

**PROPOSED AGENDA**  
**March 6-8, 1998 Meeting of Drafting Committee**  
**Revised Article 2**

**1. Introduction.**

In preparing the March, 1998 Draft of Article 2, the Reporters have done three things:

First, substantive changes or recommendations for substantive change in the July, 1997 Draft have been limited, in the main, to the issues submitted to the Drafting Committee in the November, 1997 Questionnaire. When the response of the Drafting Committee was clear, the change was made. When the response was equivocal, the text was either left unchanged or alternatives were presented for choice. These areas are indicated by underlining or Alternatives stated in the Text and discussed in the notes.

Second, the revised draft was carefully compared with the original text of Article 2 to find and assess whether the non-substantive changes that have occurred over the five years of the drafting process should be re-conformed to the original Article 2. Our goal was to conform the revised text to the original text, with the style and grammatical exceptions noted at the end of the this memo.

Third, we began to work on but did not conclude the form and content of the comments to each section.

**2. Substantive Issues From Partial Redraft.**

Here is a review of the changes made in the Partial Redraft and a statement of the issues left for decision. We will start with Part 4, Warranties.

**A. Warranties.**

2-401: Definitions

The phrase “demonstration or depiction was deleted from the definition of “demonstration.

The term “representation” includes all of the ingredients that may amount to an express warranty. It was devised to aid in drafting sections where express warranties are at issue. No change of substance is made.

2-402: Title and Infringement.

2-402 was not involved in the Partial Redraft. See Notes for a summary of

changes made.

#### 2-403: Express Warranty to Immediate Buyer

Subsection (a). The phrase “basis of the bargain” has been replaced with the phrase “part of the agreement” and when a promise or representation becomes part of the agreement is stated in the statute.

**Issue:**

1. Should “basis of the bargain” be restored? The Drafting Committee said no.
2. If so, should the statute say when a promise or representation becomes “part of the basis of the bargain?”
3. If so, is the test in subsection (a), including the exclusion for “puffing,” satisfactory?
4. If not, is the test stated in subsection (a) still satisfactory?

Subsection (b). This subsection states what the seller’s obligation is under an express warranty or promise and when the obligation is breached.

Subsection (c). This subsection codifies the case law conclusion that express warranties to immediate buyers may be created by advertising.

**Issue:**

1. Should the case law be codified? The Drafting Committee said yes.
2. If so, is a representation or promise excluded from the agreement if the immediate buyer knows of but does not believe it? The Drafting Committee said no and this result is supported by a recent decision in the Second Circuit, at least where the source of disbelief comes from sources other than the seller.

#### 2-404. Implied Warranty of Merchantability.

Personal injury and property damages resulting from breach of express or implied warranty. The Comment states the compromise between NCCUSL and the ALI on this problem and relates the more recent history.

**Issue:**

1. Should liability for personal injuries or damage to property other than the goods sold be excluded from Article 2. The Drafting Committee said no.
2. If not, is the current compromise between warranty and tort satisfactory. The Drafting Committee is satisfied.
3. If not, to what extent should personal injury and property damage be protected under Article 2? See the July, 1997 Draft.

2-406. Disclaimer or Modification of Warranty.

Subsection (b). This subsection provides general guidelines for agreements disclaiming or modifying implied warranties in commercial and consumer contract. It does not provide a safe harbor.

**Issue:**

Is the overall approach to the disclaimer or modification of implied warranties satisfactory? The Drafting Committee apparently says yes.

Is the language in subsection (b) satisfactory?

Subsection (c). This subsection provides a safe harbor in commercial contracts for disclaiming or modifying implied warranties. It does not apply in consumer contracts.

**Issue:**

1. The language must be conspicuous. See 2-102(a)(7).

Are the safe harbors in this definition satisfactory?

If not, what should the definition be?

Should the issue be for decision by the court?

2. Is the safe harbor language satisfactory? The Drafting Committee did not support a recommendation to make the safe harbor language for merchantability more restrictive than that for

fitness.

3. If not, what changes should be made, i.e., should the definition of “conspicuous” conform to 2B?

Subsection (d). This subsection provides a safe harbor in consumer contracts. Implied warranties can be disclaimed by satisfying either subsection (b) or subsection (d) but not by satisfying subsection (c).

**Issue:**

1. Conspicuous. See above.
2. Is the “pass through” safe harbor in (d)(1) satisfactory? If not, what changes should be made?
3. Is the “plain English” safe harbor in subsection (d)(2) satisfactory? If not, what changes should be made?

2-408 Extension of Express Warranty to Remote Buyer and Transferee.

Subsection (b). “Pass through” express warranties to remote buyers.

**Issue:**

1. Should this warranty, which is supported by case law, be codified or left to judicial development? To date, the Drafting Committee supports its codification.
2. If codified, is the statement of the “pass through” conditions and when an obligation is created [see the “unless” clause] satisfactory? If not, what is a better statement?
3. Is the scope of the obligation beyond the remote buyer (the beneficiaries) proper?

Subsection (c). Public communication, including advertising.

**Issue:**

1. Should this warranty, which is supported by case law, be codified or left to judicial development? To date, the Drafting Committee supports codification.

2. Scope of the obligation (see above).
3. Should Alternative (B), the buyer must both know of and believe the representation or promise, be adopted?
4. The assumption under both (b) and (c) is that if the conditions for imposing an obligation are satisfied, the seller cannot then limit the scope of the express warranty in a contract with the immediate buyer. Is this sound?

Subsection (d), (f)(4). Statute of limitations.

**Issue:**

1. Should the cause of action for the statute of limitations accrue when the obligation is breached as stated in subsection (e)? If not, when should the cause of action accrue?

Subsection (f). Remedies of Remote Buyer for breach of obligation.

**Issue:**

1. Is the general approach to remote buyer's remedies sound?

If not, how should subsection (f) be improved?

If so, should subsection (f) serve as a model for remedies or remote buyers and other protected persons under Section 2-409?

2. Is it too difficult for an advertiser under subsection (c) to communicated limitations on remedies under subsection (f)(1)? If so, how can that difficulty be eased?
3. Should a seller be liable to a remote consumer buyer for consequential lost profits? The current draft says no.

Section 2-409. Extension of Express or Implied Warranty.

1. Subsection (a) has a different theory than the extension of express warranties under Section 2-408 and is based upon policy considerations rather than case law. Should subsection (a) be retained?

2. If not, what should be said about privity in economic loss cases? Should subsection (a), like current 2-318, Alternative C, be left as an alternative for state adoption?

3. If not, what should be said about privity in cases of personal injury or damage to property? Should alternatives like 2-318 A or B be restored?

4. If not, should subsection (b) be retained, with a cross-reference for remedies to Section 2-408(f)?

5. If so:

Is the warranty extended to the proper beneficiaries?

Is the extension properly limited by the terms of the contract between seller and immediate buyer.

Should the remedy rules of Section (f)(2) & (3) be applied?

## **B. Contract Formation and Terms of the Agreement.**

### **Section 2-201. Statute of Frauds.**

Assuming that Revised Article 2 will have some statute of frauds, the questions is what conditions must be met to satisfy it. This question also applies to modifications under 2-209. The answer turns, in part, on whether the statute serves to prevent or deter fraudulent assertions about the making or a contract or its terms or serves a procedural objective, such as a summary judgment motion, to weed out complex factual disputes. The current draft assumes that the former rather than the latter is correct.

#### **Issue:**

1. Is \$5,000 an acceptable ceiling beneath which the statute will not operate? If not, what is an acceptable ceiling?

2. The current draft provides that if a signed record or conduct by both parties indicates that a contract has been made, the lack of a quantity term will not prevent satisfaction of the statute. Is this change sound?

3. The so-called estoppel exception has been deleted from the text

and will be discussed in the comments. The comments will say that 2-201 does not displace the estoppel exception as developed by the courts. Is this sound?

4. The “admissions exception in subsection (c) is satisfied if the defendant admits facts from which a contract can be inferred. Is this sound? Should the exception require admission of a “contract.

#### Section 2-202. Final Written Expression

**Issue:**

1. Should 2-202 be re-conformed to the original 2-202. The Drafting Committee says no.
2. If not, should the clarification that terms in the agreement may be interpreted by credible evidence from any source be retained? The Drafting Committee says yes.
3. If not, is the “certainly would have been included test for exclusion from a partially integrated writing an improvement on the “consistent additional terms test for inclusion?

#### Sections 2-203 and 2-205. Contract formation.

**Issue:**

1. 2-203(d) and 2-205(a)(1) draw contract formation rules from former 2-207. Do these sections work well together or are there omitted cases that should be covered?
2. 2-203(e), which is approved in principle by the Drafting Committee, raises several questions.

Should this subsection be in Article 2?

If not, how should Article 2 address the issues of terms proposed after payment has been made?

If so, should the “return for refund remedy now in 2B be added to the relief?

If so, does subsection (e) adequately cover the issue of post-payment proposed terms in non-privity cases, see 2-408, 2-409.

Section 2-206. Consumer contracts.

**Issue:**

1. Should 2-206 or a provision like it be in Revised Article 2? The Drafting Committee says yes.
2. If not, what should be done to provide adequate disclosure in consumer contracts? Is the judicial application of 2-105 coupled with state and federal consumer protection law sufficient?
3. If so, should Alternative A or Alternative B be adopted? The answer seems to depend upon the objective of 2-206, whether it is disclosure of terms or policing against “out of bounds” terms.

2-209. Modification, Rescission and Waiver.

**Issue:**

1. Should there be a statute of frauds applicable to modifications? The current draft says no. If so, what should it provide?
2. Should a “no oral modification” clause be enforceable in a consumer contract? The current draft says no.
3. If so, will the estoppel-waiver exception in subsection (b) provide adequate protection?

**C. Remedies.**

2-803. General policies.

**Issue:**

1. Should subsection (c) [Alternative C] be deleted?
2. If not, should it be made clearer the cases to which it might apply?
3. If so, which Alternative, A or B, should be adopted?



## Section 2-806. Consequential damages.

### **Issue:**

1. Are the general limitations on consequential damages stated in subsection (a), i.e., foreseeability, acceptable. If not, what improvements can be made?
2. Should the limitations in subsection (a) apply to property damage? The current draft says yes.
3. Is the “disproportionate” limitation in subsection (b) acceptable?
4. Should the “disproportionate” limitation apply to personal injuries? The current draft says no.

## Section 2-810. Limitation of Remedies.

### **Issue:**

1. Should the “minimum adequate remedy” requirement be in the text of subsection (a)(2) or left in the comments?
2. If left in the text, should the time for testing adequacy be stated or left open? Do any of the stated Alternatives provide a superior solution?
3. Subsection (b) deals with the consequences of a limited remedy failing its intended purpose. Should Alternative A, [July, 1997 Draft] B or C be adopted?

## Section 2-814. Statute of Limitations

### **Issue:**

1. Should the extension to five years in subsection (a) be preserved?
2. Should consumer contracts be excluded from original agreements reducing the statute of limitations to not less than one year.
3. Subsection (b) states an accrual rule that is subject to subsections (c) and (d) and to Sections 2-402(e) and 2-404(e). Is this rule with exceptions adequate when the purpose of a statute of limitations is considered?

### **3. Other Substantive Issues.**

#### **A. Relationship with Article 2B.**

1. 2-103(b). Embedded goods.
2. Sections 2-210 - 2-217. Electronic contracting.
3. Degree of conformity between articles.

#### **B. Relationship with Revised Article 9.**

1. 2-505(a), 2-824, revised 1-201(9) (BIOCB). Article 2 rights of buyer's to goods in seller's possession against seller and creditors of seller.
2. 2-506(f). Consignments.
3. 2-816(a), 2-818. Rights of seller in possession or control of goods against insolvent or breaching buyer and creditors of buyer.
4. 2-816. Right of seller to reclaim goods from buyer or creditors of buyer.
5. 2-829(b). Security interest of buyer in possession of goods after rejection or revocation of acceptance.
6. Transition provisions in Article 9. Draft 9-116.

#### **C. Termination and cancellation. What rights survive? 2-310, 2-808**

These new sections are taken from 2B. They state in elaborate detail when a contract may be terminated or canceled and what the consequences are.

#### **D. Waiver. 2-702**

This section has not been reviewed by Drafting Committee.

#### **E. Measure of market price damages in repudiation cases. 2-821, 2-826.**

Is the "snap shot" approach acceptable?

#### **F. Other formation issues. Battle of the Records. 2-207.**

With one exception, revised 2-207 operates whether or not there is a form record. Is that one exception justified? See 2-207(b)(4).

G. Cure. 2-709.

H. Risk of Loss. 2-612.

#### **4. Revisions of Style.**

In conforming the July, 1997 to the original Article 2, the reporters followed some “global” drafting rules in deciding when to deviate in matters of style. They are:

- i. Eliminate gender pronouns (the number of changes caused by this change is illustrated by the attached chart)
- ii. Eliminate “unless otherwise agreed” given global rule in 2-108
- iii. Grammar based changes:
  - (1) changing “which” to “that
  - (2) changing “who” to “that
  - (3) changing “when” (if not used as a time) and “where” (if not used as a place) to “if
  - (4) changing “must” to “shall
- iv. using section numbers instead of textual cross references
- v. consistent use of defined terms, examples
  - (1) document v. document of title
  - (2) delivery v. tender of delivery
  - (3) term v. clause
  - (4) writing v. record
- vi. improving readability
  - (1) breaking up long sentences
  - (2) parallel structure of multiple clauses
  - (3) passive to active voice

In review the March, 1998 Draft, if you discover places where the Draft should have been conformed to original Article 2 or where a style change is really substantive or confuses rather than clarifies, please let the reporters know.

Sections changed to eliminate “he” “his” or “him