AGENDA
Article 2B Drafting Committee
Holiday Inn, Emeryville, CA
November 13-15, 1998

Friday Morning, November 13

9:00 - 10:00 Section 2B-105 - Relation to Other Law

Revised Suggestion of Chair and Reporter (2) (Appendix 2)

Letter from Professor Perlman Dated October 7, 1998 (3)

ARL Memo (pp. 1-2) (4)

ACIS Memo (pp. 1-2) (5)

IEEE Memo (pp. 1-2) (6)

Professor McManis Memo (7)

DFC Memo (pp. 1-2) (8)

RIAA Memo (pp. 15-17) (12)

IIA Memo (p. 2) (27)

McKay Memo (32)

BSA Memo (p. 2) (29)

SVSIC Memo (33)

Kaner Memo (37)

10:00 - 12:00 **Scope:** 2B-103 and 104 (and related definitions)

Revised Suggestion of Chair and Reporter (2 - Appendix 1A and 1B)

ABA Memo (10)

Reitz, et al. Memo (11)

IIA Memo (p.1) (27)

RIAA Memo (pp. 4-14) (12)

NMPA Letter (13)

MPAA Memo (14)

ARL Memo (4)

McKay Memo (32)

BSA Memo (pp. 1, 7-8) (29)

Friday Afternoon

2:00 - 4:00 Contract Formation

Suggestion of Chair and Reporter (Draft 2B-111)

Reitz, et al Memo (11)

Braucher Memo (16)

AHCC Memo (18)

ARL Letter (4)

BSA Memo (pp. 8-9) (29)
ICCA Memo (Definitions) (30)

SVSIC Memo (33)

McKay Memo (32)

MPAA (Definitions 201, 203 (pp. 5-7); 209 (pp. 7-8); 111 (p. 9); 304(a) and (b) (pp. 12-13) (28)

Kaner Memo (37)

4:00 - 5:30 Electronic Contracting Provisions

Proposals of Chair and Reporter 2B-116; 117; 204 (2)

Reitz, et. al Memo (11)

ABA Memo on electronic records (15)

Saturday Morning, November 14, 1998

8:30 - 10:00 Mass Market Provisions

SIM Memo (Def. (32); 207) (31)

ARL Letter (Def. (32)) (4)

BSA (208; pp. 2-3; p. 11) (29)

ABA Memo (17)

SVSIC Memo (33)
Kaner Memo (Item 7) (37)

10:00 - 12:00 Warranties (Part 4)

Proposals of Chair and Reporter (August Draft – 2B-401(c))

Rice Memo (2B-402) (26)

IIA Memo (401, 406) (27)

SIM (401, 402, 406) (31)

McKay Memo (406) (32)

MPAA (401(a), 402(c); pp. 21-23) (28)

BSA (pp. 4-7) (29)

Kaner Memo (37)

Saturday Afternoon

2:00 - 3:00 Finance Provisions (Part 5 et. al)
Mooney/Harris Memo (20)
BSA Memo (21)
Smith Memo (22)
ELA Memo (23)
Rice Memo (24)
IIA Memo (27)
ARL Memo (2B-502(1)(B) (4)
BSA Memo (pp. 9-10) (29)MPAA Memo (2B-504(b); pp. 20-21 (29)
Kaner Memo (Item 10) (37)

3:00 - 4:00 Self Help Provisions (2B-715)
SIM Memo (p. 8-15) (31)
ICCA Memo (p. 6-7) (30)
MPAA Memo (pp. 17-19) (28)
Kaner Memo (37)

4:00 - 5:00 Duration (2B-308)

BSA Memo (20)
IIA Memo (27)
ICCA Memo (30)
MPAA Memo (28)
SIM Memo (31)
Kaner Memo (37)

5:00 - 6:00 Choice of Law and Forum (2B-107 and 108)
Kaner Memo (Item 5) (37)

Sunday Morning, November 15, 1998

8:00 - 10:30 Miscellaneous

DISCUSSION MEMORANDUM
November 1997 Meeting

This memorandum outlines issues we anticipate will be discussed at the September Meeting. As the memorandum from Connie Ring indicates, the intent is to begin again with selected issues and then, if time permits, go through the Draft on a section, by section.

The November Draft contains a number of revisions based on discussion at the September Meeting and a series of consultations with various groups since that time, including the ALI Council. Also, on a selective basis, I retained some black lining from the prior Draft dealing with sections that were not covered in the September session. Finally, there are a number of black-lined changes that reflect the advice of the ALI Council to use existing Article 2 language where applicable unless a substantive change was intended.

While there are a number of substantive changes time and other pressures meant that I did not go through all of the issues in this Draft. Specifically, the Draft does not revise financing issues and, while it contains more refined Notes dealing with intellectual property issues, it does not include a proposed final discussion of those issues.

The following overviews the issues to be discussed, supplementing the discussion in the Preface and in the relevant sections.

I. ELECTRONIC CONTRACT PROVISIONS

The Committee should consider and confirm the approach to electronic contracts.

With a few exceptions, all of the sections involved in this group of materials have been considered once or twice by the Committee and approved. They were also read and discussed at the Annual Meeting of NCCUSL and at the ALI Annual Meeting. In addition, the Reporter has engaged in extensive discussions with the Chair and Reporter for the non-UCC electronic commerce project to coordinate the two drafts where overlap is present. With very minor exceptions, the two projects are fully consistent.

The major changes in the Draft on these issues since last considered by the Committee reflect an effort to round out the coverage of electronic contract considerations and to approach loss allocation questions dealing raised at the ALI meeting and in a letter of committee. This latter issue concerns the question of how the Draft should deal with the risk of error in electronic transactions in reference to allocating risk between consumers and on-line vendors. The letter provided a thoughtful analysis of the problems. It was a primary motivation for the suggested language in 2B-117 which gives a consumer the ability to avoid loss for electronic errors and provides a means of shifting the burden of proof about such error to the vendor by acting immediately and without having received value from the erroneous transmission.

Also in response to this question, the Draft has been revised to clarify that, given use of a commercially reasonable attribution procedure, there is a presumption (rebuttable) of the identity of the party (when the procedure relates to identification), of the integrity of the content (if the procedure relates to that issue) or of the mesh between intended content and sent or received content (if the procedure deals with that issue). The nature of the procedures required for this result in any case hinge on agreement (or specification by law) and on the agreement being to a commercially reasonable procedure.

The Draft retains an open-ended, technology neutral approach to digital systems that create "signature" or that are employed to the idea of authentication relates to three potential issues (identity, adoption, accuracy). Rather than adopt three separate concepts for this, the approach in our structure is, as in current non-electronic law, to allow the context to control interpretation of what is meant.

The sections that generally fall within the electronic commerce package in this Draft are as follows:

2B-102(3): "authenticate": Should the Draft use "sign" or "authenticate" as the term describing both traditional signatures and electronic or digital signatures. The argument for using "authenticate" lies in the fact that the term encompasses more than mere use of tangible symbols, covering encryption and other actions that may or may not be like ordinary signatures. The argument for not using "authenticate" lies in the growing literature and state legislation dealing with digital and electronic alternatives for signatures, which legislation uses "signature" as the key word and tends to treat "authentication" as focused on a different variable.

2B-102(7): "conspicuous" includes new language dealing with the application of the term in reference to electronic agent actions.

2B-102(13): "delivery" has been rewritten to clarify its application in electronic transactions.
2B-102(15): "electronic" defined to include open-ended range of technology
2B-102(16): "electronic agent"
2B-102(17): "electronic message"
2B-102(18): "electronic transaction"
2B-102(34): "receive" contains references to electronic receipt and has been rewritten in this Draft to accommodate technological issues
2B-102(35): "record"
2B-102(39): "send" has been defined based on the current UCC definition coupled with consideration of electronic commerce issues.
2B-104(b): provides for a rule that Article 2B terms regarding aspects of electronic contracting supersede contrary, existing State laws as applicable to Article 2B transactions.
2B-106: In an on-line contract, should there be an opt-in right even if the mass market based on suggestions by a White House study that there be an opportunity to elect into a uniform law tailored to electronic environments?
2B-108: Default rule for on-line transactions located at the licensor's location since this is the only stable reference point for such transactions.
2B-109: Should the Committee adopt a rule allowing choice of forum enforcement in on-line information transactions without restrictions within the U.S.? The rationale for such a decision lies in the theme set out in the Cruise Lines case. A choice of forum that reflects adjustment to commercial contexts is enforceable. In on-line information transactions, as in cruises, the nature of the context entails a risk of exposure to suit throughout the world and controlling that risk is a reasonable contractual objective. For consumers, in states where that choice is barred by local law, Article 2B preserves that result. Where due process intervenes or ideas of unconscionability or the like apply, the bracketed terms do not change the result.
2B-112: "manifesting assent"
2B-113: "opportunity to review"
2B-114: adopts an explicit recognition of electronic signatures and records applicable to transactions within the scope of the article?
2B-115: "attribution procedure"
2B-116: "attribution to a party": proposes a rebuttable presumption rule
2B-117: "detection of change and error": contains substantial new material dealing with presumptions from use of commercially reasonable verification procedures. The principles are drawn from pending digital signature legislation. Most important, however, the section contains a proposed consumer defense, setting a simple procedure for avoiding liability in reference to alleged electronic errors.
2B-118: "authentication effect and proof": sets out the premise that an authentication has all three of the effects generally ascribed to it unless the circumstances indicate otherwise.
2B-119: "electronic messages"
2B-120: "acknowledgment of electronic messages"
2B-202: "formation": recognizes that actions of electronic agents can create a contract.
2B-204: "offer by electronic agents": sets out special rules for contracts made by electronic agents
2B-311: "electronic regulation"
2B-614: "access contracts"

II. MASS MARKET DEFINITION

Although this issue deals directly with only a single section, determining what constitutes a mass market transaction provides a fulcrum for much of the remainder of the Draft. There are many issues presented.

First, should the concept be retained or should we revert to the consumer-business distinction found in most current law?

Neither Article 2 nor Article 2A will adopt a mass market concept, even though in both fields, there is a demonstrable mass market and, in the case of sales of goods, the mass market is a far more significant factor in commerce than it is in the areas covered by Article 2B. The theme of mass market

transactions covers both consumer and business to business transactions. Some protective measures desirable for consumers are not appropriate for businesses.

The basic argument for abandoning the approach states: 1) the concept creates non-harmonization between the UCC articles on a critical question, 2) the concept is difficult to define and, thus, to gauge the actual risk and actual effect of provisions applying the concept, and 3) the net effect is enhanced uncertainty in commerce.

If the concept is retained, the following issues should be discussed:

(1) Is the approach appropriate?

Commissioner Reitz, for example, suggested a focus on the type of product at the NCCUSL Annual Meeting? For example, a mass market transaction could be defined in the following terms:

> "Mass market transaction" means a transaction involving an end user in a retail market **for information** that, in the form and under the terms provided, is [normally] [primarily] used by consumers. The term does not include an access or other on-line contract involving parties neither of which is a consumer."

The term "normally" is that used in the Magnusen Moss warranty act, which focuses on products, rather than on transactional context.

One observer has suggested a focus on form or adhesion contracts generally.

On balance, however, given the uses made of the concept in the Draft, the current approach which focuses on a particular marketplace seems most appropriate.

(2) What dollar limitation should be used?

At an earlier meeting, the Committee agreed to adopt a definition that contains a monetary limitation. As presently structured, in discussing the dollar cap, the **sole** issue is to what extent the term covers **business to business** transactions. The dollar cap does not extend to consumer deals. Given this, the issue becomes a simple one, but one with vast significance: to what extent should concepts such as an invalidation of some terms of a standard form encroach into a commercial marketplace?

One approach would key the dollar limitation to the average of consumer software prices in the current market with some form of escalator provided. This would yield a dollar amount of around $500 based on available data. An alternative would use a dollar amount that would cover at least 90% of all current retail transactions, with a provision for recomputation when needed. This would yield a figure of no more than $1000. As the dollar amount increases, the degree of risk created increases. Unlike in Article 2A, where a very large dollar amount caps "consumer" lease concepts, a large cap is not justified here as a way of protecting consumers. Consumers have coverage without any dollar limitation.

The function of a dollar limitation is twofold. One function is to define how far into concepts of freedom of contract the Draft will go, since as currently employed, the concept of mass market is used to define several points at which contract terms cannot operate. The second function is to define the level of risk to which licensors are exposed by virtue of the foregoing.

(3) Is the Committee satisfied with the places in which it uses "mass market" as compared to the places where it uses the idea of "consumer"?

As defined, mass market transactions include all consumer transactions **and** some transactions involving a license from one business to another business. That difference suggests that, in general, the term should not be used in cases where the motivation for a rule entails consumer protection principles. The list of uses is:

"**CONSUMER" APPLICATIONS:**

2B-108 (choice of law): default rule
2B-109 (choice of forum): contract choice limited
2B-117 (electronic error): ***proposed*** consumer defense
2B-303 (effect of no-oral modification clause): contract method restricted
2B-618 (hell and high water clauses): effectiveness of clause limited

"MASS MARKET" APPLICATIONS:

2B-106 (opt in to Article 2B): barred in mass market, rather than just consumer
2B-304 (modification of continuing contracts): withdrawal right required in mass market
2B-208 (notice of terms): terms unenforceable in mass market, rather than just consumer
2B-403 (implied warranty of quality): merchantability in mass market
2B-406 (disclaimer of warranty): conspicuous required in mass market

2B-502 (transferability of license): mass market presumed transferable
2B-504 (security interest without consent): allowed in mass market
2B-601 (perfect tender): required in mass market, rather than just consumer (also 2B-607)
2B-610 (refusal for imperfect tender): allowed in mass market rather than just consumer

On some of these applications (for example, the disclaimer rules), the Committee vote to use mass market (or consumer), rather than the other concept was quite close and should be re-examined in light of the definition that has been chosen.

III. MASS MARKET LICENSES (2B-208)

In this Draft, this section has been restructured to clarify the provisions and focus based on the vote of the Committee to abandon the "refusal term" concept. The Committee needs to determine whether the redraft adequately captures the policy adopted.

In particular, the Committee should consider whether the treatment of negotiated terms is appropriate as against the mass market form and whether the commentary being developed with respect to intellectual property and federal policy questions provides an appropriate basis for treating that question.

IV. SELF HELP (2B-716)

Section 2B-716 deals with self-help repossession. The section has been controversial, primarily because of the remedy of "electronic self-help" dealt with in the section. At the September Meeting, the Committee did not vote on a motion to delete the section, basing that decision largely on the hope that a compromise acceptable to all relevant parties could be developed along the lines of the notice-based concept proposed in the Draft.

This Draft makes modifications of that notice-based provision. The nature and effect of those changes are to increase the limits on the ability to use this form of remedy.

The Notes to 2B-715 present a possible alternative which emphasizes judicial intervention and an effective, court-based remedy.

Failing movement toward consensus, the Committee should delete the section and leave the decision on self-help to other law.

V. SCOPE OF THE ARTICLE (2B-103)

Article 2B deals primarily with transactions in the copyright industries that involve a *license* of information and transactions in computer software, which are covered even if the copy is sold without a license.

The first issue is whether scope should include all licenses. The draft excludes patent and trademark licenses not associated with other subject matter covered by Article 2B. Practices in the copyright industries provide the most significant commercial applications of licensing practice and share common themes that are not necessarily present in patent or trademark licensing. Yet, proposals have been made to expand to all licensing if only for the fact that courts are likely to use Article 2B rules by analogy in other fields.

As drafted, Article 2b is not an intellectual property licensing statute. It deals with commercially significant information-based transactions involving a licensing paradigm, whether or not intellectual property rights are the core of the transactional subject matter.

The second issue concerns how to draw the line between Article 2B and the goods-related articles of the UCC. Article 2B (and revised Article 2) use a gravamen of the action test in mixed transactions: each article controls issues pertinent to its subject matter. Article 2B, however, defers entirely to Article 2 where a computer program is embedded in goods other than information processing or displaying systems (e.g., embedded software that operates the brakes on a car, the timer on a television set, navigation systems in an airplane).

The third issue deals with the proposed treatment of financial transactions. Should the Committee adopt the proposed exclusion for transactions where the licensed subject matter represents money or deposit accounts?

VI. CHOICE OF LAW AND FORUM.

The Committee should revisit and either confirm or modify provisions dealing with contractual choice of law and forum. The current Draft validates contract choices in both respects. With reference to choice of law, the validation is for all cases, subject, of course, to consumer law limitations outside the UCC. With reference to choice of forum, the validation is as to non-mass-market transactions. For the Mass market, the Draft uses language from modern choice of forum case law.

Section 2B-108: Choice of Law

There is an issue under Section 2B-108 of whether the Committee should reconsider it position with respect to the enforceability of choice of law clauses in contracts under Article 2B. The Committee previously voted to fully validate all such clauses. Some criticism of this position has been expressed at the ALI meeting and in correspondence from a faculty member knowledgeable in this field. The proposal of that faculty member was to adopt a modified version of existing Article 1 which precludes a choice of law unless the chosen state has a reasonable relationship to the transaction. This potentially significant intrusion on overall contract choice is, in my view, inappropriate, especially in light of the nature of our subject matter and the increasing national nature of transactional issues in our area.

The parties, if they so choose, should be free to elect a choice of law of a state that has no relationship to the transaction, but which has a body of rules that may, for example, be more fully developed on a particular subject matter than other laws are. For example, a Swiss Corporation doing business on the Internet with a company in Texas should be able to agree with that company to apply the law of California if the parties believe that California law deals more effectively or has greater depth of coverage concerning their transaction. Restraining that choice is in the interest of neither party. Judicial reversal of such decisions is inappropriate.

In discussing the issue, the Committee should consider the following language, which adapts a portion of the Restatement (Second) of Conflicts 187, as a replacement for 2B-108(a).

> (a) A choice of law term in an agreement is valid, except that the term will not be applied if the particular issue could not have been resolved by agreement under the law of this state and the chosen state has no substantial relationship to either of the parties, to the transaction, or to the subject matter of the transaction, and there is no other reasonable basis for the choice.

This language conforms to the bulk of the Restatement approach and would unify choice of law jurisprudence in this field. Adoption of this approach seems to effectively balance concerns about over-reaching and concerns about the need to freely contract for choice of law.

It does not adopt the "fundamental policy" restriction contained in the Restatement which invalidates a choice of law on an issue that cannot be controlled by contract if the choice would violate the fundamental policy of the state whose law would otherwise apply. That standard would create substantial uncertainty.

Under the Article 2B structure, consumer laws that restrict choice of law concepts are preserved via 2B-104.

Section 2B-109: Choice of Forum

The Committee should consider whether the restrictions on contract choice of forum should remain limited to consumer contracts or should be expanded to cover all contracts. The current Draft of 2B-109 incorporates the language of modern decisions on choice of forum clauses, validating those clauses unless the clause creates jurisdiction that would not otherwise exist and is "unreasonable and unjust." A growing body of case law exists supplying insight on when or whether a particular choice is unreasonable and unjust. Adopting that modern line of authority would have the advantage of incorporating on a national basis the emerging better view in this area. The concept also would allow courts to police and avoid cases of serious abuse where the sole basis for the choice of forum was, in effect, to disenfranchise the other party. A possible redraft would provide:

> The parties may choose an exclusive judicial forum. However, a choice is not enforceable if the chosen jurisdiction would not otherwise have jurisdiction over the party objecting to enforcement of the clause and the choice is unreasonable and unjust as to the consumer. A choice-of-forum term is not exclusive unless the agreement expressly so provides.

VII. REMEDY LIMITATIONS (2B-703)

The Committee should revisit the section on contractual modification of remedies in two particulars..

First, should the Committee adopt the proposed change on the effect of a failure of an exclusive remedy, requiring that the contract make the terms expressly independent? Prior Drafts allowed the consequential damages provision to survive unless the exclusive remedy and that limitation were expressly dependent on each other. A change to the new language appears to be appropriate here.

Second, should the Committee confirm that disclaimer of consequential damages for any injury is governed under the same rules of enforceability in light of discussion at the Annual Meeting which apparently accepted the difference in this field from that of Article 2 for purposes of this rule?

VIII. BATTLE OF FORMS, CONDUCT AND OFFER AND ACCEPTANCE.

These sections were substantially redrafted based on continued review of existing law, comments from various industries, debate at the NCCUSL Annual Meeting, and analysis of the relationship between the section and other formation rules. They deals with the issues considered in current 2-207. The basic goal of the redraft in 2B-209, 2B-202 and 203 is to bring the Draft into conformance with existing Article 2, but to provide standards and clarification for decisions made in what is definitely a complex and uncertain area.

The important threshold rule deals with when or whether a contract is formed by an exchange of records that contain differing terms. There are two questions there (see 2B-203) First, did the writing purport to make and offer and an acceptance. If not, of course, they do not create a contract under ordinary offer and acceptance law. Second, if they purport to create a contract, what is the effect of the fact that they contain different terms. Basically, Article 2B follows current Article 2 in allowing the creation of a contract by offer and acceptances that are not perfect, mirror images. Unlike current Article 2, however, it goes on to provide a standard for when different terms are a counter-offer and when they are an acceptance. The difference, under this Draft lies in whether the different terms are material. If so, there is no acceptance and thus no contract formed on that basis. Third, if they are an effective offer and acceptance, what are the term? Section 2B-203 follows current law and allows the offer to control, subject to adding additional terms from the acceptance if these are not material changes.

Section 2B-209 as redrafted deals with cases where the writing, if any, do not themselves establish that a contract exists, but a contract is formed by conduct. In cases not involving the classic "battle of forms" generated in modern markets, subsection (a) applies to determining what terms govern the contract. Subsection (a) requires that the court consider the entire context. It generally conforms in that setting to common law principles. In cases involving an exchange of writings that do not entirely agree, the typical interpretation approach involves considering all of the terms of all of the writings and reconciling them in light of all the circumstances. See Abram & Tracy, Inc. v. Smith, 88 Ohio App.3d 253, 623 N.E.2d 704, 708 (1993) ("Generally, a writing should be interpreted as a whole and all the writings that are part of the same transaction should be interpreted together."); Restatement (Second) of Contracts § 202(1) (2) (1981); 2 Farnsworth, Contracts § 7.10 (1990). In such unstructured environments, requiring that a court adopt a "knock-out" rule such as that described here would needlessly place blinders and restraints on courts whose focus in such settings should more generally deal with determining the intent of the parties. Since Article 2B deals with transactions the vast majority of which are not now governed by the U.C.C., this rule allows courts to continue existing practice, rather than enforcing an entirely new regime on the interpretation process.

Where the writing a re standard forms and do not create a contract on their own terms, a contract still exists based on conduct. Article 2B-209(b) applies a "knock out" rule to cases where the records do not form a contract but behavior of <u>both</u> parties recognizes and therefore creates a contract.

To understand the operations of the sections (2B-203(c)(d) and 2B-209), several scenarios are appropriate:

1. Cases where there is no conduct by the parties indicating the existence of the contract and the parties have exchanged records regarding the contract (see 2B-209(a) and 2B-202(a))

+ If the records of the parties include an offer and an acceptance, a contract is formed even if the acceptance varies from the offer, so long as the variance does not relate to a material term, such as scope (2B-203(c)) The terms are the terms of the offer and any

non-material additional terms in the acceptance along with terms included under ordinary interpretation rules.

+ If either or both the offer or the acceptance are conditional on acceptance of their own terms and the conduct of the party is consistent with the condition, a contract exists only if the other party agrees to the conditions. (2B-203(d)) Where there is no conduct, behavior will be consistent with the conditions.

+ If one party agrees, including by manifesting assent, to the record of the other, a contract is formed under the terms of that record. (2B-207 and 2B-208)

2. Cases in which there is conduct by both parties recognizing the existence of a contract and also an exchange of records relating to that purported contract. (see 2B-202(a))

+ If the records or a single record authenticated or agreed to by the parties **does** establish or record a contract, the records control subject to ordinary contract interpretation rules.

+ If the records **do not** establish a contract under 2B-203 (e.g., they contain effective conditions that were not agreed to or they contain material variations that were not accepted), the terms of the contract formed by conduct are determined (1) in the case of non-standard forms, by consideration of all the commercial circumstances and actual agreement of the parties; (2) if the records are standard forms purporting to be an offer and acceptance, the terms are determined by a knock out rule (2B-209(b)).

3. Questions about distinguishing the first and second outcome present in subsection (2) are the most difficult formation and terms issues because they most often assume facts where the writings do not comport with or recognize actual agreement, but the behavior of both parties does. The following show some of the variations:

+ **Facts:** the offer is conditional and response is not, but is not consistent with the offer. **Result:** The contract is formed around the terms of the offer if the condition was effective under 2B-203(d). That occurs if the conditional language was not in a standard form or, if in a standard form, the offeror's conduct was not inconsistent with the language of condition. (2B-209(d). E.g., in the latter case, it did not simply accept the delivered information ignoring the different terms in the acceptance. If the behavior was not consistent with the condition and the records purporting to be an acceptance and an offer were standard forms, the knock out rule applies since the writings do not establish agreement (2B-209(b)). If they are not standard forms, the court looks to the entire context to determine the terms of the contract.

+ **Facts:** the offer is not conditional but the acceptance is conditional and the papers are not consistent with each other. **Result:** A contract is formed around the terms of the acceptance if the condition was effective under 2B-203(d) and the response reflects agreement, including by manifesting assent to the conditions. Effectiveness occurs if the conditional language was not in a standard form or, if in a standard form, if the party's conduct was not inconsistent with the language of condition. This would occur, for example, if the conditioning party did not ship until some indication of assent to its terms was received. This takes the case out of the 2B-209 terms and into general interpretation law and concepts of adopting the terms of a record. (2B-209(d)) If the behavior was not consistent, the knock out rule applies since the writings do not establish agreement (2B-209(a)).

These and other variations are admittedly complex, but that comes not from the statutory structure, but from the fact that the law is being applied to facts that are complex and the function of the statute is to provide guidance on how to approach those issues.

IX. OTHER ISSUES.

The following list sections to which some attention should be directed, but which may be subject to resolution without extended discussion in Committee meetings beyond that which has already occurred.

1. "Consequential damages": should the Committee reconsider a prior vote and include a list of types of claims that are consequential damages for purposes of guiding negotiation and drafting, as

well as implementing aspects of the Article that deal with this issue? Support for this was expressed at the NCCUSL Annual Meeting. However, given a prior Committee vote, no action will be taken to explore this option unless some interest is expressed by members of the Committee.

2. "Direct damages": is the definition appropriate? Should the definition include reference to reliance and restitution interests? At the NCCUSL Annual Meeting, several comments were made in support of the effort to provide clearer guidance for contract drafting on the issues of how one defines damages in terms of their categorization. The Draft attempts to do so.

3. 2B-104: is the definition of what laws supersede Article 2B as proposed appropriate? The prior Draft referred generally to a "law", but several written comments from commissioners asked about the meaning of this reference. In response, the section was redrafted to focus on pre-existing consumer and other statutes or regulations, and any interpretations thereof. Subsequent legislation in any area would, of course, contain its own terms regarding preemption or other relationship between the statute and Article 2B.

4. 2B-106: The Committee should consider whether, in an on-line contract, there should be an opt-in right in the mass market based on suggestions by a White House study that there be an opportunity to elect into a uniform law tailored to electronic environments?

5. 2B-110: should the proposed reference in (b) to express terms and conditions be retained?

6. 2B-201: (statute of frauds)

(1) is the dollar amount appropriate?

(2) should the Committee adopt a short term license exception as proposed?

(3) should the Committee adopt the requirement that there be an affirmative denial of a contract before the defense can be asserted?

7. 2B-204: should the Committee revert to existing Article 2 requirement that a "firm" offer be signed or should it retain the reference to "manifest assent"?

8. 2B-402: is the treatment of express contract obligations for published informational content appropriate?

9. 2B-403: should the Committee adopt the proposed revision of the definition of merchantability?

10. 2B-406: Should the Committee return to current law on the following questions:

a. Should (c) conform to current law which provides: "If a buyer before entering into a contract has examined the goods, sample, or model as fully as desired or has declined to examine them, there is no implied warranty with regard to conditions that an examination in the circumstances would have revealed to it."

b. Should the section allow disclaimers not in a record as under current Article 2 and proposed revisions of Article 2 and 2A and in light of the recognition of oral contracts and exclusion of express warranties by conduct?

c. Should the section on disclaimer by course of dealing and course of performance reinstate disclaimer through "trade use" as under current Article 2 and revisions of Article 2 and 2A?

11. 2B-618: should the hell or high water clause become fixed when a commitment to pay occurs or only when actual payment occurs?

12. 2B-619: should there be a "right" to cure when the time for performance has not yet passed as suggested in the draft?