demanded under Section 2-609.

(c) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

Reporter's Notes

This section reflects current law.

SECTION 2-612. BREACH OF INSTALLMENT CONTRACT.

(a) In an installment contract, the buyer may reject any installment that is nonconforming if the nonconformity substantially impairs the value of that installment to the buyer or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (b) and the seller gives adequate assurance of cure the buyer must accept that installment.

(b) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract to the buyer there is a breach of the whole. But the aggrieved party reinstates the contract if it accepts a nonconforming installment without seasonably notifying of cancellation or if it brings an action with respect only to past installments or demands performance as to future installments.

Reporter's Notes

The title has been changed because the definition of installment contract now appears in Section 2-102. Concomitantly, original subsection (1), where installment contracts are defined, has been deleted.

The words “to the buyer” in subsections (a) and (b) are added to equate the standard for rejecting an installment with the standard for revocation of acceptance.

A Comment will indicate that a buyer can reject a defective installment that is not substantially nonconforming if there is a breach of the whole and the buyer also cancels the contract.

SECTION 2-613. CASUALTY TO IDENTIFIED GOODS. Where the contract requires for its performance goods identified when the contract is made and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer then:

- (1) if the loss is total the contract is terminated; and
- (2) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at its option either treat the contract as terminated or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

Reporter's Notes

The following underlined language from the introductory phrase that appears in current law has been deleted because of the deletion of Section 2-324 in this draft: “before the risk of loss passes to the buyer, or in a proper case under a “no arrival, no sale” term (Section 2-324).” The point will be made by comment.

Paragraphs (1) and (2) have been revised to use “terminated” rather than the current law’s “avoided.” This preserves pre-termination breaches.

SECTION 2-614. SUBSTITUTED PERFORMANCE.

(a) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a

1 commercially reasonable substitute is available, such substitute performance must be
2 tendered and accepted.

3 (b) If the agreed means or manner of payment fails because of domestic or
4 foreign governmental regulation, the seller may withhold or stop delivery unless the
5 buyer provides a means or manner of payment which is commercially a substantial
6 equivalent. If delivery has already been taken, payment by the means or in the
7 manner provided by the regulation discharges the buyer's obligation unless the
8 regulation is discriminatory, oppressive or predatory.

9 **Reporter's Notes**

10 This section reflects current law.

11 **SECTION 2-615. EXCUSE BY FAILURE OF PRESUPPOSED**

12 **CONDITIONS.** Except so far as a seller may have assumed a greater obligation
13 and subject to Section 2-614, the following rules apply:

14 (1) Delay in performance or nonperformance in whole or in part by a seller
15 that complies with paragraphs (2) and (3) is not a breach of the seller's duty under a
16 contract for sale if performance as agreed has been made impracticable by the
17 occurrence of a contingency the nonoccurrence of which was a basic assumption on
18 which the contract was made or by compliance in good faith with any applicable
19 foreign or domestic governmental regulation or order whether or not it later proves
20 to be invalid.

21 (2) Where the causes mentioned in paragraph (1) affect only a part of the
22 seller's capacity to perform, the seller must allocate production and deliveries among

1 the seller's customers but may at the seller's option include regular customers not
2 then under contract as well as the seller's own requirements for further manufacture.
3 The seller may so allocate in any manner which is fair and reasonable.

4 (3) The seller must notify the buyer seasonably that there will be delay or
5 nonperformance and, when allocation is required under paragraph (2), of the
6 estimated quota thus made available for the buyer.

7 **Reporter's Notes**

8 Paragraph (1) is changed to cover delays "in performance or
9 nonperformance" rather than "in delivery or nondelivery." This change reflects the
10 broad range of obligations a seller may have other than the obligation to deliver the
11 goods.

12 **SECTION 2-616. PROCEDURE ON NOTICE CLAIMING EXCUSE.**

13 (a) Where the buyer receives notification of a material or indefinite delay or
14 an allocation justified under Section 2-615 the buyer may by notification in a record
15 to the seller as to any performance concerned, and where the prospective deficiency
16 substantially impairs the value of the whole contract under Section 2-612, then also
17 as to the whole,

18 (1) terminate and thereby discharge any unexecuted portion of the
19 contract; or

20 (2) modify the contract by agreeing to take its available quota in
21 substitution under Section 2-615.

(b) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract is terminated with respect to any performance affected.

(c) This section may not be negated by agreement except in so far as the seller has assumed a greater obligation under Section 2-615.

Reporter's Notes

Consistent with Section 2-613, subsection (b) refers to “termination” rather than “avoidance.” Consistent with Section 2-615, subsection (b) refers to “performance” rather than “delivery.”

1
2

3
4
5
6

7
8

9
10

11
12
13

14
15
16
17
18

19
20

PART 7
REMEDIES

**SECTION 2-701. REMEDIES FOR BREACH OF COLLATERAL
CONTRACTS NOT IMPAIRED.** Remedies for breach of any obligation or
promise collateral or ancillary to a contract for sale are not impaired by the
provisions of this article.

Reporter's Notes
This section reflects current law.

**SECTION 2-702. SELLER'S REMEDIES ON DISCOVERY OF
BUYER'S INSOLVENCY.**

(a) Where the seller discovers the buyer to be insolvent the seller may refuse
delivery except for cash including payment for all goods theretofore delivered under
the contract, and stop delivery under Section 2-705.

(b) Where the seller discovers that the buyer has received goods on credit
while insolvent the seller may reclaim the goods upon demand made within a
reasonable time after the buyer's receipt of the goods. Except as provided in this
subsection the seller may not base a right to reclaim goods on the buyer's fraudulent
or innocent misrepresentation of solvency or of intent to pay.

(c) The seller's right to reclaim under subsection (b) is subject to the rights
of a buyer in ordinary course of business or other good-faith purchaser for value.

1 Successful reclamation of goods under this section excludes all other remedies with
2 respect to them.

3 **Reporter's Notes**

4 Subsection (b) is changed from current law. Under current law, the seller
5 must make the reclamation claim within 10 days of the buyer's receipt of the goods
6 (subject to an active misrepresentation of solvency, in which case the 10-day
7 limitation does not apply). A Comment will remind sellers of the risk of delay in
8 asserting their reclamation claims in bankruptcy. A Comment will also explain the
9 relationship between this section and Section 2-403.

10 **SECTION 2-703. SELLER'S REMEDIES IN GENERAL.**

11 (a) A breach of contract by the buyer includes the buyer's wrongful
12 rejection or wrongful attempt to revoke acceptance of goods, wrongful failure to
13 perform a contractual obligation, failure to make a payment when due, or
14 repudiation.

15 (b) If the buyer is in breach of contract the seller may to the extent provided
16 for by [the Uniform Commercial Code]:

17 (1) withhold delivery of the goods;

18 (2) stop delivery of the goods under Section 2-705;

19 (3) proceed under Section 2-704 with respect to goods unidentified to
20 the contract or unfinished;

21 (4) reclaim the goods under Section 2-507(b) or 2-702(b);

22 (5) cancel;

23 (6) resell and recover damages under Section 2-706;

- 1 (7) recover damages for nonacceptance or repudiation under Section
2 2-708(a);
- 3 (8) recover lost profits under Section 2-708(b);
- 4 (9) recover the price under Section 2-709;
- 5 (10) obtain specific performance under Section 2-716;
- 6 (11) recover liquidated damages under Section 2-718;
- 7 (12) in other cases, recover damages in any manner that is reasonable
8 under the circumstances.
- 9 (c) If a buyer becomes insolvent, the seller may:
- 10 (1) withhold delivery under Section 2-702(a);
- 11 (2) stop delivery of the goods under Section 2-705;
- 12 (3) reclaim the goods under Section 2-702(b).

13 **Reporter's Notes**

14 This section is a substantial revision of current Section 2-703 and gives a
15 complete list of the seller's statutory remedies for breach. Subsection (b). In
16 addition, the section now states each of the seller's statutory remedies upon the
17 buyer's insolvency. Subsection (c). It also defines the buyer's statutory breaches
18 with more specificity, although in this context it is drafted to be inclusive rather than
19 exclusive. Subsection (a).

20 A Comment will indicate that subsection (b)(12), which is open-ended, is
21 designed to deal with remedies for contractually defined breaches.

22 **SECTION 2-704. SELLER'S RIGHT TO IDENTIFY GOODS TO THE**
23 **CONTRACT NOTWITHSTANDING BREACH OR TO SALVAGE**
24 **UNFINISHED GOODS.**

- 25 (a) An aggrieved seller under Section 2-703 may:

(1) identify to the contract conforming goods not already identified if at the time the seller learned of the breach they are in the seller's possession or control;

(2) treat as the subject of resale goods that have demonstrably been intended for the particular contract even though those goods are unfinished.

(b) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

Reporter's Notes

This section reflects current law.

**SECTION 2-705. SELLER'S STOPPAGE OF DELIVERY IN TRANSIT
OR OTHERWISE.**

(a) The seller may stop delivery of goods in the possession of a carrier or other bailee when the seller discovers the buyer to be insolvent or when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(b) As against such buyer the seller may stop delivery until:

(1) receipt of the goods by the buyer;

(2) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(3) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(4) negotiation to the buyer of any negotiable document of title covering the goods.

(c) (1) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(2) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(3) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.

(4) A carrier that has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

Reporter's Notes

Subsection (a) eliminates the restriction on the right of stoppage in transit to “carload, truckload, planeload or larger shipments” when the buyer fails to pay or repudiates the agreement. The limitation is incompatible with current shipping capabilities.

SECTION 2-706. SELLER'S RESALE INCLUDING CONTRACT FOR RESALE.

(a) In an appropriate case involving breach by the buyer, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover

1 the difference between the contract price and the resale price together with any
2 incidental and consequential damages provided under Section 2-710, but less
3 expenses saved in consequence of the buyer's breach.

4 (b) Except as otherwise agreed a resale may be at public or private sale
5 including sale by way of one or more contracts to sell or of identification to an
6 existing contract of the seller. Sale may be as a unit or in parcels and at any time
7 and place and on any terms but every aspect of the sale including the method,
8 manner, time, place and terms must be commercially reasonable. The resale must be
9 reasonably identified as referring to the broken contract, but it is not necessary that
10 the goods be in existence or that any or all of them have been identified to the
11 contract before the breach.

12 (c) Where the resale is at private sale the seller must give reasonable
13 notification of an intention to resell.

14 (d) Where the resale is at public sale:

15 (1) only identified goods can be sold except where there is a recognized
16 market for a public sale of futures in goods of the kind;

17 (2) the sale must be made at a usual place or market for public sale if one
18 is reasonably available and except in the case of goods that are perishable or
19 threaten to decline in value speedily the seller must give the buyer reasonable notice
20 of the time and place of the resale;

(3) if the goods are not to be within the view of those attending the sale

the notification of sale must state the place where the goods are located and provide

for their reasonable inspection by prospective bidders; and

(4) the seller may buy.

(e) A purchaser that buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(f) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller or a buyer that has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of any security interest under Section 2-711(c).

(g) Failure of a seller to resell within this section does not bar the seller from any other remedy.

Preliminary Comment

Changes: Consistent with the revision of Section 2-710, this section now provides for consequential as well as incidental damages. Subsection (g) is new, and parallels the provision for buyer cover in Section 2-713. Original Section 2-706(1) measures damages by the difference between the resale price and the contract price; subsection (a) reverses these terms (“difference between the contract price and the resale price”) because the contract price must be the larger number for there to be direct damages.

Comments:

1. The right of resale under this section arises when a seller reclaims goods under Section 2-507 or a buyer repudiates or makes a wrongful but effective rejection. In addition, there is a right of resale if the buyer unjustifiably attempts to revoke acceptance and the seller takes back the goods. However, the seller may choose to ignore the buyer's unjustifiable attempt to revoke acceptance, in which case the appropriate remedy is an action for the price under Section 2-709.

1 Application of the right of resale to cases of buyer repudiation is supplemented by
2 subsection (b), which authorizes a resale of goods which are not in existence or
3 were not identified to the contract before the breach.

4 Subsection (a) allows the seller to resell the goods after a buyer's breach of
5 contract if the seller has possession or control of the goods. The seller may have
6 possession or control of the goods at the time of the breach or may have regained
7 possession of the goods upon the buyer's wrongful rejection. If the seller has
8 regained possession of the goods from the buyer pursuant to Article 9, that Article
9 controls the seller's rights of resale.

10 2. Under this Article the seller resells by authority of law, on the seller's
11 own behalf, for the seller's own benefit and for the purpose of setting the seller's
12 damages. The theory of a seller's agency is thus rejected. The question of whether
13 the title to the goods has or has not passed to the buyer is not relevant for the
14 operation of this section.

15 3. To recover the damages prescribed in subsection (a) the seller must act
16 "in good faith and in a commercially reasonable manner" in making the resale. If the
17 seller complies with the prescribed standards in making the resale, the seller may
18 recover from the buyer the damages provided for in subsection (a). Evidence of
19 market or current prices at any particular time or place is relevant only for the
20 question of whether the seller acted in a commercially reasonable manner in making
21 the resale.

22 4. Subsection (b) enables the seller to resell in accordance with reasonable
23 commercial practices so as to realize as high a price as possible in the circumstances.
24 A seller may sell at a public sale or a private sale as long as the choice is
25 commercially reasonable. A "public" sale is one to which members of the public are
26 admitted. A public sale is usually a sale by auction, but all auctions are not public
27 auctions. A private sale may be effected by an auction or by solicitation and
28 negotiation conducted either directly or through a broker. In choosing between a
29 public and private sale, the character of the goods must be considered and relevant
30 trade practices and usages must be observed. A public sale has further requirements
31 stated in subsection (d).

32 The purpose of subsection (b) is to enable the seller to dispose of the goods
33 to the best advantage, and therefore the seller is permitted in making the resale to
34 depart from the terms and conditions of the original contract for sale to any extent
35 "commercially reasonable" in the circumstances.

36 As for the place for resale, the focus is on the commercial reasonableness of
37 the seller's choice as to the place for an advantageous resale. This section rejects the

1 theory that the seller should normally resell at the agreed place for delivery and that
2 a resale elsewhere can be permitted only in exceptional cases.

3 The time for resale is a reasonable time after the buyer's breach. What is a
4 reasonable time depends on the nature of the goods, the condition of the market and
5 the other circumstances of the case; its length cannot be measured by any legal
6 yardstick or divided into degrees. When a seller contemplating resale receives a
7 demand from the buyer for inspection under Section 2-515, the time for resale may
8 be appropriately lengthened.

9 5. The provision of subsection (b) that the goods need not be in existence to
10 be resold applies when the buyer is guilty of anticipatory repudiation of a contract
11 for future goods before the goods or some of the goods have come into existence.
12 In this case, the seller may exercise the right of resale and fix the damages by "one
13 or more contracts to sell" the quantity of conforming future goods affected by the
14 repudiation.

15 The companion provision of subsection (b), that resale may be made
16 although the goods were not identified to the contract prior to the buyer's breach,
17 likewise contemplates an anticipatory repudiation by the buyer, but one occurring
18 after the goods are in existence. The seller may identify goods to the contract after
19 the breach, but must identify the goods being sold as pertaining to the breached
20 contract. If the identified goods conform to the contract, their resale will fix the
21 seller's damages as satisfactorily as if the goods had been identified before the
22 breach.

23 6. If the resale is to be by private sale, subsection (c) requires that
24 reasonable notification of the seller's intention to resell must be given to the buyer.
25 Notification of the time and place of a private resale is not required.

26 7. Subsection (d) states requirements for a public resale. The requirements
27 of this subsection are in addition to the requirements of subsection (b), which pertain
28 to all resales under this section.

29 Paragraph (1) of subsection (d) qualifies the last sentence of subsection (b)
30 with respect to resales of unidentified and future goods at public sale. If conforming
31 goods are in existence the seller may identify them to the contract after the buyer's
32 breach and then resell them at public sale. If the goods have not been identified,
33 however, the seller may resell them at public sale only as "future" goods and only if
34 there is a recognized market for public sale of futures in goods of the kind.

35 Subsection (d)(2) requires that the seller give the buyer reasonable notice of
36 the time and place of a public resale so that the buyer may have an opportunity to

1 bid or to secure the attendance of other bidders. An exception is made in the case of
2 goods “which are perishable or threaten to decline speedily in value.”

3 Since there would be no reasonable prospect of competitive bidding
4 elsewhere, subsection (d)(2) requires that a public resale “must be made at a usual
5 place or market for public sale if one is reasonably available”; *i.e.*, a place or market
6 which prospective bidders may reasonably be expected to attend. The market may
7 still be “reasonably available” under this subsection, although at a considerable
8 distance from the place where the goods are located. In this case, the expense of
9 transporting the goods for resale is recoverable from the buyer as part of the seller's
10 incidental damages under subsection (a). However, the question of availability is
11 one of commercial reasonableness in the circumstances and if such “usual” place or
12 market is not reasonably available, a duly advertised public resale may be held at
13 another place if it is one which prospective bidders may reasonably be expected to
14 attend, as distinguished from a place where there is no demand whatsoever for
15 goods of the kind.

16 Subsection (d)(3) is designed to permit intelligent bidding. Subsection
17 (d)(4), which permits the seller to bid and, of course, to become the purchaser,
18 benefits the original buyer by tending to increase the resale price and thus decreasing
19 the damages the buyer will have to pay.

20 8. Subsection (e) allows a purchaser to take the goods free of the rights of
21 the buyer even if the seller has not complied with this section. The policy of
22 resolving any doubts in favor of the resale purchaser operates to the benefit of the
23 buyer by increasing the price the purchaser should be willing to pay.

24 9. Subsection (f) recognizes that when the seller is entitled to resell under
25 this Article, the goods are the seller's goods and the purpose of resale under this
26 section is to set the seller's damages as against the buyer. However, a person in the
27 position of the seller under Section 2-707 or a buyer asserting a security interest in
28 the goods under Section 2-711(c) has only a limited right in the goods and so must
29 account to the seller for any excess over the limited amount necessary to satisfy that
30 right.

31 10. Subsection (g) expresses the policy that resale is not a mandatory
32 remedy for the seller. The seller is always free to choose between resale and
33 damages for repudiation or nonacceptance under Section 2-708.

34 **Relation to other remedies:** Subsection (g) parallels the provision in the
35 cover section, Section 2-712. A seller that fails to comply with the requirements of
36 this section may recover damages under Section 2-708(1). In addition, a seller may
37 recover both incidental and consequential damages under Section 2-710 assuming

1 the seller's damages have not been liquidated under Section 2-718 or limited under
2 Section 2-719.

3 **SECTION 2-707. PERSON IN THE POSITION OF A SELLER.**

4 (a) A person in the position of a seller includes as against a principal an
5 agent that has paid or become responsible for the price of goods on behalf of the
6 principal or any person that otherwise holds a security interest or other right in
7 goods similar to that of a seller.

8 (b) A person in the position of a seller has the same remedies as a seller
9 under this article.

10 **Reporter's Notes**

11 This section has been changed to allow the "person in the position of a
12 seller" to have the full range of remedies that the seller would have. The current
13 provision is more limited, providing that "[a] person in the position of a seller may
14 as provided in this Article withhold or stop delivery (Section 2-705) and resell
15 (Section 2-706) and recover incidental damages (Section 2-710)."

16 **SECTION 2-708. SELLER'S DAMAGES FOR NONACCEPTANCE OR**
17 **REPUDIATION.**

18 (a) Subject to subsection (b) and to Section 2-723:

19 (1) the measure of damages for nonacceptance by the buyer is the
20 difference between the contract price and the market price at the time and place for
21 tender together with any incidental or consequential damages provided under
22 Section 2-710, but less expenses saved in consequence of the buyer's breach; and

23 (2) the measure of damages for repudiation by the buyer is the difference
24 between the contract price and the market price at the place for tender at the

1 expiration of a commercially reasonable time after the seller learned of the
2 repudiation, but no later than the time stated in paragraph (1), together with any
3 incidental or consequential damages provided under Section 2-710, but less
4 expenses saved in consequence of the buyer's breach.

5 (b) If the measure of damages provided in subsection (a) or in Section
6 2-706 is inadequate to put the seller in as good a position as performance would
7 have done then the measure of damages is the profit (including reasonable overhead)
8 which the seller would have made from full performance by the buyer, together with
9 any incidental and consequential damages provided under Section 2-710.

10 Preliminary Comment

11 **Changes:** This section contains the following changes from original Section
12 2-708:

13 (1) Consistent with the revision of Section 2-710, this section now provides
14 for consequential as well as incidental damages. Subsection (a) has been divided
15 into two paragraphs rather than the one paragraph in existing law. The second
16 paragraph, which is new, clarifies the proper measurement of damages in cases
17 of anticipatory repudiation. The measurement is consistent with the better
18 reasoned cases. The same approach has been taken in Section 2-713 on buyer's
19 market-based damage claims.

20 (2) Original Section 2-706(1) sets the measure of damages as the difference
21 between the market price and the unpaid contract price. The word "unpaid" has
22 been deleted as superfluous and misleading. A buyer that has already paid a
23 portion of the price is of course entitled to recover it in restitution under Section
24 2-718.

25 (3) Original Section 2-708(1) measures damages by the difference between
26 the resale price and the contract price. Subsection (a) of this draft reverses the
27 terms ("difference between the contract price and the resale price") because the
28 contract price must be the larger number in order for there to be direct damages.
29 *Compare* Sections 2-712 and 2-713 on buyer's remedies, where the contract
30 price is listed after the cover or market price.

1 (4) Subsection (b) now has the following underlined language added:
2 “provided in subsection (a) or Section 2-706 is inadequate” Courts
3 generally have correctly assumed that original Section 2-708(2) was an
4 alternative to Section 2-706 as well as Section 2-708(1) but still have had to ask
5 and analyze the question. *See, e.g., R.E. Davis Chemical Corp. v. Diasonics,*
6 *Inc.*, 826 F.2d 678 (7th Cir. 1987). The change makes this result explicit.
7 Original Section 2-708(2) also contains the phrase “due allowance for costs
8 reasonably incurred”. This draft deletes that language.

9 (5) In subsection (b), the phrase “due credit for payments or proceeds of
10 resale” from the current provision has been deleted. As has been noted
11 repeatedly (*see, e.g., Harris, A Radical Restatement of the Law of Seller’s*
12 *Damages: Sales Act and Commercial Code Results Compared*, 18 *Stanford. L.*
13 *Rev.* 66; *White & Summers, Uniform Commercial Code* pp. 275-66, 4th ed.),
14 the language makes no sense in the context of the lost-volume seller and has
15 been universally ignored in that context to make the provision work as it was
16 intended. It is assumed as obvious that when a seller ceases manufacture and
17 resells component parts for scrap or salvage value under Section 2-704(b), a
18 credit for the proceeds is due the buyer to offset the damages under this section.

19 **Comments:**

20 1. The right to damages under this section arises when a seller reclaims
21 goods under Section 2-507 or a buyer repudiates or makes a wrongful but effective
22 rejection. In addition, there is a right if the buyer unjustifiably attempts to revoke
23 acceptance and the seller takes back the goods. However, the seller may choose to
24 ignore the buyer’s unjustifiable attempt to revoke acceptance, in which case the
25 appropriate remedy is an action for the price under Section 2-709.

26 2. The current market price at the time and place for tender is the standard
27 by which damages for nonacceptance are to be determined. The time and place of
28 tender is determined by Section 2-503 on tender of delivery and by the use of
29 common shipping terms. The provisions of Section 2-723 are relevant in
30 determining the market price

31 In the event that there is no evidence available of the current market price at
32 the time and place of tender, proof of a substitute market may be made as provided
33 in Section 2-723. Furthermore, the section on the admissibility of market
34 quotations is intended to ease materially the problem of providing competent
35 evidence.

36 The price term in a long-term contract may or may not have an escalation
37 clause. The time for determining the contract price in a long-term contract should

1 not necessarily be tied to the time for measuring the market price in the repudiation
2 situation. The appropriate contract price should be determined in light of the
3 general principle of full compensation for the aggrieved party.

4 3. Subsection (a)(2) addresses the question of when the market price should
5 be measured in the case of an anticipatory repudiation by the buyer. This section
6 provides that the market price should be measured in a repudiation case at the place
7 of tender under the agreement at a commercially reasonable time after the seller
8 learned of the repudiation, but no later than the time of tender under the agreement.
9 This time is designed to approximate the market price at the time the seller would
10 have resold the goods, even though the seller has not done so under Section 2-706.
11 This subsection is designed to put the seller in the position the seller would have
12 been in if the buyer had performed by approximating the harm the seller has suffered
13 without allowing the seller an unreasonable time to speculate on the market at the
14 buyer's expense.

15 4. The seller must deduct from damages under subsection (a) any expenses
16 saved as a result of the breach.

17 5. Subsection (b) is used in the cases of uncompleted goods, jobbers or
18 middlemen, or lost-volume sellers. This remedy is an alternative to the remedy
19 under subsection (a) or Section 2-706 and is available when the damages based upon
20 resale of the goods or market price of the goods does not achieve the goal of full
21 compensation for harm caused by the buyer's breach. No effort has been made to
22 state how lost profits should be calculated because of the variety of situations in
23 which this measurement may be appropriate and the variety of ways in which courts
24 have measured lost profits. This subsection permits the recovery of lost profits in all
25 appropriate cases. This would generally include all standard priced goods. The
26 normal measure of lost profits for standard priced goods would be the list price less
27 the cost to the dealer or the list price less the manufacturing cost to the
28 manufacturer. It is not necessary to a recovery of "profit" to show a history of
29 earnings, especially if a new venture is involved.

30 This subsection, which permits recovery of expected profit including
31 reasonable overhead when the measure of damages is inadequate under subsection
32 (a) or Section 2-706, together with the requirement that an action for the price
33 under Section 2-709 may be sustained only where resale is impractical, is designed
34 to eliminate the unfair and economically wasteful result when fixed price articles are
35 involved.

36 When a seller ceases manufacture and resells component parts for scrap or
37 salvage value under Section 2-704(b), a credit for the proceeds is due the buyer to
38 offset the damages under this section.

1 6. In addition to the damages recoverable under this section, when
2 appropriate and subject to Section 2-718 and Section 2-719, the seller may also
3 recover incidental and consequential damages under Section 2-710.

4 **SECTION 2-709. ACTION FOR THE PRICE.**

5 (a) When the buyer fails to pay the price as it becomes due the seller may
6 recover, together with any incidental or consequential damages provided under
7 Section 2-710, the price of:

8 (1) goods accepted;

9 (2) conforming goods lost or damaged within a commercially reasonable
10 time after risk of their loss has passed to the buyer; and

11 (3) goods identified to the contract if the seller is unable after reasonable
12 effort to resell them at a reasonable price or the circumstances reasonably indicate
13 that such effort will be unavailing.

14 (b) A seller that sues for the price must hold for the buyer any goods that
15 have been identified to the contract and are still in the seller's control except that if
16 resale becomes possible the seller may resell them at any time prior to the collection
17 of the judgment. The net proceeds of any such resale must be credited to the buyer
18 and payment of the judgment entitles the buyer to any goods not resold.

19 (c) After the buyer has wrongfully rejected or revoked acceptance of the
20 goods or has failed to make a payment due or has repudiated, a seller that is held not
21 entitled to the price under this section shall nevertheless be awarded damages for
22 nonacceptance under Section 2-708.

1
2
3

4
5

6
7
8
9
10
11
12
13
14
15

16
17
18
19

20
21

Reporter’s Notes

Consistent with the revision of Section 2-710, this section now provides for consequential as well as incidental damages.

SECTION 2-710. SELLER'S INCIDENTAL AND CONSEQUENTIAL DAMAGES.

(a) Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

(b) Consequential damages resulting from the buyer's breach include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting had reason to know and which could not reasonably be prevented by resale or otherwise.

(c) In a consumer contract, a seller may not recover consequential damages from a consumer.

Reporter’s Notes

This section now provides for a seller’s consequential as well as incidental damages except in consumer contracts. A Comment will make it clear (with examples) that cases in which sellers will recover consequential damages are rare.

SECTION 2-711. BUYER’S REMEDIES IN GENERAL; BUYER’S SECURITY INTEREST.

1 (a) A breach of contract by the seller includes the seller's wrongful failure to
2 deliver or to perform a contractual obligation, making of a nonconforming tender of
3 delivery or performance, or repudiation.

4 (b) If the seller is in breach of contract under subsection (a) the buyer may
5 to the extent provided for by [the Uniform Commercial Code]:

6 (1) in the case of rightful cancellation, rightful rejection or justifiable
7 revocation of acceptance recover so much of the price as has been paid;

8 (2) deduct damages from any part of the price still due under Section
9 2-717;

10 (3) cancel;

11 (4) cover and have damages under Section 2-712 as to all goods affected
12 whether or not they have been identified to the contract;

13 (5) recover damages for nondelivery or repudiation under Section 2-713;

14 (6) recover damages for breach with regard to accepted goods or breach
15 with regard to a remedial promise under Section 2-714;

16 (7) recover identified goods under Section 2-502;

17 (8) obtain specific performance or obtain the goods by replevin or the
18 like under Section 2-716;

19 (9) recover liquidated damages under Section 2-718;

20 (10) in other cases, recover damages in any manner that is reasonable
21 under the circumstances.

1 (c) On rightful rejection or justifiable revocation of acceptance a buyer has a
2 security interest in goods in the buyer's possession or control for any payments
3 made on their price and any expenses reasonably incurred in their inspection, receipt,
4 transportation, care and custody and may hold such goods and resell them in like
5 manner as an aggrieved seller under Section 2-706.

6 **Reporter's Notes**

7 This section is a substantial revision of current Section 2-711. The rationale
8 for many of the changes is discussed in the Reporter's Notes to Section 2-703.

9 **SECTION 2-712. COVER; BUYER'S PROCUREMENT OF**
10 **SUBSTITUTE GOODS.**

11 (a) If the seller wrongfully fails to deliver or repudiates or the buyer
12 rightfully rejects or justifiably revokes acceptance, the buyer may cover by making in
13 good faith and without unreasonable delay any reasonable purchase of or contract to
14 purchase goods in substitution for those due from the seller.

15 (b) The buyer may recover from the seller as damages the difference
16 between the cost of cover and the contract price together with any incidental or
17 consequential damages provided under Section 2-715 but less expenses saved in
18 consequence of the seller's breach.

19 (c) Failure of the buyer to effect cover within this section does not bar the
20 buyer from any other remedy.

21 **Preliminary Comment**

22 **Changes:** Original Section 2-712(1) refers to a seller's "breach" as the basis
23 for the remedy in this section. The language has been changed to make it clear that

1 there is a right to cover “[i]f the seller wrongfully fails to deliver or repudiates or the
2 buyer rightfully rejects or justifiably revokes acceptance.”

3 **Comments:**

4 1. The purpose of this section is to provide the buyer with a remedy to
5 enable the buyer to obtain the goods the buyer is entitled to under the contract with
6 the seller. This remedy is the buyer's equivalent of the seller's right to resell.

7 The buyer is entitled to this remedy if the seller wrongfully fails to deliver the
8 goods or repudiates the contract or if the buyer rightfully rejects or justifiably
9 revokes acceptance. Cover is not available under this section if the buyer accepts
10 the goods and does not rightfully revoke the acceptance.

11 2. Subsection (b) allows a buyer that has appropriately covered to measure
12 damages by the difference between the cover price and the contract price. In
13 addition, the buyer is entitled to incidental damages, and when appropriate,
14 consequential damages under Section 2-715.

15 3. The definition of “cover” is necessarily flexible, and therefore cover
16 includes a series of contracts or sales as well as a single contract or sale, goods not
17 identical with those involved but commercially usable as reasonable substitutes
18 under the circumstances, and contracts on credit or delivery terms differing from the
19 contract in breach but reasonable under the circumstances. The test of proper cover
20 is whether at the time and place of cover the buyer acted in good faith and in a
21 reasonable manner. It is immaterial that hindsight may later prove that the method
22 of cover used was not the cheapest or most effective.

23 4. The requirement in subsection (a) that the buyer must cover “without
24 unreasonable delay” is not intended to limit the time necessary for the buyer to
25 examine reasonable options and decide how best to effect cover.

26 5. Subsection (c) expresses the policy that cover is not a mandatory remedy
27 for the buyer. The buyer is always free to choose between cover and damages for
28 nondelivery under Section 2-713. However, this subsection must be read in
29 conjunction with the Section 2-715(b)(1), which limits the recovery of consequential
30 damages to those damages that could not reasonably be prevented by cover.
31 Moreover, the operation of Section 2-716(c) on replevin and the like must be
32 considered because the inability to cover is made an express condition to the right of
33 the buyer to replevy the goods.

1 **SECTION 2-713. BUYER'S DAMAGES FOR NONDELIVERY OR**
2 **REPUDIATION.**

3 (a) Subject to Section 2-723, if the seller wrongfully fails to deliver or
4 repudiates or the buyer rightfully rejects or justifiably revokes acceptance the
5 following rules apply:

6 (1) The measure of damages in the case of wrongful failure to deliver by
7 the seller or rightful rejection or justifiable revocation of acceptance by the buyer is
8 the difference between the market price at the time for tender under the agreement
9 and the contract price together with any incidental and consequential damages
10 provided under Section 2-715, but less expenses saved in consequence of the seller's
11 breach.

12 (2) The measure of damages for repudiation by the seller is the
13 difference between the market price at the expiration of a commercially reasonable
14 time after the buyer learned of the repudiation, but no later than the time stated in
15 paragraph (1), and the contract price together with any incidental or consequential
16 damages provided under Section 2-710, but less expenses saved in consequence of
17 the seller's breach.

18 (b) Market price is to be determined as of the place for tender or, in cases of
19 rejection after arrival or revocation of acceptance, as of the place of arrival.

20 **Preliminary Comment**

21 **Changes:** This section now provides a rule for anticipatory repudiation
22 cases. This is consistent with the new rule for sellers in Section 2-708(a)(2). In a
23 case not involving repudiation, the buyer's damages will be based on the market
24 price at the time for tender under the agreement. This changes the former rule

1 where the time for measuring damages was at the time the buyer learned of the
2 breach.

3 **Comments:**

4 1. This section provides for a buyer's expectancy damages when the seller
5 wrongfully fails to deliver the goods or repudiates the contract or the buyer
6 rightfully rejects or justifiably revokes acceptance. This section provides an
7 alternative measure of damages to the cover remedy provided for in Section 2-712.

8 2. Under subsection (a)(1), the measure of damages for a wrongful failure
9 to deliver the goods by the seller or a rightful rejection or justifiable revocation of
10 acceptance by the buyer is the difference between the market price at the time for
11 tender under the agreement and the contract price.

12 3. Subsection (a)(2) addresses the question of when the market price should
13 be measured in the case of an anticipatory repudiation by the seller. The market
14 price should be measured in a repudiation case at the place where the buyer would
15 have covered at a commercially reasonable time after the buyer learned of the
16 repudiation, but no later than the time of tender under the agreement. This time is
17 designed to approximate the market price at the time the buyer would have covered
18 even though the buyer has not done so under Section 2-712. This subsection is
19 designed to put the buyer in the position the buyer would have been in if the seller
20 had performed by approximating the harm the buyer has suffered without allowing
21 the buyer an unreasonable time to speculate on the market at the seller's expense.

22 4. The market or current price to be used in comparison with the contract
23 price under this section is the price for goods of the same kind and in the same
24 branch of trade.

25 When the current market price under this section is difficult to prove,
26 Section 2-723 on determination and proof of market price is available to permit a
27 showing of a comparable market price. When no market price is available, evidence
28 of spot sale prices may be used to determine damages under this section. When the
29 unavailability of a market price is caused by a scarcity of goods of the type involved,
30 a good case is normally made for specific performance under Section 2-716.
31 Moreover, the condition of scarcity may indicate that the price has risen. This may
32 warrant under Section 1-106, which provides for the liberal administration of
33 remedies, opinion evidence about the value of the goods in the absence of a market
34 price.

35 The price term in a long-term contract may or may not have an escalation
36 clause. The time for determining the contract price in a long-term contract should

1 not necessarily be tied to the time for measuring the market price in the repudiation
2 situation. The appropriate contract price should be determined in light of the
3 general principle of full compensation for the aggrieved party.

4 5. The buyer must deduct from damages under this section any expenses
5 saved as a result of the breach.

6 6. In addition to the damages provides in this section, the buyer is entitled to
7 incidental and consequential damages under Section 2-715.

8 **SECTION 2-714. BUYER'S DAMAGES FOR BREACH IN REGARD**
9 **TO ACCEPTED GOODS.**

10 (a) Where the buyer has accepted goods and given notification under
11 Section 2-607(c) the buyer may recover as damages for any nonconformity of tender
12 the loss resulting in the ordinary course of events from the seller's breach as
13 determined in any manner which is reasonable.

14 (b) The measure of damages for breach of a warranty is the difference at the
15 time and place of acceptance between the value of the goods accepted and the value
16 they would have had if they had been as warranted, unless special circumstances
17 show proximate damages of a different amount.

18 (c) In a proper case any incidental and consequential damages provided
19 under Section 2-715 may also be recovered.

20 **Reporter's Notes**

21 This section reflects current law.

22 **SECTION 2-715. BUYER'S INCIDENTAL AND CONSEQUENTIAL**
23 **DAMAGES.**

(a) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(b) Consequential damages resulting from the seller's breach include:

(1) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(2) injury to person or property proximately resulting from any breach of warranty.

Reporter's Notes

This section reflects current law.

**SECTION 2-716. RIGHT TO SPECIFIC PERFORMANCE OR
REPLEVIN OR THE LIKE.**

(a) Specific performance may be decreed where the goods are unique or in other proper circumstances. In a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy. However, even if the parties agree to specific performance, specific performance may not be decreed if the breaching party's sole remaining contractual obligation is the payment of money.

1 (b) The decree for specific performance may include such terms and
2 conditions as to payment of the price, damages, or other relief as the court may
3 deem just.

4 (c) The buyer has a right of replevin or the like for goods identified to the
5 contract if after reasonable effort the buyer is unable to effect cover for such goods
6 or the circumstances reasonably indicate that such effort will be unavailing or if the
7 goods have been shipped under reservation and satisfaction of the security interest in
8 them has been made or tendered.

9 (d) The buyer's right under subsection (c) vests upon acquisition of a
10 special property, even if the seller had not then repudiated or failed to deliver.

11 **Preliminary Comment**

12 **Changes:** This section contains the following changes from original Section
13 2-716:

14 (1) The original heading to this section refers to a "buyer's" right to specific
15 performance. The word "buyer" has been omitted in recognition of the fact that
16 either the seller or the buyer may seek the remedy of specific performance. The
17 right of replevin is by its very nature limited to buyers.

18 (2) Subsection (a) encourages courts to decree specific performance in
19 contracts other than consumer contracts but provides protection for a party
20 whose sole remaining obligation is to pay money.

21 (3) In subsection (c), the phrase "or the like" has been added after
22 "replevin" to reflect the fact that under the governing state law the right may be
23 called "detinue," "sequestration," "claim and delivery," or something else.

24 (4) Subsection (d) is new and corresponds with Section 2-502(b), which in
25 turn is derived from (but broader than) the conforming amendments to Article 9.
26 It provides a vesting rule for cases in which there is a right of replevin.

27 **Comments:**

1 1. Subsection (a) continues the policy of seeking to further a liberal attitude
2 in connection with the remedy of specific performance. It is available when the
3 goods or the performance are unique as well as in other appropriate circumstances.
4 Uniqueness should be determined in light of the total circumstances surrounding the
5 contract and is not limited to goods identified when the contract is formed. The
6 typical specific performance situation today involves an output or requirements
7 contract rather than a contract for the sale of an heirloom or priceless work of art.
8 A buyer's inability to cover is strong evidence of a circumstance in which a decree
9 of specific performance is appropriate.

10 2. Subsection (a) provides that a court may decree specific performance if
11 the parties have agreed to such a remedy. Such an agreement is symbolized by the
12 "take or pay" contracts in the oil and gas industry, where the buyer has agreed to
13 accept and pay for goods under the contract and to specific performance of that
14 obligation. Under subsection (a), the parties' agreement to specific performance can
15 be enforced even if legal remedies are entirely adequate. Enforcing an agreement to
16 specific performance is limited to commercial cases in order to avoid having a
17 consumer buyer be forced to take and pay for goods that the consumer may not
18 want. Even in a commercial contract, the third sentence of subsection (a) prevents
19 the aggrieved party from obtaining specific performance if the only obligation of the
20 party in breach is the payment of money. Thus if a commercial buyer is obligated to
21 pay the price, that obligation should be enforced through an action for the price
22 under Section 2-709 rather than through an action for specific performance under
23 this section.

24 Nothing in this section constrains the court's exercise of its equitable
25 discretion in deciding whether to enter a decree for specific performance or in
26 determining the conditions or terms of such a decree. This section assumes that the
27 decree for specific performance will be conditioned on a tender of full performance
28 by the party that is seeking the remedy. Thus, a seller seeking to enforce a "take or
29 pay" term should be required to tender goods that conform to the contract.

30 3. The legal remedy of replevin or the like is also available for cases in
31 which cover is reasonably unavailable and the goods have been identified to the
32 contract. This is in addition to the prepaying buyer's right to recover identified
33 goods upon the seller's insolvency or, when the goods have been bought for a
34 personal, family, or household purpose, upon the seller's repudiation or failure to
35 deliver (Section 2-502). If a negotiable document of title is outstanding, the buyer's
36 right of replevin relates to the document and does not directly relate to the goods.
37 See Article 7, especially Section 7-602.

38 4. Subsection (d) provides that a buyer's right to replevin or the like vests
39 upon the buyer's acquisition of a special property in the goods (Section 2-501) even

1 if the seller has not at that time repudiated or failed to make a required delivery.
2 This vesting rule assumes application of a “first in time” priority rule. In other
3 words, if the buyer’s rights vest under this rule before a creditor acquires an *in rem*
4 right to the goods, including an Article 9 security interest and a lien created by levy,
5 the buyer should prevail.

6 **SECTION 2-717. DEDUCTION OF DAMAGES FROM THE PRICE.**

7 The buyer on notifying the seller of an intention to do so may deduct all or any part
8 of the damages resulting from any breach of the contract from any part of the price
9 still due under the same contract.

10 **Reporter’s Notes**

11 This section reflects current law.

12 **SECTION 2-718. LIQUIDATION OR LIMITATION OF DAMAGES;**
13 **DEPOSITS.**

14 (a) Damages for breach by either party may be liquidated in the agreement
15 but only at an amount that is reasonable in the light of the anticipated or actual harm
16 caused by the breach and, in a consumer contract, in addition the difficulties of proof
17 of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate
18 remedy. Section 2-719 determines the enforceability of a term that limits but does
19 not liquidate damages.

20 (b) Where the seller justifiably withholds delivery of goods or stops
21 performance because of the buyer’s breach or insolvency, the buyer is entitled to
22 restitution of any amount by which the sum of the buyer’s payments exceeds the

1 amount to which the seller is entitled by virtue of terms liquidating the seller's
2 damages in accordance with subsection (a).

3 (c) The buyer's right to restitution under subsection (b) is subject to offset
4 to the extent that the seller establishes:

5 (1) a right to recover damages under the provisions of this article other
6 than subsection (a); and

7 (2) the amount or value of any benefits received by the buyer directly or
8 indirectly by reason of the contract.

9 (d) Where a seller has received payment in goods their reasonable value or
10 the proceeds of their resale shall be treated as payments for the purposes of
11 subsection (b); but if the seller has notice of the buyer's breach before reselling
12 goods received in part performance, the resale is subject to Section 2-706.

13 **Preliminary Comment**

14 **Changes:** This section contains the following changes from original Section
15 2-718:

16 (1) In subsection (a), the requirements that the party seeking to enforce a
17 term liquidating damages demonstrate “difficulties of proof of loss” and
18 “inconvenience or nonfeasibility of otherwise obtaining an adequate remedy”
19 have been eliminated in commercial contracts.

20 (2) In subsection (a), the sentence “[a] term fixing unreasonably large
21 liquidated damages is void as a penalty” has been eliminated as unnecessary and
22 capable of causing confusion.

23 (3) The last sentence of subsection (a) has been added to clarify the
24 relationship between this section and Section 2-719.

25 (4) In subsection (b), the circumstances in which restitution is available have
26 been expanded to cover any situation where the seller stops performance on
27 account of the buyer’s breach or insolvency.

1 (5) In subsection (b), the buyer's right to restitution is not limited by a
2 statutory liquidated damages provision.

3 **Comments:**

4 1. A valid liquidated damages term may liquidate the amount of all damages,
5 including consequential and incidental damages. As under former law, liquidated
6 damages clauses should be enforced if the amount is reasonable in light of the
7 factors provided in subsection (a). This section thus respects the parties' ability to
8 contract for damages while providing some control by requiring reasonableness
9 based upon the circumstances of the particular case.

10 Under original Section 2-718, a party seeking to enforce a liquidated
11 damages term had to demonstrate the difficulty of proving the loss and the
12 inconvenience or nonfeasibility of obtaining an adequate remedy. These tests have
13 been eliminated in commercial contracts but retained in consumer contracts.

14 2. The sentence from original Section 2-718(1) stating that an unreasonably
15 large liquidated damages term is void as a penalty has been eliminated as
16 unnecessary and misleading. If the liquidated damages are reasonable in light of the
17 test of subsection (a), the term should be enforced, rendering the penalty language
18 of the former law redundant. The sentence is also misleading because of its
19 emphasis on unreasonably large damages. A liquidated damages term providing for
20 damages that are unreasonably small under the test of subsection (a) is likewise
21 unenforceable.

22 3. If a liquidated damages term is unenforceable, the remedies of this Article
23 become available to the aggrieved party.

24 4. Under subsection (b), only the buyer's payments that are more than the
25 amount of an enforceable liquidated damages term need be returned to the buyer. If
26 the buyer has made payment by virtue of a trade-in or other goods deposited with
27 the seller, subsection (d) provides that the reasonable value of such goods or their
28 resale price should be used to determine what the buyer has paid, not the value the
29 seller allowed the buyer in the trade-in. To assure that the seller obtains a
30 reasonable price for such goods, the seller must comply with the resale provisions of
31 Section 2-706 if the seller knows of the buyer's breach before it has otherwise
32 resold them.

33 Subsection (b) expands the situations in which restitution is available.
34 Original Section 2-718(2) was limited to circumstances in which the seller justifiably
35 withheld delivery because of the buyer's breach. Subsection (b) extends the right to

1 situations where the seller stops performance because of the buyer's breach or
2 insolvency.

3 5. Subsection (c) continues the rule from former law without change. If
4 there is no enforceable liquidated damages term, the buyer is entitled to restitution
5 under subsection (b) subject to a set off of the seller for any damages to which it is
6 otherwise entitled to under this Article.

7 **SECTION 2-719. CONTRACTUAL MODIFICATION OR LIMITATION**
8 **OF REMEDY.**

9 (a) Subject to subsections (b), (c), and (d) and Section 2-718:

10 (1) the agreement may provide for remedies in addition to or in
11 substitution for those provided in this article and may limit or alter the measure of
12 damages recoverable under this article, as by limiting the buyer's remedies to return
13 of the goods and repayment of the price or to repair and replacement of
14 nonconforming goods or parts; and

15 (2) resort to a remedy as provided is optional unless the remedy is
16 expressly agreed to be exclusive, in which case it is the sole remedy.

17 (b) Where circumstances cause an exclusive or limited remedy to fail of its
18 essential purpose, remedy may be had as provided in [the Uniform Commercial
19 Code].

20 (c) Consequential damages may be limited or excluded unless the limitation
21 or exclusion is unconscionable. Limitation of consequential damages for injury to
22 the person in the case of consumer goods is prima facie unconscionable but
23 limitation of damages where the loss is commercial is not.

1 **Reporter's Notes**

2 This section reflects current law.

3 **SECTION 2-720. EFFECT OF "CANCELLATION" OR "RESCISSION"**
4 **ON CLAIMS FOR ANTECEDENT BREACH.** Unless the contrary intention
5 clearly appears, expressions of "cancellation" or "rescission" of the contract or the
6 like shall not be construed as a renunciation or discharge of any claim in damages
7 for an antecedent breach.

8 **Reporter's Notes**

9 This section reflects current law.

10 **SECTION 2-721. REMEDIES FOR FRAUD.** Remedies for material
11 misrepresentation or fraud include all remedies available under this article for
12 nonfraudulent breach. Neither rescission or a claim for rescission of the contract for
13 sale nor rejection or return of the goods shall bar or be deemed inconsistent with a
14 claim for damages or other remedy.

15 **Reporter's Notes**

16 This section reflects current law.

17 **SECTION 2-722. WHO CAN SUE THIRD PARTIES FOR INJURY TO**
18 **GOODS.** Where a third party so deals with goods which have been identified to a
19 contract for sale as to cause actionable injury to a party to that contract:

20 (1) a right of action against the third party is in either party to the contract
21 for sale that has title to or a security interest or a special property or an insurable

1 interest in the goods; and if the goods have been destroyed or converted a right of
2 action is also in the party that either bore the risk of loss under the contract for sale
3 or has since the injury assumed that risk as against the other;

4 (2) if at the time of the injury the party plaintiff did not bear the risk of loss
5 as against the other party to the contract for sale and there is no arrangement
6 between them for disposition of the recovery, the party plaintiff's suit or settlement
7 is, subject to its own interest, as a fiduciary for the other party to the contract; and

8 (3) either party may with the consent of the other sue for the benefit of a
9 person that it may concern.

10 **Reporter's Notes**

11 This section reflects current law.

12 **SECTION 2-723. PROOF OF MARKET PRICE: TIME AND PLACE.**

13 (a) If evidence of a price prevailing at a time or place described in this
14 article is not readily available the price prevailing within any reasonable time before
15 or after the time described or at any other place that in commercial judgment or
16 under usage of trade would serve as a reasonable substitute for the one described
17 may be used, making any proper allowance for the cost of transporting the goods to
18 or from such other place.

19 (b) Evidence of a relevant price prevailing at a time or place other than the
20 one described in this article offered by one party is not admissible unless and until
21 that party has given the other party such notice as the court finds sufficient to
22 prevent unfair surprise.

1
2
3
4

5

6
7
8
9
10
11

12
13
14
15

16
17

18
19
20
21
22

Reporter’s Notes

Current subsection (1), which deals with the measurement of market price when there has been an anticipatory repudiation, has been deleted as unnecessary in light of Sections 2-708(a) and 2-713(a).

SECTION 2-724. ADMISSIBILITY OF MARKET QUOTATIONS.

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers, periodicals or other means of communication in general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

Reporter’s Notes

The only change from current law is the addition of the language “or other means of communication in” This addition reflects the common use of nonpaper media.

SECTION 2-725. STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE.

(a) An action for breach of any contract for sale must be commenced within the later of four years after the right of action has accrued under subsection (b) or (c) or one year after the breach was or should have been discovered, but no longer than five years after the right of action accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not

1 extend it; however, in a consumer contract, the period of limitation may not be
2 reduced.

3 (b) Except as otherwise provided in subsection (c), the follow rules apply:

4 (1) Except as otherwise provided in this subsection, a right of action for
5 breach of a contract accrues when the breach occurs, even if the aggrieved party did
6 not have knowledge of the breach.

7 (2) For breach of a contract by repudiation, a right of action accrues at
8 the earlier of when the aggrieved party elects to treat the repudiation as a breach or
9 when a commercially reasonable time for awaiting performance has expired.

10 (3) For breach of a remedial promise, a right of action accrues when the
11 remedial promise is not performed when due. However

12 (A) if the remedial promise is not made in connection with a warranty
13 arising under Section 2-313, 2-314, or 2-315 or another obligation arising under
14 Section 2-313A or 2-313B, an action may not be commenced after the later of i)
15 two years after the right of action accrues, or ii) four years after tender of delivery
16 to the immediate buyer, defined in Section 2-313, or receipt of the goods by the
17 remote purchaser, defined in Sections 2-313A and 2-313B; and

18 (B) if the remedial promise is made in connection with a warranty
19 arising under Section 2-313, 2-314, or 2-315 or another obligation arising under
20 Section 2-313A or 2-313B, an action may not be commenced after the later of i)
21 two years after the right of action accrues, or ii) the period of limitations for the
22 warranty or the other obligation expires.

1 (4) In an action by a buyer against a person that is answerable over to
2 the buyer for a claim asserted against the buyer, the buyer's right of action against
3 the person answerable over accrues at the time the claim was originally asserted
4 against the buyer.

5 (c) If a breach of a warranty arising under Section 2-312, 2-313, 2-314, or
6 2-315, or a breach of an obligation other than a remedial promise arising under
7 Section 2-313A or 2-313B, is claimed the following rules apply:

8 (1) Except as otherwise provided in paragraph (3), a right of action for
9 breach of a warranty arising under Section 2-313, 2-314, or 2-315 accrues when the
10 seller has tendered delivery to the immediate buyer, as defined in Section 2-313, and
11 has completed performance of any agreed installation or assembly of the goods.

12 (2) Except as otherwise provided in paragraph (3), a right of action for
13 breach of an obligation other than a remedial promise arising under Section 2-313A
14 or 2-313B accrues when the remote purchaser, as defined in Sections 2-313A and
15 2-313B, receives the goods.

16 (3) Where a warranty arising under Section 2-313, 2-314, or 2-315 or
17 an obligation other than a remedial promise arising under Section 2-313, 2-313A, or
18 2-313B explicitly extends to future performance of the goods and discovery of the
19 breach must await the time for performance the right of action accrues when the
20 immediate buyer as defined in Section 2-313 or the remote purchaser as defined in
21 Sections 2-313A and 2-313B discovers or should have discovered the breach.

1 (4) A right of action for breach of warranty arising under Section 2-312
2 accrues when the aggrieved party discovers or should have discovered the breach.
3 However, an action for breach of the warranty of noninfringement may not be
4 commenced more than six years after tender of delivery of the goods to the
5 aggrieved party.

6 (d) Where an action commenced within the time limited by subsection (b) or
7 (c) is so terminated as to leave available a remedy by another action for the same
8 breach such other action may be commenced after the expiration of the time limited
9 and within six months after the termination of the first action unless the termination
10 resulted from voluntary discontinuance or from dismissal for failure or neglect to
11 prosecute.

12 (e) This section does not alter the law on tolling of the statute of limitations
13 nor does it apply to rights of action which have accrued before this article becomes
14 effective.

15 **Preliminary Comment**

16 **Changes:** Original Section 2-725 has been changed as follows: (1) The
17 basic four-year limitation period in subsection (a) has been supplemented by a
18 discovery rule that permits a cause of action to be brought within one year after the
19 breach was or should have been discovered, although no later than five years after
20 the time the cause would otherwise have accrued; (2) The applicable limitation
21 period cannot be reduced in a consumer contract (subsection (a)); (3) Subsection
22 (b) contains specific rules for cases of repudiation, breach of a remedial promise,
23 and actions where another person is answerable over; (4) Subsection (c)(1)
24 provides that the limitation period for breach of warranty accrues when tender of
25 delivery has occurred and the seller has completed any agreed installation or
26 assembly of the goods; (5) Subsection (c) contains specific rules for breach of an
27 obligation arising under Section 2-313A or 2-313B, for breach of a warranty arising
28 under Section 2-312, and for breach of a warranty against infringement.

1 **Comments:**

2 1. Subsection (a) continues the four-year limitation period of original Article
3 2 but provides for a possible one-year extension to accommodate a discovery of the
4 breach late in the four year period after accrual. The four year period under this
5 Article is shorter than many other statutes of limitation for breach of contract and
6 provides a period which is appropriate given the nature of the contracts under this
7 Article and modern business practices. As under original Article 2, the period of
8 limitation can be reduced to one year by an agreement in a commercial contract, but
9 no reduction is permitted in consumer contracts.

10 2. Subsections (b) and (c) provide rules for accrual of the various types of
11 action that this Article allows. Certainty of commercial relationships is advanced
12 when such rules are clearly set forth. Subsection (b) deals with accrual rules for
13 actions other than for breach of a warranty, including actions based on repudiation
14 or breach of a remedial promise and actions where another person is answerable
15 over. Subsection (c) deals with the accrual rules for the various claims based on a
16 warranty, including a warranty of title and a warranty against infringement, or on an
17 obligation arising under Section 2-313A or 2-313B.

18 Subsection (b)(1) states the general rule from prior law that a right of action
19 for breach of contract accrues when the breach occurs without regard to the
20 aggrieved party's knowledge of the breach. This general rule is then subject to the
21 three more explicit rules in subsection (b) and to the rules for breach of warranty
22 stated in subsection (c).

23 Subsection (b)(2) provides an explicit rule about repudiation cases. In a
24 repudiation, the aggrieved party may await performance for a commercially
25 reasonable time or resort to any remedy for breach. Section 2-610. The accrual
26 rule for breach of contract in a repudiation case is keyed to the earlier of those two
27 time periods.

28 Subsection (b)(3) addresses the accrual of a cause of action for breach of a
29 remedial promise. A remedial promise may be made in the absence of a warranty
30 running to an immediate buyer arising under Section 2-313, 2-314, or 2-315 or
31 another obligation arising under Section 2-313A or 2-313B, as where a seller
32 promises that it will repair or replace any part that proves to be defective but does
33 not warrant that the parts will not fail; or it may be made in conjunction with such a
34 warranty or obligation.

35 When there is no warranty or other obligation, a cause of action for breach
36 of a remedial promise accrues when the promise is not performed when due, and an
37 action may not be brought after the later of two years after the accrual date for the

1 promise or four years after tender of delivery. Thus, if the seller breaches the
2 remedial promise in the first year after tender of delivery the buyer has until the end
3 of the fourth year after tender to commence an action; however, if the breach occurs
4 during the fourth year after tender the buyer may commence an action for two years
5 after the breach. Likewise, if the seller's remedial promise expressly extends for five
6 years and is breached during the fifth year, the buyer has until two years after the
7 breach to commence an action.

8 When the remedial promise is made in connection with a warranty or other
9 obligation, the limitation period is the later of two years after the accrual date for
10 breach of the promise or the time when a cause of action for breach of the warranty
11 or other obligation would otherwise expire. Thus, if the seller undertakes an
12 obligation to a remote purchaser under Section 2-313A that no parts will be
13 defective at the time the goods leave the seller's control and in connection with that
14 obligation promises to repair or replace any part that fails during a three-year period
15 commencing with the remote purchaser's receipt of the goods, the remote
16 purchaser's cause of action for breach of the remedial promise expires at the later of
17 two years after the promise is not performed when due or four years after the
18 remote purchaser receives the goods (subsection (c)(2)).

19 Subsection (b)(4) addresses the problem that has arisen in the cases when an
20 intermediary party is sued for a breach of obligation for which its seller or another
21 person is answerable over, but the limitations period in the upstream lawsuit has
22 already expired. This subsection allows a party four years, or if reduced in the
23 agreement, not less than one year, from when the claim is originally asserted against
24 the buyer for the buyer to sue the person that is answerable over. Whether a party is
25 in fact answerable over to the buyer is not addressed in this section.

26 3. Subsection (c) addresses the accrual rules for breach of a warranty arising
27 under Section 2-312, 2-313, 2-314, or 2-315, or of an obligation relating to the
28 goods arising under Section 2-313A or 2-313B. The accrual rules explicitly
29 incorporate the definitions of "immediate buyer" and "remote purchaser" in Sections
30 2-313, 2-313A, and 2-313B. Any cause of action brought by another person to
31 which the warranty or obligation extends is derivative in nature. Thus, the time
32 period applicable to the immediate buyer or remote purchaser governs even if the
33 action is brought by a person to which the warranty or obligation extends under
34 Section 2-318.

35 Subsection (c)(1) continues the general rule that an action for breach of
36 warranty accrues in the case of an express or implied warranty to an immediate
37 buyer upon completion of tender of delivery of nonconforming goods to the
38 immediate buyer but makes explicit that accrual is deferred until the completion of
39 any installation or assembly that the seller has agreed to undertake. This extension

1 of the time of accrual in the case of installation or assembly applies only in the case
2 of the seller promising to install or assemble and not in the case of a third party,
3 independent of the seller, undertaking that action.

4 Subsection (c)(2) addresses the accrual of a cause of action for breach of an
5 obligation other than a remedial promise arising under Section 2-313A or 2-313B.
6 In such cases case, the cause of action accrues when the remote purchaser (as
7 defined in those sections) receives the goods. This accrual rule balances the rights
8 of the remote buyer or remote lessee to be able to have a cause of action based upon
9 the warranty obligation the seller has created against the rights of the seller to have
10 some limit on the length of time the seller is liable.

11 Both of these accrual rules are subject to the exception in subsection (c)(3)
12 for a warranty or obligation that explicitly extends to the future performance of the
13 goods and discovery of the breach must await the time for performance. In such a
14 case, the cause of action does not accrue until the buyer or remote purchaser
15 discovers or should have discovered the breach.

16 With regard to a warranty of title or a warranty of noninfringement under
17 Section 2-312, subsection (c)(4) provides that a cause of action accrues when the
18 aggrieved party discovers or should have discovered the breach. In a typical case,
19 the aggrieved party will not discover the breach until it is sued by a party asserting
20 title to the goods or an infringement, an event which could be many years after the
21 buyer acquired the goods. The accrual rule allows the aggrieved party appropriate
22 leeway to then bring a claim against the person that made the warranty. In
23 recognition of a need to have a time of repose in an infringement case, a party may
24 not bring an action based upon a warranty of noninfringement more than six years
25 after tender of delivery.

26 4. Subsection (d) states the saving provision included in many state statutes
27 and permits an additional short period for bringing new actions where suits begun
28 within the four year period have been terminated so as to leave a remedy still
29 available for the same breach.

30 5. Subsection (e) makes it clear that this Article does not purport to alter or
31 modify in any respect the law on tolling of the Statute of Limitations as it now
32 prevails in the various jurisdictions.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

PART 8
TRANSITION PROVISIONS

SECTION 2-801. EFFECTIVE DATE. This [Act] shall become effective on _____, 20 ____.

SECTION 2-802. REPEAL. This [Act] [repeals] [amends] [insert citation to existing Article 2].

SECTION 2-803. APPLICABILITY. This [Act] applies to a transaction within its scope that is entered into on or after the effective date of this [Act]. This [Act] does not apply to a transaction that is entered into before the effective date of this [Act] even if the transaction would be subject to this [Act] if it had been entered into after the effective date of this [Act]. This [Act] does not apply to a cause of action that has accrued before the effective date of this [Act].

SECTION 2-804. SAVINGS CLAUSE. A transaction entered into before the effective date of this [Act] and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this [Act] as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.

1 **SECTION 2-805. PRESUMPTION THAT RULE OF LAW CONTINUES**
2 **UNCHANGED.** Unless a change in law has clearly been made, the provisions of
3 this [Act] shall be deemed declaratory of the meaning of [insert citation to existing
4 Article 2].