

DRAFT

FOR DISCUSSION ONLY

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

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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**MARCH, 2000**

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

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**PROPOSED REVISIONS OF  
UNIFORM COMMERCIAL CODE ARTICLE 2 - SALES**

**MARCH, 2000**

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1 **PART 1**

2 **GENERAL PROVISIONS**

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

5 *[Reporter’s Note – This section retains language from the July 1999 Draft of 2-101 to conform*  
6 *to the style of Article 3, Article 4, Article 4A, Article 5, and Article 8.]*

7 **SECTION 2-102. SCOPE.**

8 (a) This Article applies to transactions in goods.

9 (b) If there is a conflict between this Article and another Article of the [Uniform  
10 Commercial Code] that Article governs.

11 [(c) If there is a conflict between this Article and the [Uniform Computer  
12 Information Transactions Act] that Act governs.]

13 [(d) If there is a conflict between this Article and the [Uniform Electronic  
14 Transactions Act] this Article governs.]

15 (e) This Article does not apply to a foreign exchange transaction.

16 *[Reporter’s Note – Subsection (b) is based on a provision in the July 1999 Draft. It is a helpful*  
17 *clarification but should be accompanied by a comment making clear that it is a “one-way*  
18 *street” – that is, it does not permit a provision from Article 2 to be injected into another Article.]*

19 [Reporter’s Note – The Committee voted 7-0 to provide that if UCITA is adopted in a state  
20 Article 2 should defer to UCITA on the question of scope. Subsection (d) is in brackets as it is  
21 dependent on the state adopting UCITA.]

22 [Reporter’s Note – This Act adopts many of the provisions of the Uniform Electronic  
23 Transactions Act, sometimes directly and sometimes with modifications. Because the application  
24 of that Act to transactions within the scope of Article 2 has been carefully considered, it is  
25 appropriate that this Act govern in the event of a conflict. As with subsection (d), the provision  
26 is bracketed because it is not necessary unless a state has adopted UETA. Because UETA defers

1 to the UCC generally but does not defer to original Article 2, that Act should be amended to  
2 reflect the policy adopted here.]

3 [Reporter's Note – Decisions must be made regarding which provisions belong in Section 2-104  
4 and which belong in this section.]

## 5 **SECTION 2-103. DEFINITIONS.**

6 (a) In this Article unless the context otherwise requires:

7 (1) "Authenticate" means i) to sign, or ii) to execute or adopt a symbol, or  
8 encrypt or similarly process a record in whole or in part, with present intent to identify the  
9 authenticating person or to adopt or accept a record or term.

10 *[Reporter's Note – This definition is based on Revised Article 9 but differs in that it uses the*  
11 *disjunctive rather than the conjunctive between identification of the authenticating person and*  
12 *acceptance or adoption of a record or term. An "X" does not identify the authenticating person*  
13 *but when used to accept or adopt a record or term should qualify as an authentication.*  
14 Although it may be redundant, this draft returns to the Revised Article 9 format in that it  
15 includes "to sign" within the definition of authenticate.]

16 (2) "Between merchants" means in any transaction with respect to which  
17 both parties are chargeable with the knowledge or skill of merchants.

18 (3) "Buyer" means a person that buys or contracts to buy goods.

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

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

1 (6) “Conforming” goods or conduct means goods or conduct that are in  
2 accordance with the obligations under the contract.

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

9 (A) with respect to a person:

10 (i) a heading in capitals equal to or greater in size than the  
11 surrounding text, or in contrasting type, font, or color to the surrounding text of the same or  
12 lesser size;

13 (ii) language in the body of a record or display in larger type  
14 than the surrounding text, or in contrasting type, font, or color to the surrounding text of the  
15 same size, or set off from surrounding text of the same size by symbols or other marks that call  
16 attention to the language; and

17 (B) with respect to a person or an electronic agent, a term that is so  
18 placed in a record or display that the person or electronic agent can not proceed without taking  
19 action with respect to the particular term.

20 *[Reporter’s Note – This definition is adapted from current 1-201 and is closer to that definition*  
21 *than the previous draft. The definition will require a comment that makes plain that the*  
22 *subsections cannot be manipulated by unscrupulous sellers. See Comment 10 to Section 1-201.]*

23 (8) “Consumer” means an individual that buys or contracts to buy goods



1 that, at the time of contracting, are intended by the individual to be used primarily for personal,  
2 family, or household purposes.

3 (9) “Consumer contract” means a contract between a merchant seller and a  
4 consumer.

5 (10) “Contract” includes both a present sale of goods and a contract to sell  
6 goods at a future time.

7 (11) “Delivery” means the voluntary transfer of physical possession or  
8 control of goods.

9 (12) “Electronic” means relating to technology having electrical, digital,  
10 magnetic, wireless, optical, electromagnetic, or similar capabilities.

11 *[Reporter’s Note – This definition is identical to UETA.]*

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

15 *[Reporter’s Note – This definition is identical to UETA.]*

16 (14) “Electronic record” means a record created, generated, sent,  
17 communicated, received, or stored by electronic means.

18 *[Reporter’s Note – This definition is identical to UETA.]*

19 (15) “Financing agency” means a bank, finance company or other person  
20 who in the ordinary course of business makes advances against goods or documents of title or  
21 who by arrangement with either the seller or the buyer intervenes in ordinary course to make or  
22 collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's

1 draft or making advances against it or by merely taking it for collection whether or not documents  
2 of title accompany the draft. "Financing agency" includes also a bank or other person who  
3 similarly intervenes between persons who are in the position of seller and buyer in respect to the  
4 goods.

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

15 (17) "Future goods" means goods that are not both existing and identified.

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

18 (19) "Goods" means all things (including specially manufactured goods)  
19 that are movable at the time of identification to the contract for sale. The term includes the  
20 unborn young of animals, growing crops, and other identified things to be severed from realty  
21 under Section 2-107. The term does not include money in which the price is to be paid, the  
22 subject matter of foreign exchange transactions, documents, letters of credit, letter-of-credit

1 rights, instruments, investment property, accounts, chattel paper, deposit accounts, or general  
2 intangibles.

3 (20) “Information processing system” means an electronic system for  
4 creating, generating, sending, receiving, storing, displaying, or processing information.

5 *[Reporter’s Note – This definition is identical to UETA.]*

6 (21) “Installment contract” means a contract which requires or authorizes  
7 the delivery of goods in separate lots to be separately accepted, even though the contract contains  
8 a term “each delivery is a separate contract” or its equivalent.

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

11 (23) “Merchant” means a person who deals in goods of the kind or  
12 otherwise by its occupation holds itself out as having knowledge or skill peculiar to the practices  
13 or goods involved in the transaction or to whom such knowledge or skill may be attributed by its  
14 employment of an agent or broker or other intermediary who by its occupation holds itself out as  
15 having such knowledge or skill.

16 (24) “Present sale” means a sale that is accomplished by the making of the  
17 contract.

18 (25) “Receipt” means:

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

20 (B) with respect to a notice:

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

22 (ii) being delivered to and available at a location, or at an

1 information processing system designated by agreement for that purpose in a form capable of  
2 being processed by ~~or~~ and perceived from a system of that type by the recipient, or, in the  
3 absence of an agreed location or system:

4 (I) in the case of a notice that is not an electronic  
5 record, being delivered at the person's residence, or the person's place of business through which  
6 the contract was made, or at any other place held out by the person as a place for receipt of  
7 communications of the kind; or

8 (II) in the case of a notice that is an electronic  
9 record, being delivered to and available at a system or at an address in that system in a form  
10 capable of being processed by ~~or~~ and perceived from a system of that type by a recipient, if the  
11 recipient uses, or otherwise holds out, that system or address for receipt of notices of the kind to  
12 be given and the sender does not know that the notice cannot be accessed from that place.

13 Whether the information processing system is designated by agreement or otherwise, an electronic  
14 record is not received if the sender or its information processing system inhibits the ability of the  
15 recipient to print or store the record.

16 *[Reporter's Note – This definition is adapted from Section 15 of UETA. A comment will make*  
17 *clear that it must be read in a manner that is consistent with 1-201(27) on receipt by an*  
18 *organization. Whether this definition is necessary must be reevaluated.]*

19 *[Reporter's Note – The changes from "or" to "and" track UETA and correct an inadvertent*  
20 *mistake that originated in the July 1999 Draft.]*

21 (26) "Receive" means to take receipt.

22 (27) "Record" means information that is inscribed on a tangible medium or  
23 that is stored in an electronic or other medium and is retrievable in perceivable form.

1 *[Reporter's Note – This definition is used in both UCITA, UETA, and Revised Article 9.]*

2 (28) “Remedial promise” means a promise by the seller to repair or replace  
3 the goods or to refund all or part of the price upon the happening of a specified event.

4 **Preliminary Comment**

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

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

22 This Act takes the position that a promise by the seller to take remedial action is not a  
23 warranty at all and therefore is not subject to either the time-of-tender or discovery rule. A  
24 remedial promise is treated like any other ordinary promise and a cause of action for its breach  
25 accrues when the promised remedial action is due and not taken (2-725(b)(3)).

26 Illustration. Buyer purchases a car from Seller, who promises to repair any defect that  
27 manifests itself during the first three years or 36,000 miles after purchase, whichever first  
28 expires. During the third year and while the mileage is below 36,000, a part fails and  
29 Seller is unwilling or unable to effectuate a repair. Seller’s promise is a remedial promise,  
30 and Buyer’s cause of action accrues during the third year when the promise is breached.  
31 Section 2-725(b)(3). Whether the promised remedy is exclusive, and if so whether it has  
32 failed its essential purpose, is determined under Section 2-719.

33 (29) “Sale” means the passing of title to goods from the seller to the  
34 buyer for a price.

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

2 (31) ~~“Send” means to transmit as agreed, or in the absence of agreement~~  
3 ~~with any costs provided for and properly addressed or directed as reasonable under the~~  
4 ~~circumstances to deposit a record in the mail or with a commercially reasonable carrier, to deliver~~  
5 ~~in a reasonable manner a record for transmission to or re-creation in another location or~~  
6 ~~information processing system, or to take the steps necessary to initiate transmission to or re-~~  
7 ~~creation of a record in another location or information processing system. In addition, with~~  
8 ~~respect to an electronic record, the term includes to initiate operations that in the ordinary course~~  
9 ~~will cause the record to be delivered to and available at an information processing system or at an~~  
10 ~~address within that system in a form capable of being processed by or perceived from a system of~~  
11 ~~that type by the recipient, if the recipient uses, or otherwise holds out, that system or address as a~~  
12 ~~place for the receipt of communications of the kind sent. An electronic record is not sent if the~~  
13 ~~sender or its information processing system inhibits the ability of the recipient to print or store the~~  
14 ~~record. Receipt within the time in which it would have arrived if properly sent has the effect of a~~  
15 ~~proper sending.~~

16 *[Reporter’s Note – This definition is a slightly modified version of UETA. This definition is*  
17 *being deleted as it is unnecessary. The only use of “send” in the text of Article 2 relates to*  
18 *sending the goods, not sending a notice.]*

19 (32) ~~“Termination”~~ means that either party pursuant to a power created  
20 by agreement or law has put an end to the contract otherwise than for its breach.

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

22 (1) “Account” Section 9-102(a)(2).

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

1	(3) “Check”	Section 3-104(f).
2	(4) “Deposit account”	Section 9-102(a)(29).
3	(5) “Dishonor”	Section 3-502.
4	(6) “Draft”	Section 3-104(e).
5	(7) “General intangible”	Section 9-102(a)(42)
6	(8) “Injunction against honor”	Section 5-109(b).
7	(9) “Instrument”	Section 3-104(b).
8	(10) “Investment property”	Section 9-102(a)(49).
9	(11) “Letter of credit”	Section 5-102(a)(10).
10	(12) “Letter-of-credit right”	Section 9-102(a)(51).

11 (c) In addition Article 1 contains general definitions and principles of construction  
12 and interpretation applicable throughout this article.

13 *[Reporter’s Note – All definitions used in more than one section should be set out in a single*  
14 *section. This is consistent with Article 2A, although it deviates from present Article 2, which has*  
15 *definitions in multiple sections.]*

16 *[Reporter’s note – The comment will specify that the definitions only apply to Article Two.]*

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

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

20 (a) Except as otherwise provided in subsection (b), this Article does not impair or  
21 repeal:

22 (1) [list any certificate of title statutes covering automobiles, trailers,  
23 mobile homes, boats, farm tractors, or the like], except as to the rights of a buyer in ordinary

1 course of business under Section 2-403(b) which arise before a certificate of title covering the  
2 goods is effective in the name of any other buyer;

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

4 (3) any other law of this State to which the transaction is subject, such as  
5 laws dealing with:

6 (A) the sale or lease of agricultural products;

7 (B) the transfer of blood, blood products, human tissues, and parts;

8 (C) the consignment or transfer by artists of works of art or fine  
9 prints;

10 (D) distribution agreements, franchises, and other relationships  
11 through which goods are sold;

12 (E) tort liability for products that cause injury to person or  
13 property;

14 (F) the making and disclaimer of warranties;

15 (G) the misbranding or adulteration of food products and drugs;  
16 and

17 (H) dealers in particular products, such as automobiles, motorized  
18 wheelchairs, agricultural equipment, and hearing aids.

19 (b) ~~If another law of this State applies to a transaction subject to this Article and~~  
20 ~~requires that a term, waiver, notice, or disclaimer be in a writing, or requires that a writing, term,~~  
21 ~~waiver, notice, or disclaimer be signed, the requirement is also satisfied by a record that is not a~~  
22 ~~writing or by an authentication that is not a signing [unless one of the parties to the transaction is~~



1 ~~a consumer and it is clear that the other law intended the formalism of a writing or a signature to~~  
2 ~~protect that party]], but if one of the parties to the transaction is a consumer the requirement is~~  
3 ~~not satisfied by a record or by an authentication unless the consumer has separately authenticated~~  
4 ~~a term in a record permitting the requirement to be satisfied in that manner]].~~ Except as otherwise  
5 provided in [list consumer protection laws to be exempted from this provision including, in a state  
6 that has adopted UETA, consumer protection laws exempted from UETA], if another law of this  
7 State applies to a transaction subject to this Article and requires that a term, waiver, notice, or  
8 disclaimer be in a writing, or requires that a writing, term, waiver, notice, or disclaimer be signed,  
9 the requirement is also satisfied by a record that is not a writing or by an authentication that is not  
10 a signing.

11 (c) Except for the rights of a buyer in ordinary course of business under  
12 subsection (a)(1), in the event of a conflict between this article and a law referred to in subsection  
13 (a), that law governs.

14 (d) For purposes of this Article, failure to comply with laws of the kind referred to  
15 in subsection (a) has only the effect specified in those laws.

16 [Reporter's Note – There is some confusion over the Committee's action in San Jose with regard  
17 to Section 2-104(b). The Reporter and Chair understood the Committee to have adopted the  
18 approach of UETA Section 3, coupled with an internal listing of consumer protection statutes to  
19 be exempted, including any statutes already exempted by a legislature that has adopted UETA,  
20 and a legislative note. Byron Sher has advised us that we are mistaken and that the Committee  
21 agreed to adopt the approach of UETA Section 8(b). The draft reflects our understanding, but if  
22 we made an error then the following two subsections would replace what is in the draft  
23 (subsequent subsections would then be renumbered and the legislative note that follows the  
24 Preliminary Comments would be revised). In Chicago we will attempt to reconstruct the  
25 Committee's decision and if we are mistaken we will correct the mistake.

26 (b) Except as otherwise provided for consumer contracts in subsection (c) or in [list laws  
27 to be exempted from this provision including, in a state that has adopted UETA, laws

1 exempted from UETA], if another law of this State applies to a transaction subject to this  
2 Article and requires that a term, waiver, notice, or disclaimer be in a writing, or requires  
3 that a writing, term, waiver, notice, or disclaimer be signed, the requirement is also  
4 satisfied by a record that is not a writing or by an authentication that is not a signing.

5 (c) Except as otherwise provided in [list laws to be exempted from this provision  
6 including, in a state that has adopted UETA, laws exempted from UETA], if another law  
7 of this State applies to a consumer contract and requires that a writing, term, waiver,  
8 notice, or disclaimer be in a writing, the requirement is also satisfied by a record that is  
9 not a writing unless the other law requires that the record (i) be posted or displayed in a  
10 certain manner, (ii) be sent, communicated, or transmitted by a specified method, or (iii)  
11 contain information that is formatted in a certain manner, in which case the following  
12 rules apply:

13 (1) the record must be posted or displayed in the manner specified in the other law:

14 (2) the record must be sent, communicated, or transmitted by the method specified in the  
15 other law;

16 (3) the record must contain the information formatted in the manner specified in the  
17 other law.

18 The requirements of this subsection may be varied by agreement only to the extent permitted by  
19 the other law.]

## 20 Preliminary Comment

21 **Changes:** Section 2-104, which is new, builds upon original Section 2-102 after the word  
22 “nor” and follows the form of Section 2A-104(1).

### 23 Comments:

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

27 2. Subsection (a)(1) permits the states to list any applicable certificate-of-title statutes and  
28 provides that Article 2 is subject to their provisions on the transfer and effect of title except for  
29 the rights of a buyer in ordinary course of business in certain limited situations. In entrustment  
30 situations, subsection (a)(1) overrides those certificate-of-title statutes that provide that a person  
31 cannot qualify as an owner unless a certificate has been issued in the person’s name. By contrast,  
32 in those cases where an owner in whose name a certificate has been issued entrusts a titled asset  
33 to a dealer who then sells it to a buyer in ordinary course of business, subsections (a), (c) and (d)  
34 provide that the priority issue between the owner and the buyer is to be resolved in the first  
35 instance by reference to the certificate-of-title statute.

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

10 Illustration #2. Dealer sells a new car to Buyer #1 and signs a form permitting Buyer #1  
11 to apply for a certificate of title. Buyer #1 leaves the car with Dealer so that Dealer can  
12 finish its preparation work on the car. While the car remains in Dealer's possession and  
13 before the state issues a certificate of title in Buyer #1's name, Buyer #2 makes Dealer a  
14 better offer on the car, which Dealer accepts. Buyer #1 entrusted the car to Dealer, and if  
15 Buyer #2 qualifies as a buyer in ordinary course of business its title to the car will be  
16 superior to that of Buyer #1.

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

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

27 "Law" in this subsection includes (a) different levels of law, federal, state, and local, and  
28 (b) different sources of law, legislation, regulation, administrative rule and judicial decision. It  
29 also includes law existing at the time of enactment and changes thereafter. It does not deal with  
30 the effect of changes in consumer law upon existing contracts.

31 Assuming that there is a conflict, subsection (d) deals with the failure of parties to the  
32 contract to comply with the applicable law. The failure has the "effect specified" in the law.  
33 Thus, the failure to obtain a required license may make the contract illegal, and thus  
34 unenforceable, while the nonnegligent supply of unmerchantable blood under a "blood shield"  
35 statute may mean only that the supplier is insulated from injury to person or property.

36 Subsection (a)(2) states that Article 2 is subject to "any applicable law that establishes a  
37 different rule for consumers." The relationship between Article 2 and federal and state consumer

1 law will vary from transaction to transaction and from State to State. For example, the  
2 Magnuson-Moss Warranty Act, 15 U.S.C.A. §§ 2301 et. seq., may or may not apply to the  
3 consumer dispute in question and the applicable state “Lemon Law” may provide more or less  
4 protection than Magnuson-Moss. To the extent of application, they control. Otherwise, Article 2  
5 applies.

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

12 Subsection (a)(2) and subsection (a)(3) replace language in former Section 2-102, which  
13 provided: “[N]or does this Article impair or repeal any statute regulating sales to consumers,  
14 farmers or other specified classes of buyers.”

15 *Legislative Note: Subsection (a)(2) states the general policy that Article 2 defers to state*  
16 *consumer protection laws. Subsection (b), a limited exception to this policy, overrides*  
17 *the provisions of other state laws, including consumer protection laws, that require that*  
18 *information be provided in a writing or that a signature be obtained. Under subsection*  
19 *(b), such requirements may be satisfied by a record or an authentication as those terms*  
20 *are defined in this Act. Because many consumer protection laws were enacted before the*  
21 *advent of electronic commerce no consideration was given to their appropriateness in the*  
22 *context of an electronic medium, and requiring sellers today to comply with all such*  
23 *writing and signature requirements would unnecessarily reduce the efficiency of*  
24 *electronic transactions. At the same time, it is important to recognize the protective*  
25 *effects that such requirements may have, and the legislatures are encouraged to review*  
26 *their consumer protection laws to determine which, if any, should be excepted from the*  
27 *rule of subsection (b). Any statute that has been exempted from the effects of the*  
28 *Uniform Electronic Transactions Act should automatically be listed here.*

## 29 **SECTION 2-105. INTEREST AND PART INTEREST IN GOODS.**

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

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

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

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

*[Reporter's Note – The language is the same as existing Article 2. However, the section has been renamed and the text abridged because the definitions have been moved to 2-103.]*

**SECTION 2-106. EFFECT OF TERMINATION AND CANCELLATION.** On termination all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives. The effect of cancellation is the same as that of termination except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

*[Reporter's Note – Termination and cancellation are now defined in section 2-103.]*

*[Reporter's Note – The second sentence is from the existing Code, and therefore is being preserved. However, a comment will be useful to give examples of other rights that may also survive termination or cancellation.]*

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

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

(b) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in

1 subsection (a) or of timber to be cut is a contract for the sale of goods within this Article whether  
2 the subject matter is to be severed by the buyer or by the seller even though it forms part of the  
3 realty at the time of contracting, and the parties can by identification effect a present sale before  
4 severance.

5 (c) The provisions of this section are subject to any third party rights provided by  
6 the law relating to realty records, and the contract for sale may be executed and recorded as a  
7 document transferring an interest in land and shall then constitute notice to third parties of the  
8 buyer's rights under the contract for sale.

9 *[Reporter's Note – There is no from change from current law.]*

## 10 **PART 2**

### 11 **FORM, FORMATION, TERMS, AND READJUSTMENT** 12 **OF CONTRACT; ELECTRONIC CONTRACTING**

13 *[Reporter's Note – The heading has been amended to add a reference to electronic contracting.]*

#### 14 **SECTION 2-201. FORMAL REQUIREMENTS.**

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

21 (b) Between merchants if within a reasonable time a record in confirmation of the

1 contract and sufficient against the sender is received and the party receiving it has reason to know  
2 its contents, it satisfies the requirements of subsection (1) against such party unless notice of  
3 objection to its contents is given in a record within 10 days after it is received.

4 (c) A contract which does not satisfy the requirements of subsection (1) but which  
5 is valid in other respects is enforceable

6 (1) if the goods are to be specially manufactured for the buyer and are not  
7 suitable for sale to others in the ordinary course of the seller's business and the seller, before  
8 notice of repudiation is received and under circumstances which reasonably indicate that the  
9 goods are for the buyer, has made either a substantial beginning of their manufacture or  
10 commitments for their procurement; or

11 (2) if the party against whom enforcement is sought admits in the party's  
12 pleading, or in the party's testimony or otherwise under oath that a contract for sale was made,  
13 but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

14 (3) with respect to goods for which payment has been made and accepted  
15 or which have been received and accepted. (Sec. 2- 606).

16 (d) An enforceable contract under this section is not rendered unenforceable  
17 merely because it is not capable of being performed within one year or any other applicable period  
18 after its making.

### 19 Preliminary Comment

20 **Changes:** Original Section 2-201 has been changed as follows: 1) The threshold for  
21 application of the statute has been increased to \$5,000 or more; 2) The introductory phrase to  
22 original subsection (1) ("Except as otherwise provided in this section") has been eliminated; 3) In  
23 keeping with the principle of medium neutrality, the statute may be satisfied by an authenticated  
24 record (rather than a signed writing); 4) Subsection (c)(2) has been amended to make it clear that

an admission under oath but not made in court satisfies the statute; and 5) Subsection (d) renders the one-year provision of the Statute of Frauds inapplicable to contracts for the sale of goods.

### **Comments:**

1. The required record need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad or input into a laptop computer. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

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

Only three definite and invariable requirements as to the memorandum are made by subsection (a). First, it must evidence a contract for the sale of goods; second, it must be “authenticated”, a word which includes a signature and also includes any symbol or encryption process executed or adopted for the purpose of identifying the authenticating party (Section 2-103); and third, it must specify a quantity.

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

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

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable



1 part of the goods. The overt actions of the parties make admissible evidence of the other terms of  
2 the contract necessary to a just apportionment. This is true even though the actions of the parties  
3 are not in themselves inconsistent with a different transaction such as a consignment for resale or  
4 a mere loan of money.

5 Part performance by the buyer requires that the buyer deliver something that is accepted  
6 by the seller as such performance. Thus, part payment may be made by money or check, accepted  
7 by the seller. If the agreed price consists of goods or services, then they must also have been  
8 delivered and accepted. When the seller accepts partial payment for a single item the statute is  
9 satisfied entirely.

10 4. Between merchants, failure to answer a confirmation of a contract in a record within ten  
11 days of receipt is tantamount to a record under subsection (b) and is sufficient against both parties  
12 under subsection (a). The only effect, however, is to take away from the party who fails to  
13 answer the defense of the statute of frauds; the burden of persuading the trier of fact that a  
14 contract was in fact made orally prior to the written confirmation is unaffected.

15 A merchant includes a person “that by occupation purports to have knowledge or skill  
16 peculiar to the *practices* or goods involved in the transaction.” Section 2-103(emphasis supplied).  
17 Thus, a professional or a farmer should be considered a merchant because the practice of  
18 objecting to an improper confirmation ought to be familiar to any person in business.

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

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

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

1           8. Subsection (d), which is new, repeals the “one year” provision of the statute of frauds  
2 for contracts for the sale of goods. The phrase “any other applicable period” recognizes that  
3 some state statutes apply to periods longer than one year. The confused and contradictory  
4 interpretations under the so-called “one year” clause are illustrated in *C.R. Klewin, Inc. v.*  
5 *Flagship Properties, Inc.*, 600 A.2d 772 (Conn. 1991) (Peters, J).

6           **SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE.**

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

11                       (1) by evidence of course of performance, course of dealing or usage of  
12 trade; and

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

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

19                               **Preliminary Comment**

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

25                               **Comments:**

26           1. Subsection (a) codifies the parol evidence rule, the operation of which depends upon

1 the intention of both parties that terms in a record are the “final expression of their agreement  
2 with respect to the included terms.” Without this mutual intention to integrate the record, the  
3 parol evidence rule does not apply to exclude other terms allegedly agreed to prior to or  
4 contemporaneously with the writing. Unless there is a final writing, these alleged terms are  
5 provable as part of the agreement by relevant evidence from any credible source. Where each  
6 party sends a confirmatory record, mutual intention to integrate is presumed with regard to terms  
7 “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 integration) does not  
9 mean that the parties intended that the record contain all the terms of their agreement (a total  
10 integration). If a record is final but not complete and exclusive it cannot be contradicted by  
11 evidence of prior agreements reflected in a record or prior or contemporaneous oral agreements,  
12 but it can be supplemented by evidence, drawn from any source, of consistent additional terms.  
13 Even if the record is final, complete and exclusive it can be supplemented by evidence of  
14 noncontradictory terms drawn from an applicable course of performance, course of dealing, or  
15 usage of trade unless those sources are carefully negated by a term in the record. If the record is  
16 final, complete and exclusive it cannot be supplemented by evidence of terms drawn from other  
17 sources, even terms that are consistent with the record.

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

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

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

38 **SECTION 2–203. SEALS INOPERATIVE.** The affixing of a seal to a record  
39

1     evidencing a contract for sale or an offer to buy or sell goods does not constitute the record a  
2     sealed instrument and the law with respect to sealed instruments does not apply to such a contract  
3     or offer.

4     *[Reporter's Notes – There is no substantive change to the law; however, "writing" has been*  
5     *changed to "record."]*

## 6           **SECTION 2-204. FORMATION IN GENERAL.**

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

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

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

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

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

20           (2) A contract may be formed by the interaction of an electronic agent and an  
21     individual acting on the individual's own behalf or for another person. A contract is formed if the  
22     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) In an interaction between individuals, 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 message is received; or

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

*[Reporter's Notes – There is no change from existing law in subsections (a)-(c).]*

*[Reporter's Note – Subsection (d) is new and is designed to reflect rules of electronic commerce. Paragraphs (1) and (2) are identical to Sections 14(a) and (b) of UETA. Since UETA does not contain substantive contract rules it has no counterpart to Paragraph (3).]*

*[Reporter's Note – This section will require a comment that formation is subject to equitable defenses, such as fraud, (electronic) mistake, etc. The comment will point out that the law with regard to electronic mistake is not well developed and that courts should not automatically apply standards developed in other contexts.]*

~~SECTION 2-204A. EXPRESS CONDITION IN RECORD; EXPRESS AGREEMENT~~

~~(a) Subject to subsection (d), an offer in a record that contains conspicuous language that expressly conditions intent to make a contract upon the offeree's assent to its terms prevents formation of a contract unless the offeree accepts the offer without proposing additional~~

1 ~~or different terms or conduct by both parties recognizes the existence of a contract. If the offeree~~  
2 ~~accepts the offer without proposing additional or different terms, the terms of the contract are as~~  
3 ~~stated in Section 2-207(a). If conduct by both parties recognizes the existence of a contract, its~~  
4 ~~terms are as stated in Section 2-207(b).~~

5 ~~—————(b) Subject to subsection (d), a record sent by an offeree that would otherwise be a~~  
6 ~~definite and seasonable expression of acceptance but that contains conspicuous language that~~  
7 ~~expressly conditions intent to make a contract upon the offeror's assent to its terms operates as a~~  
8 ~~counteroffer and no contract is formed unless the offeror expressly accepts the counteroffer~~  
9 ~~without proposing additional or different terms or conduct by both parties recognizes the~~  
10 ~~existence of a contract. If the offeror expressly accepts the counteroffer without proposing~~  
11 ~~additional or different terms, the terms of the contract are as stated in Section 2-207(a). If~~  
12 ~~conduct by both parties recognizes the existence of a contract, its terms are as stated in Section 2-~~  
13 ~~207(b).~~

14 ~~—————(c) Subject to subsection (d), if a record contains language that is not conspicuous~~  
15 ~~and that expressly conditions intent to make a contract upon the other party's assent to its terms,~~  
16 ~~the language is not effective unless the other party knows of it. If the other party knows of the~~  
17 ~~language, it has the effect stated in subsections (a) and (b).~~

18 ~~—————(d) Whether language that expressly conditions a party's intent to make a contract~~  
19 ~~upon the other party's assent to its terms has the effect stated in subsections (a) through (c) must~~  
20 ~~be determined in the context of its commercial setting.~~

21 ~~—————(e) For purposes of this Section and Section 2-207, a party does not expressly~~  
22 ~~accept or expressly agree to a record or term by the mere retention or use of goods or by the~~

1 ~~mere retention of payment.~~

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

7 *[Reporter's Note – There is no change in substance, but this section is revised to change “signed*  
8 *writing” to “authenticated record” and “form” has been changed to “form record” to*  
9 *acknowledge nonpaper transactions,.]*

10       **SECTION 2-206. OFFER AND ACCEPTANCE.**

11               (a) Unless otherwise unambiguously indicated by the language or circumstances

12                       (1) An offer to make a contract shall be construed as inviting acceptance in  
13 any manner and by any medium reasonable under the circumstances.

14                       (2) An order or other offer to buy goods for prompt or current shipment  
15 shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or  
16 current shipment of conforming or nonconforming goods, but such a shipment of nonconforming  
17 goods does not constitute an acceptance if the seller seasonably notifies the buyer that the  
18 shipment is offered only as an accommodation to the buyer.

19               (b) Where the beginning of a requested performance is a reasonable mode of  
20 acceptance an offeror who is not notified of acceptance within a reasonable time may treat the  
21 offer as having lapsed before acceptance.

22               (c) A definite and seasonable expression of acceptance in a record operates as an

1 acceptance even if it contains terms additional to or different from the offer.

## 2 Preliminary Comment

3 **Changes:** Subsection (c) is a modified version of original Section 2-207(1). There is no  
4 change in the other subsections.

### 5 **Comments:**

6 1. Any reasonable manner of acceptance is intended to be regarded as available unless the  
7 offeror has made it quite clear that it will not be acceptable. Former technical rules as to  
8 acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc.,  
9 are rejected and a criterion that the acceptance be “in any manner and by any medium reasonable  
10 under the circumstances”, is substituted. This section is intended to remain flexible and its  
11 applicability to be enlarged as new media of communication develop or as the more time-saving  
12 present day media come into general use.

13 2. Either shipment or a prompt promise to ship is made a proper means of acceptance of  
14 an offer looking to current shipment. In accordance with ordinary commercial understanding the  
15 section interprets an order looking to current shipment as allowing acceptance either by actual  
16 shipment or by a prompt promise to ship and rejects the artificial theory that only a single mode of  
17 acceptance is normally envisaged by an offer. This is true even though the language of the offer  
18 happens to be “ship at once” or the like. “Shipment” is here used in the same sense as in Section  
19 2-504; it does not include the beginning of delivery by the seller’s own truck or by messenger.  
20 But loading on the seller’s own truck might be a beginning of performance under subsection (b).

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

28 4. Subsection (a)(2) deals with the situation where a shipment made following an order is  
29 shown by a notification of shipment to be referable to that order but has a defect. Such a non-  
30 conforming shipment is normally to be understood as intended to close the bargain, even though it  
31 proves to have been at the same time a breach. However, the seller by stating that the shipment is  
32 nonconforming and is offered only as an accommodation to the buyer keeps the shipment of  
33 notification from operating as an acceptance.

34 5. The “unless” clause that appeared at the end of the sentence that is now subsection (c)  
35 when that sentence was in former 2-207(a) has been omitted as unnecessary. An offer can, of



1 course, proscribe the modes of acceptance and an offeree can determine whether its response is to  
2 be treated as an acceptance or as a counteroffer.

3 **SECTION 2-207. TERMS OF CONTRACT; EFFECT OF CONFIRMATION.**

4 ~~\_\_\_\_\_ (a) If a contract is formed by offer, including counteroffer, and acceptance and the~~  
5 ~~acceptance does not contain terms additional to or different from the offer, the terms of the~~  
6 ~~contract are:~~

7 ~~\_\_\_\_\_ (1) terms in the offer; and~~

8 ~~\_\_\_\_\_ (2) terms supplied or incorporated under any provision of [The Uniform~~  
9 ~~Commercial Code].~~

10 ~~\_\_\_\_\_ (b) If (i) conduct by both parties recognizes the existence of a contract but their~~  
11 ~~records do not establish a contract, (ii) a contract is formed by an offer and a definite and~~  
12 ~~seasonable expression of acceptance in a record that contains terms additional to or different from~~  
13 ~~the offer, or (iii) a party confirms a contract by a record received by the other party which~~  
14 ~~contains terms additional to or different from those in the contract being confirmed, the terms of~~  
15 ~~the contract, subject to Section 2-202, are:~~

16 ~~\_\_\_\_\_ (1) terms not in a record to which the parties have agreed;~~

17 ~~\_\_\_\_\_ (2) terms in a record supplied by a party to which the other party has~~  
18 ~~expressly agreed;~~

19 ~~\_\_\_\_\_ (3) terms in the records of the parties to the extent that they the terms~~  
20 ~~show agreement of the parties; and~~

21 ~~\_\_\_\_\_ (4) terms supplied or incorporated under any provision of [The Uniform~~  
22 ~~Commercial Code].~~

1 ~~\_\_\_\_\_ (c) If the parties enter into a contract and terms that are not otherwise part of the~~  
2 ~~contract are delivered to the buyer at the time the buyer receives the goods, the following rules~~  
3 ~~apply:~~

4 ~~\_\_\_\_\_ (1) In a contract other than a consumer contract, terms that do not~~  
5 ~~contradict terms in the agreement are effective if:~~

6 ~~\_\_\_\_\_ (i) prior to receipt of the goods the buyer agrees to be bound by the~~  
7 ~~terms; or~~

8 ~~\_\_\_\_\_ (ii) at the time the contract is formed the buyer has notice that the~~  
9 ~~seller intends to deliver the terms after formation and either (A) the seller gives the buyer a right~~  
10 ~~to avoid the contract by returning the goods for a full refund within thirty days after the buyer~~  
11 ~~receives the goods and the buyer fails to exercise the right of return in a timely manner, or (B) the~~  
12 ~~terms, taken as a whole, do not alter the contract to the detriment of the buyer.~~

13 ~~\_\_\_\_\_ (2) In a consumer contract, terms that do not contradict terms in the~~  
14 ~~agreement are effective if:~~

15 ~~\_\_\_\_\_ (i) prior to receipt of the goods the buyer agrees to be bound by the~~  
16 ~~terms and either (A) the seller gives the buyer a right to avoid the contract by returning the goods~~  
17 ~~for a full refund within thirty days after the buyer receives the goods and the buyer fails to~~  
18 ~~exercise the right of return in a timely manner, or (B) the terms, taken as a whole, do not alter the~~  
19 ~~contract to the detriment of the buyer; or~~

20 ~~\_\_\_\_\_ (ii) at the time the contract is formed the buyer has notice that the~~  
21 ~~seller intends to deliver the terms after formation and either (A) the seller gives the buyer a right~~  
22 ~~to avoid the contract by returning the goods for a full refund within thirty days after the buyer~~

1 ~~receives the goods and the buyer fails to exercise the right of return in a timely manner, or (B) the~~  
2 ~~terms, taken as a whole, do not alter the contract to the detriment of the buyer.~~

3 ~~The provisions of this paragraph may not be excluded or modified by agreement.~~

4 ~~————— (3) Terms that are delivered after the contract is formed and that are not~~  
5 ~~effective under paragraphs (1) or (2) of this subsection are treated as a confirmation under~~  
6 ~~subsection (b).~~

7 (a) If (i) conduct by both parties recognizes the existence of a contract although their  
8 records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance,  
9 or (iii) a contract formed in any manner is confirmed by a record which contains terms additional  
10 to or different from those in the contract being confirmed, the terms of the contract, subject to  
11 Section 2-202, are:

12 (1) terms that appear in the records of both parties,

13 (2) terms, whether in a record or not, to which both parties have agreed, and

14 (3) terms supplied or incorporated under any provision of this [Act].

15 (b) Terms to which the buyer has not otherwise agreed that are delivered to the buyer with  
16 the goods become part of the contract, subject to 2-202, only if:

17 (1) the buyer does not within [twenty] [thirty] days of their receipt object to the  
18 terms and offer to return the goods at the seller's expense,

19 (2) the terms do not contradict the terms of the parties' agreement, and

20 (3) taken as a whole, the terms do not materially alter the contract to the detriment  
21 of the buyer.

22 [(c) A contract formed by the interaction of an individual and an electronic agent (Section

2-204(e)(2)) does not include terms provided by the individual if the individual had reason to know that the agent could not react to the terms as provided.]

*[Reporter's Note – Subsection (c) is bracketed as an internal place marker. This subsection is likely to be moved into the provisions on electronic contracting.]*

*[Reporter's Note – The following Preliminary Comment was drafted by a committee member.]*

### **Preliminary Comment**

**Changes:** Subsection (a) is in part a reformulation of original Section 2-207 (original Section 2-207(1), in modified form, has been moved and is now Section 2-206(c)). It also states the terms of contracts generally, including contracts in which there has been no “battle of the forms.” Subsection (b) addresses the effectiveness of terms delivered with the goods after a contract has been formed.

### **Comments:**

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

2. By inviting a court to determine whether a party has “agreed” to the other party's terms, the section recognizes the enormous variety of circumstances that may be presented to a court under this section and this section gives the court greater discretion to include certain terms than former section 2-207 did. In most cases mere performance should not be construed to be agreement to terms on another's record by one who has sent or will send its own record with additional or different terms. Thus a party who sends a confirmation with additional or different terms should not be regarded as having agreed to any of the other's additional or different terms by performance; in that case the terms are found under (a)(1) (terms in both records) and (4) (terms supplied by the code). By the same reasoning, performance after an original agreement between the parties (orally, electronically or otherwise) should not normally be construed to be agreement to terms on the other's record unless that record is part of the original agreement.

1  
2 The rule would be different where no agreement precedes the performance and only one  
3 party sends a record. If, for example, a buyer sends a purchase order, there is no oral or other  
4 agreement and the seller delivers in response to the purchase order but does not send its own  
5 acknowledgment or acceptance, the seller should normally be treated as having agreed to the  
6 terms of the purchase order.

7 In other cases a court might find agreement to some of the additional or different terms  
8 that appear in only one record. If, for example, both parties' forms called for the sale of 700,000  
9 nuts and bolts but the purchase order or another record of the buyer conditioned the sale on a test  
10 of a sample to see if the nuts and bolts would perform properly, the seller's sending a small  
11 sample to the buyer might be construed to be an agreement to the buyer's condition. A court  
12 could also find that the contract called for arbitration where both forms provided for arbitration  
13 but each contained slightly different arbitration provisions. There is a limitless variety of verbal  
14 and non verbal behavior that may be claimed to be an agreement to another's record. The section  
15 leaves the interpretation of that behavior to the wise discretion of the courts.

16 3. Subsection (b) is intended to strike a balance between the buyer's need for protection  
17 from unexpected and unfair terms which the buyer does not see until the product is delivered and  
18 the seller's need for an inexpensive way of contracting with its buyers. To the extent that *Hill v.*  
19 *Gateway 2000*, 105 F.3d 1147(7<sup>th</sup> Cir.1997) finds that no agreement exists at the end of a  
20 telephone exchange in which the seller agrees to ship and the buyer agrees to pay, the subsection  
21 rejects the reasoning in *Gateway*. The section also rejects the conclusion that the terms of the  
22 resulting contract are not to be found by applying section 2-207. However in normal commercial  
23 and consumer cases like *Gateway*, the rules in subsection (b) are intended to make terms that are  
24 delivered with a product part of the contract. Where the buyer does not object, the terms do not  
25 contradict the terms of the parties' "agreement" (not including Article 2 default terms, *see* 1-  
26 201(3)) and the terms delivered with the product contain some sugar (express warranties,  
27 promises of help or maintenance) with the medicine (disclaimers, and other conventional  
28 limitations on remedies) those terms will become part of the contract under subsection (b).

29 Where the buyer makes a timely objection to the terms and offers to return the goods at  
30 seller's expense, and the seller accepts, the contract is canceled. Where the seller refuses that  
31 offer, the contract continues but without the terms that were delivered with the product.

32 4. Since subsection (b) applies only when the parties have not "otherwise agreed" to the  
33 terms, sellers who are fearful either that buyers will object or that the terms with the product may  
34 be found materially to alter the existing contract, may use other methods of contracting. For  
35 example some sellers may choose to get agreement to their terms electronically or orally before  
36 they ship.

37 5. Some records that may accompany the goods are not "delivered" with them under  
38 subsection (b). The subsection is intended to deal with terms on the container (*ProCD v.*

1 *Zeidenberg*, 86 F.3d 1447 (7<sup>th</sup> Cir. 1996)), terms in the box (*Hill v. Gateway 2000*, 105 F.3d  
2 1147 (7<sup>th</sup> Cir. 1997)), and terms on a label or booklet attached to the goods (*Mainline Tractor &*  
3 *Equipment C. v. Nutrite Corp.*, 937 F.Supp. 1095 (D. Vt. 1996)), but not with conventional  
4 commercial form contracting documents such as confirmations, invoices or acknowledgments that  
5 happen to accompany the goods. The terms on such invoices, acknowledgments or the like  
6 become part of the contract only under subsection (a).

7           **SECTION 2–208. COURSE OF PERFORMANCE OR PRACTICAL**  
8 **CONSTRUCTION.**

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

13           (b) The express terms of the agreement and any such course of performance, as  
14 well as any course of dealing and usage of trade, shall be construed whenever reasonable as  
15 consistent with each other; but when such construction is unreasonable, express terms shall  
16 control course of performance and course of performance shall control both course of dealing and  
17 usage of trade (Section 1–205).

18           (c) Subject to the provisions of the next section on modification and waiver, such  
19 course of performance shall be relevant to show a waiver or modification of any term inconsistent  
20 with such course of performance.

21 *[Reporter’s Note – There is no change from existing law.]*

22 *[Reporter Note – A legislative note might be placed here to suggest that this section should be*  
23 *deleted upon adoption of revised Article 1, which will cover this area.]*

24           **SECTION 2–209. MODIFICATION, RESCISSION AND WAIVER.**

1 (a) An agreement modifying a contract within this Article needs no consideration  
2 to be binding.

3 (b) An agreement in an authenticated record which excludes modification or  
4 rescission except by an authenticated record cannot be otherwise modified or rescinded, but  
5 except as between merchants such a requirement on a form record supplied by a merchant must  
6 be separately authenticated by the other party.

7 (c) The requirements of the statute of frauds section of this Article (Section  
8 2–201) must be satisfied if the contract as modified is within its provisions.

9 (d) Although an attempt at modification or rescission does not satisfy the  
10 requirements of subsection (b) or (c) it can operate as a waiver of those requirements.

11 ~~(e) A party who has made a waiver affecting an executory portion of the contract~~  
12 ~~may retract the waiver by reasonable notification received by the other party that strict~~  
13 ~~performance will be required of any term waived, unless the retraction would be unjust in view of~~  
14 ~~a material change of position in reliance on the waiver. A condition in a contract may be waived~~  
15 ~~by the party for whose benefit it was included. Language or conduct is relevant to show a waiver.~~  
16 A waiver affecting an executory portion of a contract may be retracted by reasonable notice  
17 received by the other party that strict performance will be required of any term waived unless the  
18 retraction would be unjust in view of a material change of position in reliance on the waiver.

19 *[Reporter’s Note – Subsection (b) acknowledges electronic transactions by replacing “signed*  
20 *writings” with “authenticated records.”]*

21 *[Reporter’s Note – The relationship between subsections (d) and (e) (subsections (4) and (5) in*  
22 *original Article 2) has been troublesome, and this draft seeks to clarify that relationship.*  
23 *Subsection (d) has been amended to make it clear that it is referring to a waiver of the*  
24 *requirements of subsections (b) and (c) only. Subsection (e) deals with waiver of conditions*

1 generally and is based on the July 1999 Draft. Since an agreement under subsection (b)  
2 operates as a condition, it is subject to the provisions of both subsection (d)(waiver by attempt to  
3 modify or rescind) and subsection (e)(waiver by any means).]

4           **SECTION 2–210. ASSIGNMENT OF RIGHTS; DELEGATION OF**  
5 **PERFORMANCE.**

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

8                   (1) Subject to paragraph (2) of this subsection and except as otherwise  
9 provided in Section 9-406 or otherwise agreed, all rights of either seller or buyer may be assigned  
10 unless the assignment would materially change the duty of the other party, increase materially the  
11 burden or risk imposed on that party by the contract, or impair materially that party's chance of  
12 obtaining return performance. A right to damages for breach of the whole contract or a right  
13 arising out of the assignor's due performance of its entire obligation can be assigned despite an  
14 agreement otherwise.

15                   (2) The creation, attachment, perfection, or enforcement of a security  
16 interest in the seller's interest under a contract is not an assignment that materially changes the  
17 duty of or materially increases the burden or risk imposed on the buyer or materially impairs the  
18 buyer's chance of obtaining return performance within the purview of paragraph (1) of this  
19 subsection unless, and then only to the extent that, enforcement of the security interest results in a  
20 delegation of a material performance of the seller. Even in that event, the creation, attachment,  
21 perfection, and enforcement of the security interest remain effective. However, the seller is liable  
22 to the buyer for damages caused by the delegation to the extent that the damages could not  
23 reasonably be prevented by the buyer, and a court having jurisdiction may grant other appropriate



1 relief, including cancellation of the contract or an injunction against enforcement of the security  
2 interest or consummation of the enforcement.

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

5 (1) A party may perform its duties through a delegate unless otherwise  
6 agreed or unless the other party has a substantial interest in having its original promisor perform  
7 or control the acts required by the contract. No delegation of performance relieves the party  
8 delegating of any duty to perform or any liability for breach.

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

12 (3) The other party may treat any delegation of duties as creating  
13 reasonable grounds for insecurity and may without prejudice to its rights against the assignor  
14 demand assurances from the assignee (Section 2–609).

15 (4) A contractual term prohibiting the delegation of duties otherwise  
16 delegable under paragraph (1) of this subsection is enforceable, and an attempted delegation is not  
17 effective.

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

22 (d) Unless the circumstances indicate the contrary a prohibition of assignment of

“the contract” is to be construed as barring only the delegation to the assignee of the assignor’s performance.

*[Reporter’s Note – This section is an amalgamation of current law, conforming amendments in Revised Article 9, and the July 1999 Draft. That is, it follows the July 1999 Draft’s general approach of breaking assignment and delegation apart; incorporates the changes dictated by revised Article 9; and uses language from existing Article 2 whenever possible.]*

*[Reporter’s Note – A comment will describe the relationship between this provision and Section 9-406. That provision, which trumps this provision under Section 2-102(b), broadly invalidates anti-assignment terms in agreements between account debtors and assignors, and also invalidates terms that render assignments a breach. In a transaction that is not within the scope of Section 9-406, this provision governs the effect of an anti-assignment term. It does not address terms that render assignments a breach, and these terms are enforceable under this Article.]*

*[Reporter’s Note – The addition of the “otherwise agreed” language in subsection (a)(1) restores language that has always been in Section 2-210 and was inadvertently omitted.]*

*[Reporter’s Note – The addition of the phrase “to the extent that the damages could not reasonably be prevented by the buyer” was in the amendment to Section 2-210 adopted by revised Article 9 and was inadvertently omitted.]*

*[Reporter’s Note – A comment will indicate that an assignment of rights may trigger a right to demand adequate assurances of performance under Section 2-609. The right is not automatic, as it is under subsection (b)(3) for any delegation of duties, and the test set forth in Section 2-609 must be satisfied.]*

## **SECTION 2-211. LEGAL RECOGNITION OF ELECTRONIC CONTRACTS,**

### **RECORDS AND AUTHENTIFICATIONS.**

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

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

~~(dc) This Article does not require a record or authentication to be created,~~

1 ~~generated, sent, communicated, received, stored, or otherwise processed by electronic means or~~  
2 ~~in electronic form.~~ Subsection (a) only applies to transactions between parties each of which  
3 agrees to conduct transactions by electronic means. Whether the parties agree to conduct  
4 transactions by electronic means is determined from the context and surrounding circumstances,  
5 including the parties' conduct.

6 (ed) This Article does not require a record or authentication to be created,  
7 generated, sent, communicated, received, stored, or otherwise processed by electronic means or  
8 in electronic form.

### 9 Preliminary Comment

10 **Changes:** This section is new. Subsections (a) and (b) are derived from Section 7(a) and  
11 (b) of the Uniform Electronic Transactions Act (UETA). Subsections (c) and (d) are derived  
12 from Section 5(a) and (b) of UETA.

### 13 Comments:

14 1. This section sets forth the premise that the medium in which a record, authentication,  
15 or contract is created, presented or retained does not affect its legal significance. Subsections (a)  
16 and (b) are designed to eliminate the single element of medium as a reason to deny effect or  
17 enforceability to a record, authentication, or contract. The fact that the information is set forth in  
18 an electronic, as opposed to paper, medium is irrelevant.

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

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

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

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

**SECTION 2-212. ATTRIBUTION.** An electronic record or electronic authentication is attributed to a person if the record was created by or the authentication was the act of the person or the person's electronic agent or the person is otherwise bound by the act under the law.

## Preliminary Comment

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

**Comments:**

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

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

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

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

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

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

9 3. Nothing in this section affects the use of an electronic authentication as a means of  
10 attributing a record to a person. See Section 2-103(a)(1). Once an electronic authentication is  
11 attributed to the person, the electronic record with which it is associated would also be attributed  
12 to the person unless the person established fraud, forgery, or other invalidating cause. However,  
13 an electronic authentication is not the only method for attribution of a record.

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

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

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

1                   **SECTION 2-213 . ~~CONTRACT FORMATION~~; ELECTRONIC RECORD.**

2                   (a) ~~Except as otherwise provided in subsection (b), a~~An electronic record is  
3 effective when received even if no individual is aware of its receipt.

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

7 *[Reporter's Note – The subsection (b) referred to in subsection (a) was deleted previously. The*  
8 *cross-reference should have been deleted at that time.]*

9                   **Preliminary Comment**

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

12                  **Comments:**

13                  1. Subsection (a) makes clear that receipt is not dependent on a person having notice that  
14 the record is in the person's electronic system. Receipt occurs when the record reaches the  
15 designated system whether or not the recipient ever retrieves the record. The paper analog is the  
16 recipient who never reads a mail notice.

17                  2. Subsection (b) provides legal certainty regarding the effect of an electronic  
18 acknowledgment. It only addresses the fact of receipt, not the quality of the content, nor whether  
19 the electronic record was read or "opened."

20                  3. This section does not address the question of whether the exchange of electronic  
21 records constitutes the formation of a contract. Questions of formation are addressed by Sections  
22 2-204 and 2-206.

23                  4. This section does not resolve the questions of when or where electronic records are  
24 determined to be sent or received; the section only covers the effectiveness of an electronic record  
25 once it has been received. This Act determines the time of receipt (Section 2-103).

26                                   **PART 3**

1                   **GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT**

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

5                   *[Reporter’s Note – There is no change from existing law.]*

6                   **SECTION 2–302. UNCONSCIONABLE CONTRACT OR TERM.**

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

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

14                   **Preliminary Comment**

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

16                  **Comments:**

17                  1. This section is intended to make it possible for the courts to police explicitly against the  
18 contracts or terms which they find to be unconscionable instead of by adverse construction of  
19 language, by manipulation of the rules of offer and acceptance or by determinations that the term is  
20 contrary to public policy or to the dominant purpose of the contract. The section is intended to allow  
21 a court to pass directly on the unconscionability of the contract or a particular term of the contract  
22 and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of  
23 the general commercial background and the commercial needs of the particular trade or case, the term  
24 or contract involved is so one-sided as to be unconscionable under the circumstances existing at the  
25 time of the making of the contract. However, a court ought not, on the basis of substantive  
26 unconscionability alone, refuse to enforce a term disclaiming an implied warranty that complies with  
27 the requirements of Section 2-316 or a term that provides for a remedy that is expressly agreed to

1 be exclusive under Section 2-719 (as long as that term provides a minimum adequate remedy). *See,*  
2 *e.g.,* Hornberger v. General Motors Corp., 929 F. Supp. 884 (E.D. Pa. 1996)(limitation of remedy  
3 to repair not unconscionable where consumer lessee, who incurred repair costs after expiration of  
4 express warranty, based claim on breach of implied warranty of merchantability); Moore v. Coachmen  
5 Industries, 499 S.E.2d 772 (N.C. 1998)(conspicuous term limiting warranty coverage on recreational  
6 vehicle to one year or 15,000 miles not unconscionable).

7 Generally a finding of unconscionability requires that a court find both “procedural” and  
8 “substantive” unconscionability. Accordingly, courts also should seldom invalidate a contract, or a  
9 term of a contract, that is not substantively unconscionable in that it merely allocates risk or otherwise  
10 significantly cuts against the complaining party on the basis of the other party’s conduct standing  
11 alone. Unconscionability is not intended to allow disturbance of allocation of risks because of  
12 superior bargaining power, and in those cases that call out for relief the conduct will often constitute  
13 an invalidating cause, such as fraud or duress. Consistent with the provisions of Section 2A-108(2)  
14 and the Uniform Consumer Credit Code (Section 5.108), however, in an appropriate case a court may  
15 invoke procedural unconscionability to invalidate a term or contract. For example, a court might  
16 invalidate a contract because of high pressure sales tactics used in a consumer buyer’s home even  
17 though the conduct does not constitute fraud or duress.

18 The principle underlying unconscionability is one of the prevention of oppression and unfair  
19 surprise. *Cf.* Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948). The operation of this section  
20 is illustrated by the results in cases such as the following:

21 Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d  
22 1272 (1937) (where a term limiting time for complaints was held inapplicable to latent defects  
23 in a shipment of catsup which could be discovered only by microscopic analysis); Brower v.  
24 Gateway 2000, Inc. 676 N.Y.S.2d 569 (N.Y.A.D. 1998) (term requiring arbitration in  
25 Chicago pursuant to rules requiring \$4,000 advance fee, of which \$2,000 was nonrefundable  
26 even if claimant prevailed, substantively unconscionable as applied to consumer, even if  
27 consumer was aware of the term); New Prague Flouring Mill Co. v. G. A. Spears, 194 Iowa  
28 417, 189 N.W. 815 (1922) (holding that a clause permitting the seller, upon the buyer’s  
29 failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely  
30 postponed 30 days at a time by the inaction, does not indefinitely postpone the date of  
31 measuring damages for the buyer’s breach, to the seller’s advantage); Green v. Arcos, Ltd.  
32 (1931 CA) 47 T.L.R. 336 (blanket clause prohibiting rejection of shipments by the buyer  
33 restricted to apply to shipments where discrepancies represented merely mercantile  
34 variations); Austin Co. v. J. H. Tillman Co., 104 Or. 541, 209 P. 131 (1922) (clause limiting  
35 the buyer’s remedy to return held to be applicable only if the seller had delivered a machine  
36 needed for a construction job which reasonably met the contract description).

37 These cases are but a small number of the cases decided prior to the Code and after its  
38 enactment; they nonetheless indicate how various courts have applied the concept of  
39 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", the agreement may not only shift the allocation but may also divide the risk or burden.

*[Reporter's Note – There is no change from current law.]*

**SECTION 2–304. PRICE PAYABLE IN MONEY, GOODS, REALTY, OR OTHERWISE.**

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

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

*[Reporter's Note – This section remains unchanged except for gender neutral language.]*

**SECTION 2–305. OPEN PRICE TERM.**

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

(1) nothing is said as to price; or

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

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

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

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

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

13 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

14 **SECTION 2–306. OUTPUT, REQUIREMENTS AND EXCLUSIVE DEALINGS.**

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

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

22 *[Reporter's Note – There is no change from existing law.]*

1           **SECTION 2–307. DELIVERY IN SINGLE LOT OR SEVERAL LOTS.** Unless  
2 otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and  
3 payment is due only on such tender but where the circumstances give either party the right to make  
4 or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

5 *[Reporter’s Note – There is no change from existing law.]*

6           **SECTION 2–308. ABSENCE OF SPECIFIED PLACE FOR DELIVERY.** Unless  
7 otherwise agreed

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

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

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

14 *[Reporter’s Note – There is no change from existing law.]*

15           **SECTION 2–309. ABSENCE OF SPECIFIC TIME PROVISIONS; NOTICE OF**  
16 **TERMINATION.**

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

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

22                      (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 Note – The last sentence of subsection (c) comes from the July 1999 Draft, and it provides 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 (Section 2–513); and

(3) if tender of delivery is agreed to be made by way of documents of title otherwise than by subsection (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 Note – Paragraph (2) has been changed from original Article 2 so that it applies when the seller is “required or authorized to send the goods.” The “required or” language was added to make this section consistent with other usages throughout Article 2, as well as being consistent with the common understanding of business practice.]*

*[Reporter's Note – Although no substantive change is intended, paragraph (3) picks up clarifying*

1 *language from section 2-611(c) of the July 1999 Draft.]*

2           **SECTION 2-311. OPTIONS AND COOPERATION RESPECTING**  
3 **PERFORMANCE.**

4           (a) An agreement for sale which is otherwise sufficiently definite (subsection (c) of  
5 Section 2-204) to be a contract is not made invalid by the fact that it leaves particulars of  
6 performance to be specified by one of the parties. Any such specification must be made in good faith  
7 and within limits set by commercial reasonableness.

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

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

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

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

17 *[Reporter's Note – In subsection (b), the cross-reference in existing Article 2 to various subsections*  
18 *of 2-319 has been deleted as those provisions no longer exist. The introductory phrase “Unless*  
19 *otherwise agreed” is sufficient. ]*

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

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

23                   (1) the title conveyed shall be good and its transfer rightful and shall not,

1 because of any colorable claim to or interest in the goods, unreasonably expose the buyer to litigation;  
2 and

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

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

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

13 *[Reporter's Note – Subsection (a) brings up from the comments the doctrine of marketable title*  
14 *("shall not, because of any colorable claim to or interest in the goods, unreasonably expose the*  
15 *buyer to litigation"). Although the concept was in the July 1999 Draft, the exact language is new*  
16 *to this draft.]*

17 *[Reporter's Note – The order of subsections (b) and (c) has been reversed for logical clarity.]*

18 *[Reporter's Note – A comment should clarify that to the extent that Article 2 may ultimately apply*  
19 *to a computer software license, title is not involved (except as to a tangible medium in which the*  
20 *software is packaged, such as a diskette).]*

21 **SECTION 2–313. EXPRESS WARRANTIES BY AFFIRMATION, PROMISE,**  
22 **DESCRIPTION, SAMPLE, MODEL; REMEDIAL PROMISE.**

23 (a) In this section, "immediate buyer" means a buyer that enters into a contract with  
24 the seller.

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

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

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

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

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

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

### **Preliminary Comment**

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

Subsection (d) introduces the term “remedial promise”, which was not used in original Article 2. This section deals with remedial promises to immediate buyers; sections 2-313A and 2-313B deal with remedial promises running directly from a seller to a remote purchaser. Remedial promise is defined in Section 2-103.

### **Comments:**

1. “Express” warranties rest on “dickered” aspects of the individual bargain, and go so

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

6 2. This section is limited in its scope and direct purpose to express warranties and remedial  
7 promises made by the seller to the immediate buyer as part of a contract for sale. It is not designed  
8 in any way to disturb those lines of case law growth which have recognized that warranties need not  
9 be confined to sales contracts.

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

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

16 3. The present section deals with affirmations of fact or promises made by the seller,  
17 descriptions of the goods, or exhibitions of samples or models, exactly as any other part of a  
18 negotiation which ends in a contract is dealt with. No specific intention to make a warranty is  
19 necessary if any of these factors is made part of the basis of the bargain. In actual practice  
20 affirmations of fact and promises made by the seller about the goods during a bargain are regarded  
21 as part of the description of those goods; hence no particular reliance on such statements need be  
22 shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such  
23 affirmations or promises, once made, out of the agreement requires clear affirmative proof. The issue  
24 normally is one of fact.

25 4. In view of the principle that the whole purpose of the law of warranty is to determine what  
26 it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse  
27 except in unusual circumstances to recognize a material deletion of the seller’s obligation. Thus, a  
28 contract is normally a contract for a sale of something describable and described. A clause generally  
29 disclaiming “all warranties, express or implied” cannot reduce the seller’s obligation with respect to  
30 such description and therefore cannot be given literal effect under Section 2–316.

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

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



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

6 6. The basic situation as to statements affecting the true essence of the bargain is no different  
7 when a sample or model is involved in the transaction. This section includes both a “sample” actually  
8 drawn from the bulk of goods which is the subject matter of the sale, and a “model” which is offered  
9 for inspection when the subject matter is not at hand and which has not been drawn from the bulk of  
10 the goods.

11 Although the underlying principles are unchanged, the facts are often ambiguous when  
12 something is shown as illustrative, rather than as a straight sample. In general, the presumption is that  
13 any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But  
14 there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn  
15 from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile  
16 experience the mere exhibition of a “sample” does not of itself show whether it is merely intended to  
17 “suggest” or to “be” the character of the subject-matter of the contract. The question is whether the  
18 seller has so acted with reference to the sample as to become responsible that the whole shall have  
19 at least the values shown by it. The circumstances aid in answering this question. If the sample has  
20 been drawn from an existing bulk, it must be regarded as describing values of the goods contracted  
21 for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand,  
22 a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal  
23 description of the subject matter is not so strong, and particularly so if modification on the buyer's  
24 initiative impairs any feature of the model.

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

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

1           There are a number of factors relevant to determining whether an expression creates  
2 a warranty under this section or is merely puffing. For example, the buyer might be unreasonable if  
3 the seller's representations taken in context (1) were verbal rather than written, (2) were general  
4 rather than specific, (3) related to the consequences of buying rather than the goods themselves, (4)  
5 were "hedged" in some way, (5) were related to experimental rather than standard goods, (6) were  
6 concerned some aspects of the goods but not a hidden or unexpected non-conformity, (7) were  
7 phrased in terms of opinion rather than fact, or (8) were not capable of objective measurement. *See*,  
8 *Federal Signal Corp. v. Safety Factors, Inc.*, 886 P.2d 172 (Wash. 1994), where the court held that  
9 the trial court erred in not making findings of fact where the seller stated that a new product was  
10 "better than" an earlier, comparable model. *See also*, *Jordan v. Pascas, Inc.*, 37 F.3d 1181 (6th Cir.  
11 1994) (representations about strength of fiberglass roof which shattered and caused personal injury  
12 when the truck rolled over were "puffing" as a matter of law).

13           9. The use of the word "promise" in subsection (a)(1) is unusual in that it refers to statements  
14 about the quality or performance characteristics of the goods. For example, a seller might make an  
15 affirmation of fact to the buyer that the goods are of a certain quality, or may promise that the goods  
16 when delivered will be of a certain quality, or may promise that the goods will perform in a certain  
17 manner after delivery. In normal usage, "promise" refers to a what a person, not goods, will do; that  
18 is, a promise is a commitment to act, or refrain from acting, in a certain manner in the future. A  
19 promise about the quality or performance characteristics of the goods creates an express warranty  
20 if the other elements of such a warranty are present whereas a promise by which the seller commits  
21 itself to take remedial action upon the happening of a specified event is a remedial promise. The  
22 distinction has meaning only in the context of the statute of limitations. A cause of action for breach  
23 of an express warranty accrues when the goods are tendered to the immediate buyer (Section 2-  
24 725(c)(1)) unless the warranty consists of a promise that explicitly extends to the future performance  
25 of the goods and discovery must await the time for performance, in which case accrual occurs when  
26 the immediate buyer discovers or should have discovered the breach (Section 2-725(c)(4)). By  
27 contrast, a remedial promise is treated like any other ordinary promise in that a cause of action  
28 accrues when the seller fails to perform as promised (Section 2-725(b)(3)).

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

32           **SECTION 2-313A. OBLIGATION TO REMOTE PURCHASER CREATED BY**  
33 **RECORD PACKAGED WITH OR ACCOMPANYING GOODS.**

34           (a) In this section:

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

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

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

5                   (b) If a seller makes an affirmation of fact or promise that relates to the goods, or  
6 provides a description that relates to the goods, or makes a remedial promise, in a record packaged  
7 with or accompanying the goods, and the seller reasonably expects the record to be, and the record  
8 is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that the  
9 goods will conform to the affirmation of fact, promise or description unless a reasonable person in  
10 the position of the remote purchaser would not believe that the affirmation of fact, promise or  
11 description created an obligation, and an obligation to the remote purchaser that the seller will  
12 perform the remedial promise ~~unless a reasonable person in the position of the remote purchaser~~  
13 ~~would not believe that the affirmation of fact, promise or description created an obligation.~~

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

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

20                   ~~(1) Damages may be proved in any manner that is reasonable. Unless special~~  
21 ~~circumstances show proximate damages of a different amount, the measure of damages if the goods~~  
22 ~~do not conform to an affirmation of fact, promise or description is the value of the goods if they had~~

1 ~~been as represented less the value of the goods as delivered, and the measure of damages for breach~~  
2 ~~of a remedial promise is the value of the promised remedial performance less the value of any~~  
3 ~~remedial performance completed.~~

4 (21) The seller may modify or limit the remedies available to the remote  
5 purchaser if the modification or limitation is furnished to the remote purchaser no later than the time  
6 of purchase or if the modification or limitation is contained in the record that contains the affirmation  
7 of fact, promise or description.

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

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

#### 14 Preliminary Comment

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

#### 16 **Comments:**

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

25 No direct contract exists between the seller and the remote purchaser, and thus the seller's  
26 obligation under this section is not referred to as an "express warranty." Use of "obligation" rather

1 than “express warranty” avoids any inference that the basis of the bargain test is applicable here. The  
2 test for whether an obligation other than a remedial promise arises is similar in some respects to the  
3 basis of the bargain test, but the test set forth herein is exclusive. Because “remedial promise” in  
4 Section 2-313 is not subject to the basis of the bargain test that term is used in this section.

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

17         3. The application of this section is limited to new goods and goods sold as new goods within  
18 the normal chain of distribution. It does not apply to goods that are sold outside the normal chain,  
19 such as “gray” goods or salvaged goods, nor does it apply if the goods are unused but sold as  
20 seconds.

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

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

31         5. Obligations other than remedial promises created under this section are analogous to  
32 express warranties and are subject to a test that is akin to the basis of the bargain test of Section 2-  
33 313(b). The seller is entitled to shape the scope of the obligation, and the seller’s language must be  
34 considered in context. If a reasonable person in the position of the remote purchaser, reading the  
35 seller’s language as a whole, would not believe that an affirmation of fact, promise or description  
36 created an obligation, there is no liability under this section.

37         6. There is no difference between remedial promise as used in this section (and Section 2-

1 313B) and the same term as used in Section 2-313. Subsection (d)(1) makes clear that the seller may  
2 employ the provisions of Section 2-719 to modify or limit the remedies available to the remote  
3 purchaser for breach of the seller's obligation hereunder. The modification or limitation may appear  
4 on the same record as the one which creates the obligation, or it may be provided to the remote  
5 purchaser separately, but in no event may it be furnished to the remote purchaser any later than the  
6 time of purchase. The requirements and limitations set forth in Section 2-719, such as the  
7 requirement of an express statement of exclusivity and the test for failure of essential purpose, are  
8 applicable to a modification or limitation of remedy under this section.

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

14 8. As a rule, a remote purchaser may recover monetary damages measured in the same  
15 manner as in the case of an aggrieved buyer under Section 2-714, including incidental and  
16 consequential damages to the extent they would be available to an aggrieved buyer. In the case of  
17 an obligation that is not a remedial promise, the measure of damages would normally be the difference  
18 between the value of the goods if they had conformed to the seller's statements and their actual value,  
19 and the measure of damages for breach of a remedial promise would normally be the difference  
20 between the value of the promised remedial performance and the value of the actual performance  
21 received.

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

24 **SECTION 2-313B. OBLIGATION TO REMOTE PURCHASER CREATED BY**  
25 **COMMUNICATION TO PUBLIC.**

26 (a) In this section:

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

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

31 (3) "Remote purchaser" means a person that buys or leases goods from an

1 immediate buyer or other person in the normal chain of distribution.

2 (b) If a seller makes an affirmation of fact or promise that relates to the goods, or  
3 provides a description that relates to the goods, or makes a remedial promise, in a medium for  
4 communication to the public, such as advertising, and the remote purchaser enters into a transaction  
5 of purchase with knowledge of and with the expectation that the goods will conform to the  
6 affirmation of fact, promise, or description, or that the seller will perform the remedial promise, the  
7 seller has an obligation to the remote purchaser that the goods will conform to the affirmation of fact,  
8 promise or description unless a reasonable person in the position of the remote purchaser would not  
9 believe that the affirmation of fact, promise or description created an obligation, and an obligation  
10 to the remote purchaser that the seller will perform the remedial promise ~~unless a reasonable person~~  
11 ~~in the position of the remote purchaser would not believe that the affirmation of fact, promise or~~  
12 ~~description created an obligation.~~

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

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

19 ~~(1) Damages may be proved in any manner that is reasonable. Unless special~~  
20 ~~circumstances show proximate damages of a different amount, the measure of damages if the goods~~  
21 ~~do not conform to an affirmation of fact, promise or description is the value of the goods if they had~~  
22 ~~been as represented less the value of the goods as delivered, and the measure of damages for breach~~

1 of a remedial promise is the value of the promised remedial performance less the value of any  
2 remedial performance completed.

3 (21) The seller may modify or limit the remedies available to the remote  
4 purchaser if the modification or limitation is furnished to the remote purchaser no later than the time  
5 of purchase. The modification or limitation may be furnished as part of the communication that  
6 contains the affirmation of fact, promise or description.

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

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

### 13 Preliminary Comment

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

#### 15 **Comments:**

16 1. Sections 2-313B and 2-313A are new, and they follow case law and practice in extending  
17 a seller's obligations regarding new goods to remote purchasers. This section deals with obligations  
18 to a remote purchaser created through a medium for communication with the public, and that means  
19 primarily advertising. In the paradigm situation, a manufacturer will engage in an advertising  
20 campaign directed towards all or part of the market for its product and will make statements that if  
21 made to an immediate buyer would amount to an express warranty or remedial promise under Section  
22 2-313. The goods, however, are sold to someone other than the recipient of the advertising and are  
23 then resold or leased to the recipient. By imposing liability on the seller, this section adopts the  
24 approach of cases such as *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 226  
25 N.Y.S.2d 363, 181 N.E.2d 399 (Ct. App. 1962).

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



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

3. This section provides an additional test for enforceability not found in Section 2-313A. In order to be held liable, the remote purchaser must, at the time of purchase, have knowledge of the affirmation of fact, promise, description or remedial promise and must also have an expectation that the goods will conform or that the seller will comply. This test is entirely subjective, while the reasonable person test in subsection (b) is objective in nature.

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

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

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

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

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

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

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

(4) run, within the variations permitted by the agreement, of even kind, quality

and quantity within each unit and among all units involved; and

(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 (Section 2–316) other implied warranties may arise from course of dealing or usage of trade.

*[Reporter’s Note – The only change from original Article 2 is the use of “goods of that description” rather than “such goods” in subsection (b)(3). The substituted language comes from the July 1999 Draft.]*

#### **SECTION 2–315. IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE.**

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

*[Reporter’s Note – There is no change from current law.]*

#### **SECTION 2–316. DISCLAIMER OR MODIFICATION OF WARRANTIES.**

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2–202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(b) Notwithstanding subsection (c), unless the circumstances indicate otherwise, all implied warranties are disclaimed by expressions such as “as is” or “with all faults” or similar

1 language or conduct which in common understanding make it clear to the buyer that the seller  
2 assumes no responsibility for the quality or fitness of the goods. In a consumer contract evidenced  
3 by a record, the requirements of this subsection must be satisfied by conspicuous language in the  
4 record.

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

7 (1) In a contract other than a consumer contract, the language ~~is sufficient if~~  
8 must:

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

11 (B) in the case of an implied warranty of fitness, ~~the language~~ states,  
12 for example, “There are no warranties that extend beyond the description on the face hereof.”

13 (2) In a consumer contract, the language must be in a record and be  
14 conspicuous and:

15 (A) in the case of an implied warranty of merchantability, state “The  
16 seller ~~makes no representations about and is not responsible~~ undertakes no responsibility for the  
17 quality of the goods except as otherwise provided in this contract”; and

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

21 (3) Language that ~~is sufficient to disclaim or modify an implied warranty under~~  
22 satisfies paragraph (2) ~~is also sufficient to disclaim or modify an implied warranty under~~ satisfies

paragraph (1).

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

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

(f) Remedies for breach of warranty may be limited in accordance with this article with respect to liquidation or limitation of damages and contractual modification of remedy (Sections 2-718 and 2-719).

*[Reporter's Note – This provision is essentially the same as the July 1999 Draft (as modified by the errata sheet distributed in Denver).]*

*[Reporter's Note – Subsection (c) has been revised to provide a parallel structure for both consumer and nonconsumer contracts. The use of "must" rather than "sufficient" is consistent with original 2-316(2).]*

## **SECTION 2–317. CUMULATION AND CONFLICT OF WARRANTIES EXPRESS**

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

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

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

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

1 *[Reporter's Note – There is no change from existing law.]*

2           **SECTION 2–318. THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS**  
3 **OR IMPLIED, WARRANTY OBLIGATIONS, AND REMEDIAL PROMISES.**

4           (a) In this section:

5                       (1) “Immediate buyer” means a buyer that enters into a contract with the  
6 seller.

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

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

10           (b) A seller's warranty whether express or implied to an immediate buyer, a seller's  
11 remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section  
12 2-313A or Section 2-313B extends to any natural person who is in the family or household of ~~the~~  
13 such immediate buyer or ~~the~~ such remote purchaser or who is a guest in the home of either ~~person~~  
14 if it is reasonable to expect that such person may use, consume or be affected by the goods and who  
15 is injured in person by breach of the warranty, remedial promise or obligation. A seller may not  
16 exclude or limit the operation of this section.

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

18           (b) A seller's warranty whether express or implied to an immediate buyer, a seller's  
19 remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section  
20 2-313A or Section 2-313B extends to any natural person who may reasonably be expected to use,  
21 consume or be affected by the goods and who is injured in person by breach of the warranty, remedial  
22 promise or obligation. A seller may not exclude or limit the operation of this section.

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

2 (b) A seller's warranty whether express or implied to an immediate buyer, a seller's  
3 remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section  
4 2-313A or Section 2-313B extends to any person who may reasonably be expected to use, consume  
5 or be affected by the goods and who is injured by breach of the warranty, remedial promise or  
6 obligation. A seller may not exclude or limit the operation of this section with respect to injury to  
7 the person of an individual to whom the warranty, remedial promise or obligation extends.

8 *[Reporter's Note – This section retains the existing Code's approach to issues of (at least)*  
9 *horizontal privity but adapts them in light of new sections 2-313A and 2-313B.]*

10 *[Reporter's Note – A comment will make clear that each use of the term “remote purchaser” refers*  
11 *to the person to whom an obligation under Section 2-313A or 2-313B runs directly.]*

12 **SECTION 2–319. RESERVED.**

13 *[Reporter's Note – We need a comment about the usage of shipping terms; however, the appropriate*  
14 *section for the comment must be determined.]*

15 **SECTIONS 2–320 THROUGH 2-324.**

16 **Reserved.**

17 **SECTION 2–325. FAILURE TO PAY BY AGREED LETTER OF CREDIT.** If the  
18 parties agree that the primary method of payment will be by letter of credit, the following rules apply:

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

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

24 (3) If the letter of credit is wrongfully dishonored or repudiated, the seller on

seasonable notification may require payment directly from the buyer.

*[Reporter's Note – This is section 2-308 from the July 1999 Draft. This revision conforms to revised Article 5.]*

## **SECTION 2–326. SALE ON APPROVAL AND SALE OR RETURN.**

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

(1) a “sale on approval” if the goods are delivered primarily for use, and

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

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

(c) Any “or return” term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Article (Section 2–201) and as contradicting the sale aspect of the contract within the provisions of this Article on parol or extrinsic evidence (Section 2–202).

*[Reporter's Note – This is Section 2-326 as amended by revised Article 9. The Article 9 definition of “consignment” does not cover transactions in which the consignor is a consumer, the consignee is an auctioneer or is generally known by its creditors to be substantially engaged in selling the goods of others, or the aggregate value of each delivery is \$1,000 or more. Because original Section 2-326(3) has been eliminated, most such transactions will not qualify for sale-or-return status; that is, title to the goods will not pass and thus the consignee will not be a “buyer” as that term is used in subsection (a). If the transactions are entrustments the consignor's interest will be severed by a buyer in ordinary course (Section 2-403), but otherwise they will be governed by the common law of bailments and the question whether the goods are subject to the claims of the consignee's creditors must be resolved by reference to that law.]*

*[Reporter's Note – The reference to consignments in the title to this section has been deleted as the section no longer governs consignments.]*

## **SECTION 2–327. SPECIAL INCIDENTS OF SALE ON APPROVAL AND SALE OR RETURN.**

1 (a) Under a sale on approval unless otherwise agreed

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

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

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

9 (b) Under a sale or return unless otherwise agreed

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

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

13 *[Reporter's Note – There is no change in current law.]*

14 **SECTION 2–328. SALE BY AUCTION.**

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

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

21 (c) A sale by auction is subject to the seller's right to withdraw the goods unless at  
22 the time the goods are put up or during the course of the auction it is announced in express terms that



1 the right to withdraw the goods is not reserved. In an auction in which the right to withdraw the  
2 goods is reserved, the auctioneer may withdraw the goods at any time until completion of the sale  
3 is announced by the auctioneer. In an auction in which the right to withdraw the goods is not  
4 reserved, after the auctioneer calls for bids on an article or lot, the article or lot cannot be withdrawn  
5 unless no bid is made within a reasonable time. In either case a bidder may retract a bid until the  
6 auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any  
7 previous bid.

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

12 *[Reporter's Note – This section is an amalgamation of original Article 2 and the July 1999 Draft.*  
13 *Stylistically, original Article 2 is followed whenever possible. Retained from the revision draft are*  
14 *“process of completing the sale” rather than “hammer falling” (subsection (b)), “right to withdraw*  
15 *the goods” rather than “with reserve” (subsection (c)), and “sale required by law” rather than*  
16 *“forced sale” (subsection (d)). ]*

## 17 **PART 4**

### 18 **TITLE, CREDITORS AND GOOD FAITH PURCHASERS**

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

1                   (1) Title to goods cannot pass under a contract for sale prior to their  
2 identification to the contract (Section 2–501), and unless otherwise explicitly agreed the buyer  
3 acquires by their identification a special property as limited by this Act. Any retention or reservation  
4 by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to  
5 a reservation of a security interest. Subject to these provisions and to the provisions of the Article  
6 on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner  
7 and on any conditions explicitly agreed on by the parties.

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

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

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

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

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

22                               (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 reverts title to the goods in the seller. Such reversion occurs by operation of law and is not a “sale”.

*[Reporter’s Note – In subsection (2), “physical delivery” has been changed to “delivery” because we define “delivery” in section 2-103(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 which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Sections 2–502 and 2–716).

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

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

(1) under the provisions of the Article on Secured Transactions (Article 9);  
or

(2) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are

1 situated would apart from this Article constitute the transaction a fraudulent transfer or voidable  
2 preference.

3 *[Reporter's Note – The introductory phrase in subsection (c) is necessary because the revision of*  
4 *Section 2-403(b) has the effect of impairing the rights of a secured party.]*

5 **SECTION 2–403. POWER TO TRANSFER; GOOD FAITH PURCHASE OF**  
6 **GOODS; “ENTRUSTING”.**

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

12 (1) the transferor was deceived as to the identity of the purchaser, or

13 (2) the delivery was in exchange for a check which is later dishonored, or

14 (3) it was agreed that the transaction was to be a “cash sale”, or

15 (4) the delivery was procured through criminal fraud.

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

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

23 (d) The rights of other purchasers of goods and of lien creditors are governed by the

Articles on Secured Transactions (Article 9), [Bulk Sales (Article 6): if the state retains the remnants of Article 6] and Documents of Title (Article 7).

*[Reporter's Note – References to "larceny", a somewhat dated term, have been replaced in subsections (a) and (c) by more general language referring to "criminal fraud" (subsection (a)) and conduct "punishable under the criminal law" (subsection (c)).]*

*[Reporter's Note – Subsection (b) has been modified to conform with Revised Article 9's treatment of "remote entrusting" (Revised 9-315(a)).]*

## 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;

(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 twelve months

1 after contracting or for the sale of crops to be harvested within twelve months or the next normal  
2 harvest season after contracting whichever is longer.

3 (b) The seller retains an insurable interest in goods so long as title to or any security  
4 interest in the goods remains in the seller and where the identification is by the seller alone the seller  
5 may until default or insolvency or notification to the buyer that the identification is final substitute  
6 other goods for those identified.

7 (c) Nothing in this section impairs any insurable interest recognized under any other  
8 statute or rule of law.

9 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

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

12 (a) Subject to subsections (b) and (c) and even though the goods have not been  
13 shipped a buyer who has paid a part or all of the price of goods in which the buyer has a special  
14 property under the provisions of the immediately preceding section may on making and keeping good  
15 a tender of any unpaid portion of their price recover them from the seller if

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

18 (2) in all cases, the seller becomes insolvent within ten days after receipt of the  
19 first installment on their price.

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

22 (c) If the identification creating the special property has been made by the buyer, the

1 buyer acquires the right to recover the goods only if they conform to the contract for sale.

2 *[Reporter's Note – This section is derived from a conforming amendment to Article 2 that was*  
3 *promulgated as part of the Article 9 revision process.]*

4 *[Reporter's Note – Because Section 2-402 is limited to the rights of unsecured creditors, a comment*  
5 *along the following lines may be helpful in each of the referenced sections: “This rule assumes*  
6 *application of a ‘first in time’ priority rule. In other words, if the buyer’s rights vest under this rule*  
7 *before a creditor acquires an in rem right to the goods, including an Article 9 security interest and*  
8 *a lien created by levy, the buyer should prevail.”]*

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

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

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

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

18 (b) Where the case is within the next section respecting shipment tender requires that  
19 the seller comply with its provisions.

20 (c) Where the seller is required to deliver at a particular destination tender requires  
21 that the seller comply with subsection (a) and also in any appropriate case tender documents as  
22 described in subsections (d) and (e) of this section.

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

25 (1) tender requires that the seller either tender a negotiable document of title

1 covering such goods or procure acknowledgment by the bailee to the buyer of the buyer's right to  
2 possession of the goods; but

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

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

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

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

14 *[Reporter's Note – Consistent with the July 1999 Draft, subsection (d)(1) clarifies that the bailee's*  
15 *acknowledgment must be made to the buyer. See Jason's Foods, Inc. v. Peter Eckrick & Sons, Inc.,*  
16 *774 F.2d 214 (7th Cir. 1985). See similar amendment to Section 2-509(b)(3)(B).]*

17 *[Reporter's Note – Subsection (d)(2) has the following changes from current law: "of a written*  
18 *direction to the bailee" is changed to "a record directing the bailee"; and, the phrase "except as*  
19 *otherwise provided in Article 9" has been added to bring this subsection in line with the recent*  
20 *revisions to Article 9 (Revised 9-313).]*

21 *[Reporter's Note – The present version of what is now designated as subsection (e)(2) has the*  
22 *language "except as provided in this Article with respect to bills of lading in a set (subsection (2)*  
23 *of Section 2-323". This has been deleted because we have not retained section 2-323. However,*  
24 *we intend to draft a comment that refers to bills in a set and indicates that if they are used they must*  
25 *be in "correct form" (emphasizing the language of subsection (e)(1)).]*

26 **SECTION 2-504. SHIPMENT BY SELLER.** Where the seller is required or authorized  
27 to send the goods to the buyer and the contract does not require the seller to deliver them at a



particular destination, then unless otherwise agreed the seller must

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

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

(3) promptly notify the buyer of the shipment.

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

*[Reporter's Note – The addition of the word “conforming” in paragraph (1) clarifies the relationship between the perfect tender rule in the context of a seller's obligations with respect to 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 of conditional delivery (subsection (b) of ~~Section 2-507~~) 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

1 the seller retains possession of the bill of lading.

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

6 *[Reporter's Note – ~~This section remains unchanged except for gender neutral language. The change~~*  
7 *in subsection (a)(2) corresponds with a change in Section 2-507, which no longer uses the language*  
8 *of conditional delivery but instead grants a right of reclamation.]*

## 9 **SECTION 2-506. RIGHTS OF FINANCING AGENCY.**

10 (a) Except as otherwise provided in Article 5, a financing agency by paying or  
11 purchasing for value a draft which relates to a shipment of goods acquires to the extent of the  
12 payment or purchase and in addition to its own rights under the draft and any document of title  
13 securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's  
14 right to have the draft honored by the buyer.

15 (b) Except as otherwise provided in Article 5, the right to reimbursement of a  
16 financing agency which has in good faith honored or purchased the draft under commitment to or  
17 authority from the buyer is not impaired by subsequent discovery of defects with reference to any  
18 relevant document which was apparently regular on its face.

19 *[Reporter's Note - This section remains unchanged except that it now explicitly provides that Article*  
20 *5 governs in the event of a conflict.]*

## 21 **SECTION 2-507. EFFECT OF SELLER'S TENDER; DELIVERY ON CONDITION.**

22 (a) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless  
23 otherwise agreed, to the buyer's duty to pay for them. Tender entitles the seller to acceptance of the  
24 goods and to payment according to the contract.

(b) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, the seller may reclaim the goods delivered upon a demand made within a reasonable time after the seller discovers or should have discovered that payment was not made.

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

*[Reporter's Note – Subsection (a) remains unchanged except for gender neutral language. A comment such as the following should be added to this section: "If the seller has agreed to assemble or install the tendered goods, completion of that performance is also a condition to the buyer's duty to accept and pay for the goods." This comes from the black letter text of the July 1999 Draft.]*

*[Reporter's Note – Subsection (b) has been changed to state more directly the seller's right of reclamation from a nonpaying buyer in a cash-sale transaction. The current provision says this very indirectly: "the buyer's right as against the seller to retain or dispose of them is conditional upon the buyer making the payment due." The revision makes subsection 2-507(b) parallel to subsection 2-702(b), as it was always intended to be. Because the buyer is actually in breach in the cash sale situation, as opposed to the insolvency situation, there is no reason to put the seller to an election of remedies here.]*

*[Reporter's Note – A comment should clarify that "due and demanded" in subsection (b), which is from the current law, refers to the situation where the seller takes a check for payment. The comment will also explain the relationship between this subsection and section 2-403.]*

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

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

(b) Where the buyer rejects goods or a tender of delivery under Section 2-601 or Section 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 ~~performs~~ 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 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.

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

**Comments:**

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

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

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

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

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

35           The requirement that the cure be "appropriate and timely under the circumstances" provides  
36 important protection for the buyer. If the buyer is acquiring inventory on a just-in-time basis and  
37 needs to procure substitute goods from another supplier in order to keep the buyer's process moving,  
38 the cure would not be timely. If the seller knows from the circumstances that strict compliance with  
39 the contract obligations is expected, the seller's cure would not be appropriate. If the seller attempts

1 to cure by repair, the cure would not be appropriate if it resulted in goods that did not conform in  
2 every respect to the requirements of the contract. The standard for quality on the second tender is  
3 still governed by Section 2-601. Whether a cure is appropriate and timely should be tested based  
4 upon the circumstances and needs of the buyer. Seasonable notice to the buyer and timely cure  
5 incorporate the idea that the notice and offered cure would be untimely if the buyer has reasonably  
6 changed its position in good faith reliance on the nonconforming tender.

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

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

11 ~~\_\_\_\_\_ (a) This section is subject to the contrary agreement of the parties and to Section 2-~~  
12 ~~327 and Section 2-510.~~

13 ~~\_\_\_\_\_ (b) Risk of loss passes to the buyer regardless of the conformity of the goods to the~~  
14 ~~contract as follows:~~

15 ~~\_\_\_\_\_ (1) Except as otherwise provided in this subsection, the risk of loss passes to~~  
16 ~~a buyer upon delivery.~~

17 ~~\_\_\_\_\_ (2) If the contract requires or authorizes the seller to ship goods by carrier,~~  
18 ~~the following rules apply:~~

19 ~~\_\_\_\_\_ (A) If the contract does not require delivery at a particular destination,~~  
20 ~~the risk of loss passes to the buyer when the goods are delivered to the carrier and the seller complies~~  
21 ~~with Section 2-504, even if the shipment is under reservation.~~

22 ~~\_\_\_\_\_ (B) If the contract requires delivery at a particular destination and the~~  
23 ~~goods arrive there in the possession of the carrier, the risk of loss passes to the buyer when the goods~~  
24 ~~are tendered in the manner required by subsection (c) of Section 2-503.~~

25 ~~\_\_\_\_\_ (3) If the goods are held by a bailee to be delivered without being moved, the~~  
26 ~~risk of loss passes to the buyer.~~

1 ~~\_\_\_\_\_ (A) on the buyer's receipt of a negotiable document of title covering~~  
2 ~~the goods with any required indorsement;~~

3 ~~\_\_\_\_\_ (B) on acknowledgment by the bailee to the buyer of the buyer's right~~  
4 ~~to possession of the goods; or~~

5 ~~\_\_\_\_\_ (C) after the buyer's receipt of a nonnegotiable document of title or~~  
6 ~~record directing delivery as provided in subsection (d)(2) of Section 2-503.~~

7 (a) Where the contract requires or authorizes the seller to ship the goods by carrier

8 (1) if it does not require the seller to deliver them at a particular destination,  
9 the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the  
10 shipment is under reservation (Section 2-505); but

11 (2) if it does require the seller to deliver them at a particular destination and  
12 the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the  
13 buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

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

16 (1) on the buyer's receipt of a negotiable document of title covering the goods;  
17 or

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

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

22 (c) In any case not within subsection (a) or (b), the risk of loss passes to the buyer on

1 the buyer's receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on  
2 tender of delivery.

3 (d) The provisions of this section are subject to contrary agreement of the parties and  
4 to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk  
5 of loss (Section 2-510).

6 *[Reporter's Note – This is taken from the July 1999 Draft with only the most minor, nonsubstantive*  
7 *changes. The Drafting Committee's vote to return to original Section 2-510 necessitated a return*  
8 *to the original version of this section.]*

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

10 ~~————— A breach of contract by either party affects risk of loss only in the following cases:~~

11 ~~————— (1) If the buyer rightfully rejects or justifiably revokes acceptance of the~~  
12 ~~goods, the seller in a consumer contract has the risk of loss from the time the rejection or revocation~~  
13 ~~is effective; otherwise, unless the seller has cured, the seller has the risk of loss after a commercially~~  
14 ~~reasonable time after the rejection or revocation is effective.~~

15 ~~————— (2) If the seller has tendered nonconforming goods so that the buyer would~~  
16 ~~have the right to reject or revoke acceptance of the goods, the goods are damaged or lost before the~~  
17 ~~buyer effectively rejects or revokes acceptance, and the risk of loss would have otherwise passed to~~  
18 ~~the buyer under Section 2-509, the seller has the risk of loss to the extent the nonconformity of the~~  
19 ~~goods caused the damage or loss.~~

20 ~~————— (3) If conforming goods are identified to the contract when the buyer breaches~~  
21 ~~and the risk of loss has not otherwise passed to the buyer, the buyer has the risk of loss for those~~  
22 ~~goods for a commercially reasonable time after the breach.~~

23 (a) Where a tender or delivery of goods so fails to conform to the contract as to give



1 a right of rejection the risk of their loss remains on the seller until cure or acceptance.

2 (b) Where the buyer rightfully revokes acceptance the buyer may to the extent of any  
3 deficiency in its effective insurance coverage treat the risk of loss as having rested on the seller from  
4 the beginning.

5 (c) Where the buyer as to conforming goods already identified to the contract for sale  
6 repudiates or is otherwise in breach before risk of their loss has passed to the buyer, the seller may  
7 to the extent of any deficiency in its effective insurance coverage treat the risk of loss as resting on  
8 the buyer for a commercially reasonable time.

9 [Reporter's Note – By 4-1 vote of the committee, this section returns to current Article 2 (except for  
10 gender-neutral language).]

11 **SECTION 2-511. TENDER OF PAYMENT BY BUYER; PAYMENT BY CHECK.**

12 (a) Unless otherwise agreed tender of payment is a condition to the seller's duty to  
13 tender and complete any delivery.

14 (b) Tender of payment is sufficient when made by any means or in any manner current  
15 in the ordinary course of business unless the seller demands payment in legal tender and gives any  
16 extension of time reasonably necessary to procure it.

17 (c) Subject to the provisions of this Act on the effect of an instrument on an obligation  
18 (Section 3–310), payment by check is conditional and is defeated as between the parties by dishonor  
19 of the check on due presentment.

20 [Reporter's Note – This section remains unchanged.]

21 **SECTION 2-512. PAYMENT BY BUYER BEFORE INSPECTION.**

22 (a) Where the contract requires payment before inspection nonconformity of the goods  
23 does not excuse the buyer from so making payment unless

1 (1) the nonconformity appears without inspection; or  
2 (2) despite tender of the required documents the circumstances would justify  
3 injunction against honor under this Act (Section 5-109(b)).

4 (b) Payment pursuant to subsection (a) does not constitute an acceptance of goods  
5 or impair the buyer's right to inspect or any of the buyer's remedies.

6 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

7 **SECTION 2-513. BUYER'S RIGHT TO INSPECTION OF GOODS.**

8 (a) Unless otherwise agreed and subject to subsection (c), where goods are tendered  
9 or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance  
10 to inspect them at any reasonable place and time and in any reasonable manner. When the seller is  
11 required or authorized to send the goods to the buyer, the inspection may be after their arrival.

12 (b) Expenses of inspection must be borne by the buyer but may be recovered from the  
13 seller if the goods do not conform and are rejected.

14 (c) Unless otherwise agreed the buyer is not entitled to inspect the goods before  
15 payment of the price when the contract provides

16 (1) for delivery on terms that under applicable course of performance, course  
17 of dealing, or usage of trade are interpreted to preclude inspection before payment; or

18 (2) for payment against documents of title, except where such payment is due  
19 only after the goods are to become available for inspection.

20 (d) A place, method or standard of inspection fixed by the parties is presumed to be  
21 exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place  
22 for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as

provided in this section unless the place, method or standard fixed was clearly intended as an indispensable condition failure of which avoids the contract.

*[Reporter's Note – Subsection (d) now provides that, in addition to the place and method of inspection, the parties may provide for the standard of inspection. This addition reflects the large number of cases where there is a dispute about the standard of inspection anticipated by the parties. The second sentence of subsection (d) is unchanged from current law. The comments will note that the word “compliance” in that sentence includes compliance with an agreed mode of inspection.]*

*[Reporter's Note – Subsection (c)(1) has been redrafted to acknowledge that we have removed the sections on shipping terms (section 2-319 to 2-322) and are leaving the meaning of shipping terms to the custom and usage employed by the parties.]*

**SECTION 2-514. WHEN DOCUMENTS DELIVERABLE ON ACCEPTANCE; WHEN ON PAYMENT.** Unless otherwise agreed and except as provided by Article 5, documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

*[Reporter's Note – I have added the phrase “and except as provide by Article 5”. This section is designed to track section 4-503, which notes that Article 4 in this respect is also subject to a contrary rule under Article 5. The specific question is what constitutes a time draft as opposed to a sight draft. Under Article 5, because an issuer may have up to seven days to determine compliance of documents (section 5-108), the delay beyond three days may not necessarily indicate that the draft should be treated as a time draft.]*

**SECTION 2-515. PRESERVING EVIDENCE OF GOODS IN DISPUTE.** In furtherance of the adjustment of any claim or dispute

(1) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(2) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

1 *[Reporter's Note – This section remains unchanged. ]*

2 **PART 6**

3 **BREACH, REPUDIATION AND EXCUSE**

4 **SECTION 2–601. BUYER'S RIGHTS ON IMPROPER DELIVERY.** Subject to the  
5 provisions of this Article on breach in installment contracts (Section 2–612) and shipment contracts  
6 (Section 2-504) and unless otherwise agreed under the sections on contractual limitations of remedy  
7 (Sections 2–718 and 2–719), if the goods or the tender of delivery fail in any respect to conform to  
8 the contract, the buyer may

9 (1) reject the whole; or

10 (2) accept the whole; or

11 (3) accept any commercial unit or units and reject the rest.

12 *[Reporter's Note – The only change is the addition of a cross-reference to Section 2-504 on breach*  
13 *in shipment contracts. This makes no substantive change, but flags in this section that there is a*  
14 *limitation on the perfect tender rule in section 2-504.]*

15 **SECTION 2–602. MANNER AND EFFECT OF REJECTION.**

16 (a) Rejection of goods must be within a reasonable time after their delivery or tender.

17 It is ineffective unless the buyer seasonably notifies the seller.

18 (b) Subject to subsection (d) of Section 2-608 and to Sections 2–603 and 2–604,

19 (1) after rejection any exercise of ownership by the buyer with respect to any  
20 commercial unit is wrongful as against the seller; and

21 (2) if the buyer has before rejection taken physical possession of goods in  
22 which the buyer does not have a security interest under the provisions of this Article (subsection (c))

1 of Section 2–711), the buyer is under a duty after rejection to hold them with reasonable care at the  
2 seller's 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 governed by the  
6 provisions of this Article on seller's remedies in general (Section 2–703).

7 *[Reporter's Note – The title has been changed to eliminate the word “rightful” before “rejection”*  
8 *since the section deals with both effective and rightful rejections.]*

9 *[Reporter's Note – The only change in the text is a cross-reference to 2-608(d), which contains the*  
10 *rule governing reasonable post-rejection and post-revocation use.]*

### 11 **SECTION 2–603. MERCHANT BUYER'S DUTIES AS TO REJECTED GOODS.**

12 (a) Subject to any security interest in the buyer (subsection (c) of Section 2–711),  
13 when the seller has no agent or place of business at the market of rejection a merchant buyer is under  
14 a duty after rejection of goods in its possession or control to follow any reasonable instructions  
15 received from the seller with respect to the goods and in the absence of such instructions to make  
16 reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in  
17 value speedily. In the case of a rightful rejection instructions are not reasonable if on demand  
18 indemnity for expenses is not forthcoming.

19 (b) When the buyer sells goods under subsection (a) following a rightful rejection, the  
20 buyer is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of  
21 caring for and selling them, and if the expenses include no selling commission then to such  
22 commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent  
23 on the gross proceeds.

(c) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

*[Reporter's Note – "Rightful" has been eliminated from the title (see Reporter's Note to 2-602).]*

*[Reporter's Note – The only changes in the text are to clarify that the buyer is not entitled to indemnity for expenses (subsection (a)) or to a commission (subsection (b)) following a wrongful rejection.]*

*[Reporter's Note – Rather than incorporate references to revocation of acceptance in this section, this draft continues the practice of tying the revoking buyer's rights into those of the rejecting buyer. Notice that Section 2-608(c) contains an expanded cross-reference that includes Sections 2-603 and 2-604. This approach has the added advantage of reducing the need to make tenuous distinctions between justified revocations of acceptance and wrongful revocations (a concept that exists only in atom smashers, where it can be observed for nanoseconds before disappearing).]*

#### **SECTION 2-604. BUYER'S OPTIONS AS TO SALVAGE OF REJECTED GOODS.**

Subject to the provisions of this Article on the duties of a merchant buyer (Section 2-603), the buyer may store the rejected goods for the seller's account or reship them to the seller or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

*[Reporter's Note – The format (but not the effect) of the introductory clause has been changed. The change emphasizes the fact that Section 2-604 is available to all buyers, including nonmerchants. (The current language is "Subject to the provisions of the immediately preceding section on perishables.")]*

*[Reporter's Note – The word "rightfully" has been taken out of the title to this section. This section builds on section 2-603, and that section adequately distinguishes wrongful from rightful rejections.]*

#### **SECTION 2-605. WAIVER OF BUYER'S OBJECTIONS BY FAILURE TO PARTICULARIZE.**

(a) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection or in connection with revocation of acceptance a ~~known~~ defect which justifies revocation and of which the buyer has notice precludes the buyer from relying

on the unstated defect to justify rejection or revocation of acceptance

(1) where the seller had a right to cure the defect (Section 2-508) and could have cured it if stated seasonably; or

(2) between merchants when the seller has after rejection or revocation of acceptance made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(b) A buyer's payment against documents tendered to the buyer made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

*[Reporter's Note – Subsection (a) has been revised so that a failure to particularize waives only the right to rely on the unstated defect to justify the remedies of rejection and revocation of acceptance, not other remedies. This is consistent with revised section 2-607.]*

*[Reporter's Note – The addition of a reference to revocation in subsection (a) is necessitated by the expansion of the right to cure (section 2-508) to cover revocation in nonconsumer contracts. Because a revocation under section 2-608(a)(1) does not trigger a right to cure and therefore waiver cannot occur, and because section 2-608(a)(2) involves defects that are by definition difficult to discover, there should be no waiver in connection with any revocation unless the defect at issue justifies the revocation and the buyer has notice of it.]*

*[Reporter's Note – Subsection (a)(1) has been revised to make it clear that the seller must have had both the right and the ability to cure (current law refers only to ability).]*

*[Reporter's Note – Subsection (b) has been revised to make clear that the buyer who makes payment upon presentation of the documents to the buyer may waive defects, but a person who is not the buyer (e.g., a letter-of-credit issuer) does not waive the buyer's right to assert defects in the documents as against the seller.]*

## **SECTION 2–606. WHAT CONSTITUTES ACCEPTANCE OF GOODS.**

(a) Acceptance of goods occurs when the buyer

(1) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or will be taken or retained in spite of their nonconformity; or

(2) fails to make an effective rejection (subsection (a) of Section 2–602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or (3) except as otherwise provided in Section 2-608(d), does any act inconsistent with the seller’s ownership; but if such act is ratified by the seller it is an acceptance.

(b) Acceptance of a part of any commercial unit is acceptance of that entire unit.

*[Reporter’s Note – The only substantive change is a cross-reference to new Section 2-608(d), which deals with reasonable use following rejection or revocation of acceptance. The last clause of subsection (a)(3) has been revised to eliminate the word “wrongful”. That word is fully handled by the combination of 2-602(b)(1) and 2-608(d).]*

**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 (subsection (b) of Section 2–312) 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



1 for liability established by the litigation.

2 (d) The burden is on the buyer to establish any breach with respect to the goods  
3 accepted.

4 (e) Where the buyer is sued for indemnity, breach of a warranty or other obligation  
5 for which another party is answerable over

6 (1) the buyer may give the other party notice of the litigation in a record. If  
7 the notice states that the other party may come in and defend and that if the other party does not do  
8 so it will be bound in any action against it by the buyer by any determination of fact common to the  
9 two litigations, then unless the other party after seasonable receipt of the notice does come in and  
10 defend it is so bound.

11 (2) if the claim is one for infringement or the like (subsection (b) of Section  
12 2–312) the original seller may demand in a record that its buyer turn over to it control of the litigation  
13 including settlement or else be barred from any remedy over and if it also agrees to bear all expense  
14 and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand  
15 does turn over control the buyer is so barred.

16 (f) The provisions of subsections (c), (d) and (e) apply to any obligation of a buyer to  
17 hold the seller harmless against infringement or the like (subsection (b) of Section 2–312).

18 *[Reporter's Note – There is a change in subsection (c)(1), where the effect of a failure to give timely*  
19 *notice is reduced to a prejudice rule instead of an absolute bar to any recovery as under the current*  
20 *provision. A comment will specify that the buyer has to be in good faith in not giving notice, and*  
21 *that the buyer cannot come back after the buyer's own default and claim that the seller was in*  
22 *breach.]*

23 *[Reporter's Note – Consistent with the July 1999 Draft, the vouching-in procedure in subsection (e)*  
24 *has been expanded to include indemnity actions and persons other than the seller who are*  
25 *answerable over.]*

1           **SECTION 2-608. REVOCATION OF ACCEPTANCE IN WHOLE OR IN PART;**  
2           **USE OF GOODS FOLLOWING RIGHTFUL REJECTION OR JUSTIFIABLE**  
3           **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 and  
7           it has not been seasonably cured; or

8                       (2) without discovery of such nonconformity if the buyer's acceptance was  
9           reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

10           (b) Revocation of acceptance must occur within a reasonable time after the buyer  
11           discovers or should have discovered the ground for it and before any substantial change in condition  
12           of the goods which is not caused by their own defects. It is not effective until the buyer notifies the  
13           seller of it.

14           (c) A buyer who so revokes has the same rights and duties with regard to the goods  
15           involved as if the buyer had rejected them (subsection (b) of Section 2-602 and Sections 2-603 and  
16           2-604).

17           (d) If a buyer uses the goods after a rightful rejection or justifiable revocation of  
18           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 (subsection (a)(3) of  
21           Section 2-606).

22                       (2) Any use of the goods that is reasonable under the circumstances is not

wrongful as against the seller and is not an acceptance, but in an appropriate case the buyer shall be obligated to the seller for the value of the use to the buyer.

### **Preliminary Comment**

**Changes:** Subsection (d) is new. Otherwise the section remains unchanged except that subsection (c) contains an expanded cross-reference to provisions that by their explicit terms deal with rejection.

### **Comments:**

1. Revocation of acceptance does not prevent the buyer from exercising other remedies for the seller's breach of contract and is not a rescission or cancellation of the contract, although an aggrieved buyer may also cancel a contract as part of the buyer's available remedies for breach. As with rejection, revocation of acceptance is by lot or commercial unit.

2. Revocation of acceptance is possible only where the nonconformity substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the nonconformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.

3. "Assurances" by the seller under subsection (a)(2) can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery. These are the only assurances involved in subsection (a)(2). Explicit assurances may be made either in good faith or bad faith. In either case any remedy accorded by this Article is available to the buyer under the Section 2-721 on remedies for fraud.

4. Subsection (b) continues the rule that a buyer must notify a seller to make an effective revocation and that a revocation must be within a reasonable time after discovery. Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time for notification of breach, beyond the time for discovery of nonconformity after acceptance, and beyond the time for rejection after tender. The parties may provide in their agreement the time periods for revocation subject to Section 1-204. Except as provided in Section 2-605(a), the contents of the notice must be determined based upon considerations of good faith, prevention of surprise and reasonable adjustment. More is required than mere notice of a breach under Section 2-607. The requirements for notification should be applied less stringently in the case of a nonmerchant buyer. Section 2-605(a) on waiver of the buyer's objections operates only in the circumstance where the seller in a nonconsumer contract has a right to cure under Section 2-508 after a revocation of acceptance pursuant to subsection (a)(2).

5. Under subsection (b), the buyer's ability to revoke is limited to those circumstances where

1 the goods have not materially deteriorated unless that deterioration is caused by the nonconformity  
2 of the goods. Worthless goods, however, need not be offered back and minor defects in the goods  
3 should be ignored.

4 6. Subsection (c) provides that the buyer who justifiably revokes acceptance under this  
5 section must comply with Sections 2-602, 2-603 and 2-604 in regard to the care of the goods after  
6 the revocation. A buyer who is not justified in its revocation under subsection (a) or who does not  
7 act effectively under subsection (b) to revoke acceptance has not undone the acceptance and thus may  
8 do what it wants with the goods and is not subject to the provisions of those sections.

9 7. Subsection (d), which is new, deals with the problem of post-rejection or revocation use  
10 of the goods. The courts have developed several alternative approaches. Under original Article 2,  
11 a buyer's post-rejection or revocation use of the goods could be treated as an acceptance, thus  
12 undoing the rejection or revocation, could be a violation of the buyer's obligation of reasonable care,  
13 or could be a reasonable use for which the buyer must compensate the seller. Subsection (d) adopts  
14 the third approach. If the buyer's use after an effective rejection or a justified revocation of  
15 acceptance is unreasonable under the circumstances is inconsistent with the rejection or revocation  
16 of acceptance and is wrongful as against the seller. This gives the seller the option of ratifying the  
17 use, thereby treating it as an acceptance, or pursuing a non-code remedy for conversion.

18 If the buyer's use is reasonable under the circumstances, the buyer's actions cannot be treated  
19 as an acceptance. The buyer must compensate the seller for the value of the use of the goods to the  
20 buyer. Determining the appropriate level of compensation requires a consideration of the buyer's  
21 particular circumstances and should take into account the defective condition of the goods. There  
22 may be circumstances, such as where the use is solely for the purpose of protecting the buyer's  
23 security interest in the goods, where no compensation is due the seller.

## 24 **SECTION 2-609. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.**

25 (a) A contract for sale imposes an obligation on each party that the other's expectation  
26 of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with  
27 respect to the performance of either party the other may in a record demand adequate assurance of  
28 due performance and until the party receives such assurance may if commercially reasonable suspend  
29 any performance for which it has not already received the agreed return.

30 (b) Between merchants the reasonableness of grounds for insecurity and the adequacy  
31 of any assurance offered shall be determined according to commercial standards.

32 (c) Acceptance of any improper delivery or payment does not prejudice the aggrieved

1 party's right to demand adequate assurance of future performance.

2 (d) After receipt of a justified demand failure to provide within a reasonable time not  
3 exceeding thirty days such assurance of due performance as is adequate under the circumstances of  
4 the particular case is a repudiation of the contract.

5 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

6 **SECTION 2–610. ANTICIPATORY REPUDIATION.**

7 (a) When either party repudiates the contract with respect to a performance not yet  
8 due the loss of which will substantially impair the value of the contract to the other, the aggrieved  
9 party may

10 (1) for a commercially reasonable time await performance by the repudiating  
11 party; or

12 (2) resort to any remedy for breach (Section 2–703 or Section 2–711), even  
13 though the aggrieved party has notified the repudiating party that it would await the latter's  
14 performance and has urged retraction; and

15 (3) in either case suspend performance or proceed in accordance with the  
16 provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach  
17 or to salvage unfinished goods (Section 2–704).

18 (b) Repudiation includes language that a reasonable party would interpret to mean  
19 that the other party will not or cannot make a performance still due under the contract or voluntary,  
20 affirmative conduct that would appear to a reasonable party to make a future performance by the  
21 other party impossible.

22 *[Reporter's Note – The only change of substance is the addition of subsection (b) from the July 1999*  
23 *Draft.]*

1                   **SECTION 2–611. RETRACTION OF ANTICIPATORY REPUDIATION.**

2                   (a) Until the repudiating party's next performance is due that party can retract its  
3                   repudiation unless the aggrieved party has since the repudiation canceled or materially changed  
4                   position or otherwise indicated that the repudiation is final.

5                   (b) Retraction may be by any method which clearly indicates to the aggrieved party  
6                   that the repudiating party intends to perform, but must include any assurance justifiably demanded  
7                   under the provisions of this Article (Section 2–609).

8                   (c) Retraction reinstates the repudiating party's rights under the contract with due  
9                   excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

10                  *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

11                   **SECTION 2–612. BREACH OF INSTALLMENT CONTRACT.**

12                  (a) In an installment contract, the buyer may reject any installment which is  
13                  nonconforming if the nonconformity substantially impairs the value of that installment to the buyer  
14                  or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall  
15                  within subsection (b) and the seller has a right to cure the defect (Section 2-508) and gives adequate  
16                  assurance of cure the buyer must accept that installment.

17                  (b) Whenever nonconformity or default with respect to one or more installments  
18                  substantially impairs the value of the whole contract to the buyer there is a breach of the whole. But  
19                  the aggrieved party reinstates the contract if it accepts a nonconforming installment without  
20                  seasonably notifying of cancellation or if it brings an action with respect only to past installments or  
21                  demands performance as to future installments.

22                  *[Reporter's Note – The title has been changed because the definition of installment contract now*  
23                  *appears in 2-103. Concomitantly, current subsection (1), where installment contracts are defined,*

1 *has been deleted. ]*

2 *[Reporter's Note – The words “to the buyer” in subsections (a) and (b) are added to equate the*  
3 *standard for rejecting an installment with the standard for revocation of acceptance. This language*  
4 *appears in the July 1999 Draft.]*

5 *[Reporter's Note – Subsection (a) has been revised to clarify the relationship between this section*  
6 *and the section on cure (section 2-508).]*

7 *[Reporter's Note – A comment will indicate that a buyer can reject a defective installment that is*  
8 *not substantially nonconforming if there is a breach of the whole and the buyer also cancels the*  
9 *contract.]*

10 **SECTION 2–613. CASUALTY TO IDENTIFIED GOODS.** Where the contract requires  
11 for its performance goods identified when the contract is made and the goods suffer casualty without  
12 fault of either party before the risk of loss passes to the buyer then

13 (1) if the loss is total the contract is terminated; and

14 (2) if the loss is partial or the goods have so deteriorated as no longer to  
15 conform to the contract the buyer may nevertheless demand inspection and at its option either treat  
16 the contract as terminated or accept the goods with due allowance from the contract price for the  
17 deterioration or the deficiency in quantity but without further right against the seller.

18 *[Reporter's Note – I have deleted the underlined part of the following text: “ before the risk of loss*  
19 *passes to the buyer, or in a proper case under a “no arrival, no sale” term (Section 2–324)” because*  
20 *we have deleted section 2-324. A comment will be needed to make the same point.]*

21 *[Reporter's Note – Paragraphs (1) and (2) have been revised to use “terminated” rather than the*  
22 *current law's “avoided”. This preserves pre-termination breaches, which I believe to be the*  
23 *appropriate rule in this context.]*

24 **SECTION 2–614. SUBSTITUTED PERFORMANCE.**

25 (a) Where without fault of either party the agreed berthing, loading, or unloading  
26 facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery  
27 otherwise becomes commercially impracticable but a commercially reasonable substitute is available,

1 such substitute performance must be tendered and accepted.

2 (b) If the agreed means or manner of payment fails because of domestic or foreign  
3 governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means  
4 or manner of payment which is commercially a substantial equivalent. If delivery has already been  
5 taken, payment by the means or in the manner provided by the regulation discharges the buyer's  
6 obligation unless the regulation is discriminatory, oppressive or predatory.

7 *[Reporter's Note – There is no change from the current law.]*

8 **SECTION 2–615. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.** Except  
9 so far as a seller may have assumed a greater obligation and subject to the preceding section on  
10 substituted performance:

11 (1) Delay in performance or nonperformance in whole or in part by a seller  
12 who complies with paragraphs (2) and (3) is not a breach of the seller's duty under a contract for sale  
13 if performance as agreed has been made impracticable by the occurrence of a contingency the  
14 nonoccurrence of which was a basic assumption on which the contract was made or by compliance  
15 in good faith with any applicable foreign or domestic governmental regulation or order whether or  
16 not it later proves to be invalid.

17 (2) Where the causes mentioned in paragraph (1) affect only a part of the  
18 seller's capacity to perform, the seller must allocate production and deliveries among the seller's  
19 customers but may at the seller's option include regular customers not then under contract as well  
20 as the seller's own requirements for further manufacture. The seller may so allocate in any manner  
21 which is fair and reasonable.

22 (3) The seller must notify the buyer seasonably that there will be delay or



1 nonperformance and, when allocation is required under paragraph (2), of the estimated quota thus  
2 made available for the buyer.

3 *[Reporter's Note –subsection (1) is changed to cover delays “in performance or nonperformance”*  
4 *rather than “in delivery or nondelivery.” This change reflects an understanding of the broader*  
5 *range of obligations a seller may have other than the delivery of the goods.]*

## 6 **SECTION 2–616. PROCEDURE ON NOTICE CLAIMING EXCUSE.**

7 (a) Where the buyer receives notification of a material or indefinite delay or an  
8 allocation justified under Section 2-615 the buyer may by notification in a record to the seller as to  
9 any delivery concerned, and where the prospective deficiency substantially impairs the value of the  
10 whole contract under the provisions of this Article relating to breach of installment contracts (Section  
11 2–612), then also as to the whole,

12 (1) terminate and thereby discharge any unexecuted portion of the contract;

13 or

14 (2) modify the contract by agreeing to take its available quota in substitution  
15 under Section 2-615.

16 (b) If after receipt of such notification from the seller the buyer fails so to modify the  
17 contract within a reasonable time not exceeding thirty days the contract is terminated with respect  
18 to any performance affected.

19 (c) The provisions of this section may not be negated by agreement except in so far  
20 as the seller has assumed a greater obligation under the preceding section.

21 *[Reporter's Note – Consistent with section 2-613 (see Reporter's Note to that section), subsection*  
22 *(b) is amended to refer to “termination” and “performance” rather than “avoidance” and*  
23 *“delivery”.]*

## 24 **PART 7**

1 **REMEDIES**

2 **SECTION 2-701. REMEDIES FOR BREACH OF COLLATERAL CONTRACTS**

3 **NOT IMPAIRED.** Remedies for breach of any obligation or promise collateral or ancillary to a  
4 contract for sale are not impaired by the provisions of this Article.

5 *[Reporter's Note – This section remains unchanged.]*

6 **SECTION 2-702. SELLER'S REMEDIES ON DISCOVERY OF BUYER'S**  
7 **INSOLVENCY.**

8 (a) Where the seller discovers the buyer to be insolvent the seller may refuse delivery  
9 except for cash including payment for all goods theretofore delivered under the contract, and stop  
10 delivery under this Article (Section 2-705).

11 (b) Where the seller discovers that the buyer has received goods on credit while  
12 insolvent the seller may reclaim the goods upon demand made within a reasonable time after the  
13 buyer's receipt of the goods. Except as provided in this subsection the seller may not base a right to  
14 reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

15 (c) The seller's right to reclaim under subsection (b) is subject to the rights of a buyer  
16 in ordinary course of business or other good faith purchaser for value. Successful reclamation of  
17 goods under this Section excludes all other remedies with respect to them.

18 *[Reporter's Note – Subsection (b) is changed from the current provision. Under the current law,*  
19 *the seller must make the reclamation claim within 10 days of the buyer's receipt of the goods*  
20 *(subject to an active misrepresentation of solvency, in which case the 10 day limitation does not*  
21 *apply). A comment should remind sellers of the risk of delay in asserting their reclamation claims*  
22 *in bankruptcy. A comment should also explain the relationship between this section and section 2-*  
23 *403.]*

24 *[Reporter's Note – Subsection (c) has been simplified.]*

25 **SECTION 2-703. SELLER'S REMEDIES IN GENERAL.**

1 (a) A breach of contract by the buyer includes the buyer's wrongful rejection or  
2 wrongful attempt to revoke acceptance of goods, wrongful failure to perform a contractual  
3 obligation, failure to make a payment when due, or repudiation.

4 (b) If the buyer is in breach of contract the seller may in an appropriate case:

5 (1) withhold delivery of the goods under subsection (a) of Section 2-702;

6 (2) stop delivery of the goods under Section 2-705;

7 (3) proceed under Section 2-704 with respect to goods unidentified to the  
8 contract or unfinished ~~under Section 2-704~~;

9 (4) reclaim the goods under subsection (b) of Section 2-702 or subsection (b)  
10 of Section 2-507;

11 (5) cancel (Section 2-106);

12 (6) resell and recover damages under Section 2-706;

13 (7) recover damages for nonacceptance or repudiation under subsection (a)  
14 of Section 2-708;

15 (8) recover lost profits under subsection (b) of Section 2-708;

16 (9) recover the price under Section 2-709;

17 (10) obtain specific performance under Section 2-716;

18 (11) recover liquidated damages under Section 2-718;

19 ~~(12) recover incidental and consequential damages under Section 2-710; or~~

20 ~~(13)~~ in a case not within any of the preceding paragraphs, recover damages  
21 in any manner that is reasonable under the circumstances.

22 (c) If a buyer becomes insolvent ~~but is not in breach of contract under subsection (a),~~

the seller may:

(1) withhold delivery under subsection (a) of Section 2-702;

(2) stop delivery of the goods under Section 2-705; or

(3) reclaim the goods under subsection (b) of Section 2-702.

~~[(d) Unless the contract provides for liquidated damages enforceable under Section 2-718 or a limited remedy under Section 2-719 an aggrieved party may not recover that part of a loss resulting from a breach of contract that could have been avoided by reasonable measures under the circumstances.]~~

*[Reporter's Note – This section is a substantial revision of current 2-703 and gives a laundry list of the seller's remedies for breach. In addition, the section now states the seller's remedies upon the buyer's insolvency. It also defines the buyer's statutory breaches (as opposed to contractually defined breaches) with more specificity, although it is drafted to be inclusive rather than exclusive.]*

*[Reporter's Note – The words "in an appropriate case" have been added to the introductory language in subsection (b) to make it clear that not all remedies are available in any given case. The word "or" has been deleted after the penultimate paragraphs in subsections (b) and (c) to make it clear that the seller is not limited to one remedy.]*

*[Reporter's Note – Subsection (b)(12) has been deleted as incidental and consequential damages are provided for in the specific remedy provisions.]*

*[Reporter's Note – The change in subsection (b)(3) is for clarification.]*

*[Reporter's Note – A comment should indicate that subsection (b)(13), which is open-ended, is designed to deal with remedies for contractually defined breaches.]*

*[Reporter's Note – Even though the phrase "but is not in breach of contract under subsection (a)" in the introductory clause to subsection (c) is technically accurate because the remedies listed in that subsection are also listed in subsection (b) dealing with breach, the language could cause confusion and has been eliminated.]*

## **SECTION 2-704. SELLER'S RIGHT TO IDENTIFY GOODS TO THE CONTRACT NOTWITHSTANDING BREACH OR TO SALVAGE UNFINISHED GOODS.**

(a) An aggrieved seller under the preceding section may

1 (1) identify to the contract conforming goods not already identified if at the  
2 time the seller learned of the breach they are in the seller's possession or control;

3 (2) treat as the subject of resale goods which have demonstrably been intended  
4 for the particular contract even though those goods are unfinished.

5 (b) Where the goods are unfinished an aggrieved seller may in the exercise of  
6 reasonable commercial judgment for the purposes of avoiding loss and of effective realization either  
7 complete the manufacture and wholly identify the goods to the contract or cease manufacture and  
8 resell for scrap or salvage value or proceed in any other reasonable manner.

9 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

10 **SECTION 2-705. SELLER'S STOPPAGE OF DELIVERY IN TRANSIT OR**  
11 **OTHERWISE.**

12 (a) The seller may stop delivery of goods in the possession of a carrier or other bailee  
13 when the seller discovers the buyer to be insolvent (Section 2-702) or when the buyer repudiates or  
14 fails to make a payment due before delivery or if for any other reason the seller has a right to withhold  
15 or reclaim the goods.

16 (b) As against such buyer the seller may stop delivery until  
17 (1) receipt of the goods by the buyer; or  
18 (2) acknowledgment to the buyer by any bailee of the goods except a carrier  
19 that the bailee holds the goods for the buyer; or  
20 (3) such acknowledgment to the buyer by a carrier by reshipment or as  
21 warehouseman; or  
22 (4) negotiation to the buyer of any negotiable document of title covering the

1 goods.

2 (c)(1) To stop delivery the seller must so notify as to enable the bailee by reasonable  
3 diligence to prevent delivery of the goods.

4 (2) After such notification the bailee must hold and deliver the goods according  
5 to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.  
6 ~~A carrier or other bailee need not stop delivery if the seller does not provide indemnity for charges~~  
7 ~~or damages upon demand of the carrier or bailee.~~

8 (3) If a negotiable document of title has been issued for goods the bailee is  
9 not obliged to obey a notification to stop until surrender of the document.

10 (4) A carrier who has issued a nonnegotiable bill of lading is not obliged to  
11 obey a notification to stop received from a person other than the consignor.

12 *[Reporter's Note – Subsection (a) eliminates the restriction on the right of stoppage in transit to*  
13 *“carload, truckload, planeload or larger shipments” when the buyer fails to pay or repudiates the*  
14 *agreement. This change comes from the July 1999 Draft, and it is based on the assumption that the*  
15 *present limitation is incompatible with current shipping capabilities.]*

16 **SECTION 2–706. SELLER'S RESALE INCLUDING CONTRACT FOR RESALE.**

17 (a) In an appropriate case involving breach by the buyer (Section 2-703(a)), the seller  
18 may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good  
19 faith and in a commercially reasonable manner the seller may recover the difference between the  
20 contract price and the resale price together with any incidental and consequential damages allowed  
21 under the provisions of this Article (Section 2–710), but less expenses saved in consequence of the  
22 buyer's breach.

23 (b) Except as otherwise agreed a resale may be at public or private sale including sale  
24 by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale

1 may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale  
2 including the method, manner, time, place and terms must be commercially reasonable. The resale  
3 must be reasonably identified as referring to the broken contract, but it is not necessary that the goods  
4 be in existence or that any or all of them have been identified to the contract before the breach.

5 (c) Where the resale is at private sale the seller must give reasonable notification of  
6 an intention to resell.

7 (d) Where the resale is at public sale

8 (1) only identified goods can be sold except where there is a recognized market  
9 for a public sale of futures in goods of the kind; and

10 (2) it must be made at a usual place or market for public sale if one is  
11 reasonably available and except in the case of goods which are perishable or threaten to decline in  
12 value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

13 (3) if the goods are not to be within the view of those attending the sale the  
14 notification of sale must state the place where the goods are located and provide for their reasonable  
15 inspection by prospective bidders; and

16 (4) the seller may buy.

17 (e) A purchaser who buys in good faith at a resale takes the goods free of any rights  
18 of the original buyer even though the seller fails to comply with one or more of the requirements of  
19 this section.

20 (f) The seller is not accountable to the buyer for any profit made on any resale. A  
21 person in the position of a seller (Section 2–707) or a buyer who has rightfully rejected or justifiably  
22 revoked acceptance must account for any excess over the amount of any security interest, as

hereinafter defined (subsection (3) of Section 2-711).

[(g) A seller who does not resell in the manner required under this section is not barred from any other appropriate remedy.]

*[Reporter's Note – A comment will indicate that the situations giving rise to a right of resale under this Section are those in which a seller reclaims goods under Section 2-507 or a buyer repudiates or makes a wrongful but effective rejection. In addition, there should be a right of resale if the buyer unjustifiably attempts to revoke acceptance and the seller takes back the goods. However, the seller in this case may choose to ignore the buyer's attempt to revoke acceptance, in which case the appropriate remedy is an action for the price.]*

*[Reporter's Note – Consistent with the expansion in 2-710 to allow consequential damages for sellers, subsection (a) now provides for the seller's consequential damages in appropriate situations.]*

*[Reporter's Note – Current law measures damages by the difference between the resale price and the contract price. Subsection (a) of this draft reverses the terms ("difference between the contract price and the resale price") because the contract price must be the larger number in order for there to be direct damages. The same change has been made in section 2-708(a). Compare sections 2-712 and 2-713 on buyer's remedies, where the contract price is listed after the cover or market price.]*

*[Reporters Note – I have bracketed subsection (g) for discussion and added the word "appropriate for clarification". This subsection is new and it comes from the July 1999 Draft. The obvious reason for this provision is that the same provision is currently in the concomitant provision for buyers. (See section 2-712.) This provision is not innocuous, however, and it is intended to overrule some very specific cases and to address a very specific situation – when the seller would receive a higher measure of damages under section 2-708 than the seller would receive under section 2-706. This problem arises when the seller resells the goods, but by a commercially unreasonable does not meet the requirements of section 2-706, and therefore is "relegated" to collecting a higher amount of damages under the default measure of section 2-708. Many courts have taken the position that when there is a commercially unreasonable resale, the seller cannot receive more under section 2-708 than the seller would have received under section 2-706. This provision would overrule those cases.*

*Note also that this provision eliminates any argument a buyer would have that the seller had an obligation to mitigate damages by reselling (although, unlike the problem discussed above, I have never seen this mitigation argument made in any cases).*

*A comment will clarify that subsection (g) applies when the seller's resale is inconsistent with the requirements of Section 2-706 and also applies when the seller chooses not to resell.]*

## **SECTION 2-707. "PERSON IN THE POSITION OF A SELLER".**

(a) A "person in the position of a seller" includes as against a principal an agent who



1 has paid or become responsible for the price of goods on behalf of the principal or anyone who  
2 otherwise holds a security interest or other right in goods similar to that of a seller.

3 (b) A person in the position of a seller has the same remedies as a seller under this  
4 Article.

5 *[Reporter's Note – This section has been changed to allow the "person in the position of a seller"*  
6 *to have the full range of remedies that the seller would have. The current provision is more limited,*  
7 *and it provides that: "A person in the position of a seller may as provided in this Article withhold*  
8 *or stop delivery (Section 2–705) and resell (Section 2–706) and recover incidental damages (Section*  
9 *2–710)." I can think of no reason for the present limitation, nor have I been able to find any*  
10 *commentary that would justify the limitation (although there is plenty of commentary that expresses*  
11 *the same puzzlement with the limitation.)]*

12 **SECTION 2-708. SELLER'S DAMAGES FOR NONACCEPTANCE OR**  
13 **REPUDIATION.**

14 (a) Subject to subsection (2) and to the provisions of this Article with respect to proof  
15 of market price (Section 2–723)

16 (1) the measure of damages for nonacceptance by the buyer is the difference  
17 between the contract price and the market price at the time and place for tender together with any  
18 incidental or consequential damages provided in this Article (Section 2–710), but less expenses saved  
19 in consequence of the buyer's breach; and

20 (2) the measure of damages for repudiation by the buyer is the difference  
21 between the contract price and the market price at the place for tender and at the expiration of a  
22 commercially reasonable time after the seller learned of the repudiation, but no later than the time  
23 stated in paragraph (1), together with any incidental or consequential damages provided in this Article  
24 (Section 2-710), but less expenses saved in consequence of the buyer's breach.

25 (b) If the measure of damages provided in subsection (a) or in Section 2-706 is

inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental and consequential damages provided in this Article (Section 2–710).

*[Reporter’s Note – Consistent with the approach taken in the comments to Section 2-706, a comment will indicate that “nonacceptance” by the buyer refers to cases in which a seller reclaims the goods under Section 2-507 or the buyer repudiates or makes a wrongful but effective rejection. It also includes a case in which the buyer unjustifiably attempts to revoke acceptance and the seller takes back the goods.]*

*[Reporter’s Note – Subsection (a) has been divided into two paragraphs rather than the one paragraph in existing law. The second paragraph, which is new, clarifies the proper measurement of damages in cases of anticipatory repudiation. The measurement is consistent with the better reasoned cases. The same approach has been taken in 2-713 on buyer’s market-based damage claims.]*

*[Reporter’s Note – The current provision sets the measure of damages as the difference between the market price and the unpaid contract price. I have deleted the word “unpaid” as being superfluous and misleading. It is a word that is never mentioned in the cases or commentary, because it is generally recognized as meaningless. It is also unnecessary, because if the buyer has already paid a portion of the price, the buyer is entitled to that back as restitution under section 2-718. Thus the word, in the current provision, sits there waiting to cause mischief. I have also reversed the order of the terms “market price” and “contract price” – see the second Reporter’s Note to section 2-706.]*

*[Reporter’s Note – Consistent with the revision of section 2-710, this section now provides for consequential as well as incidental damages in both subsections (a) and (b).]*

*[Reporter’s Note – Subsection (b) now has the following underlined language added: “provided in subsection (a) or section 2-706 is inadequate...” Courts generally have correctly assumed that 2-708(b) was an alternative to section 2-706 as well as 2-708(a), but the courts still have been forced to ask and analyze the question. See e.g., R.E. Davis Chemical Corp. v. Diaconics, Inc., 826 F.2d 678 (7<sup>th</sup> Cir. 1987). This change makes this result explicit.]*

*[Reporter’s Note – In subsection (b) the language “due credit for payments or proceeds of resale” from the current provision has been deleted. As has been noted repeatedly, (see e.g., Harris, A Radical Restatement of the Law of Seller’s Damages: Sales Act and Commercial Code Results Compared, 18 Stanford. L. Rev. 66; White & Summers, Uniform Commercial Code pp. 275-66, 4<sup>th</sup> Ed.) ) the language makes no sense whatsoever (at least in the context of the lost-volume seller) and it has been universally ignored in order to make this provision work as it was intended.]*

1 *[Reporter's Note – The existing version of subsection (b) contains the phrase “due allowance for*  
2 *costs reasonably incurred”. This draft deletes that language because it can cause mischief in*  
3 *certain contexts. The proper application of the concept, including its application to a component-*  
4 *parts manufacturer, will be worked out in the comments.]*

## 5 **SECTION 2-709. ACTION FOR THE PRICE.**

6 (a) When the buyer fails to pay the price as it becomes due the seller may recover,  
7 together with any incidental or consequential damages under the next section, the price

8 (1) of goods accepted

9 (2) of conforming goods lost or damaged within a commercially reasonable  
10 time after risk of their loss has passed to the buyer; ~~but, if the seller has retained or regained control~~  
11 ~~of the goods, the seller may recover the price only if the loss or damage has occurred within a~~  
12 ~~commercially reasonable time after the risk of loss has passed to the buyer; and~~

13 (3) of goods identified to the contract if the seller is unable after reasonable  
14 effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort  
15 will be unavailing.

16 (b) A seller who sues for the price must hold for the buyer any goods which have been  
17 identified to the contract and are still in the seller's control except that if resale becomes possible the  
18 seller may resell them at any time prior to the collection of the judgment. The net proceeds of any  
19 such resale must be credited to the buyer and payment of the judgment entitles the buyer to any goods  
20 not resold.

21 (c) After the buyer has wrongfully rejected or revoked acceptance of the goods or has  
22 failed to make a payment due or has repudiated, a seller who is held not entitled to the price under  
23 this section shall nevertheless be awarded damages for nonacceptance under the preceding section.

24 *[Reporter's Note – Consistent with the revision of section 2-710, this section now provides for*

1 *consequential as well as incidental damages.]*

2 *[Reporter's Note – Subsection (a) has been changed from two to three paragraphs. This structural*  
3 *change is made for the purpose of making the section more readable. ~~Within subsection (a)(2) the~~*  
4 *risk of loss rule has been clarified to conform with section 2-510.]*

5 **SECTION 2-710. SELLER'S INCIDENTAL AND CONSEQUENTIAL DAMAGES.**

6 (a) Incidental damages to an aggrieved seller include any commercially reasonable  
7 charges, expenses or commissions incurred in stopping delivery, in the transportation, care and  
8 custody of goods after the buyer's breach, in connection with return or resale of the goods or  
9 otherwise resulting from the breach.

10 (b) Consequential damages resulting from the buyer's breach include any loss  
11 resulting from general or particular requirements and needs of which the buyer at the time of  
12 contracting had reason to know and which could not reasonably be prevented by resale or otherwise.

13 (c) ~~Unless otherwise agreed, in~~ In a consumer contract a seller may not recover  
14 consequential damages from a consumer.

15 *[Reporter's Note – This section has been amended to provide for seller's consequential as well as*  
16 *incidental damages. The title of the section has also been changed to reflect this. In addition, a*  
17 *comment will make it clear (with examples) that it is very difficult to have seller's consequential*  
18 *damages. A seller may not recover consequential damages from a consumer buyer.]*

19 **SECTION 2-711. BUYER'S REMEDIES IN GENERAL; BUYER'S SECURITY**  
20 **INTEREST.**

21 (a) A breach of contract by the seller includes the seller's wrongful failure to deliver  
22 or to perform a contractual obligation, making of a nonconforming tender of delivery or performance,  
23 or repudiation.

24 (b) If the seller is in breach of contract under subsection (a) the buyer may in an  
25 appropriate case:

1 (1) in the case of rightful cancellation, rightful rejection or justifiable  
2 revocation of acceptance recover so much of the price as has been paid;

3 (2) deduct damages from any part of the price still due under Section 2-717);

4 (3) cancel (Section 2-106);

5 (4) cover and have damages under the Section 2-712 as to all goods affected  
6 whether or not they have been identified to the contract;

7 (5) recover damages for nondelivery or repudiation under Section 2-713;

8 (6) recover damages for breach with regard to accepted goods or breach with  
9 regard to a remedial promise under Section 2-714;

10 (7) recover identified goods under Section 2-502;

11 (8) obtain specific performance or obtain the goods by replevin or the like  
12 under Section 2-716;

13 (9) recover liquidated damages under Section 2-718;

14 ~~(10) recover incidental and consequential damages under Section 2-715; or~~

15 ~~(140)~~ in a case not within any of the preceding paragraphs, recover damages  
16 in any manner that is reasonable under the circumstances.

17 (c) On rightful rejection or justifiable revocation of acceptance a buyer has a security  
18 interest in goods in the buyer's possession or control for any payments made on their price and any  
19 expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may  
20 hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

21 ~~{(d) Unless the contract provides for liquidated damages enforceable under Section~~  
22 ~~2-718 or a limited remedy under Section 2-719 an aggrieved party may not recover that part of a loss~~

1 ~~resulting from a breach of contract that could have been avoided by reasonable measures under the~~  
2 ~~circumstances.]~~

3 *[Reporter's Note – This section is a substantial revision of current 2-711. The rationale for many*  
4 *of the changes is discussed in the Reporter's Notes to section 2-703.]*

5 *[Reporter's Note – The words “in an appropriate case” has been added to the introductory*  
6 *language in subsection (b) to make it clear that not all remedies are available in any given case.*  
7 *The word “or” has been deleted after the penultimate paragraph in subsection (b) to make it clear*  
8 *that the seller is not limited to one remedy.]*

9 *[Reporter's Note – Subsection (b)(10) has been deleted as incidental and consequential damages*  
10 *are provided for in the specific damage provisions.]*

## 11 **SECTION 2-712. COVER; BUYER'S PROCUREMENT OF SUBSTITUTE GOODS.**

12 (a) If the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects  
13 or justifiably revokes acceptance, the buyer may cover by making in good faith and without  
14 unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those  
15 due from the seller.

16 (b) The buyer may recover from the seller as damages the difference between the cost  
17 of cover and the contract price together with any incidental or consequential damages as hereinafter  
18 defined (Section 2–715) but less expenses saved in consequence of the seller's breach.

19 (c) Failure of the buyer to effect cover within this section does not bar the buyer from  
20 any other [appropriate] remedy.

21 *[Reporter's Note – The changes from current law in subsection (a) make the application of the*  
22 *section more precise. Cover is not available if the buyer accepts the goods and does not rightfully*  
23 *revoke that acceptance.]*

24 *[Reporter's Note – The word “appropriate” should be added if section 2-706(g) is retained. If that*  
25 *subsection is not retained, the word “appropriate” should still be considered here.]*

## 26 **SECTION 2-713. BUYER'S DAMAGES FOR NONDELIVERY OR REPUDIATION.**

(a) Subject to the provisions of this Article with respect to proof of market price (Section 2–723), if the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or justifiably revokes acceptance the following rules apply:

(1) the measure of damages in the case of wrongful failure to deliver by the seller or rightful rejection or justifiable revocation of acceptance by the buyer is the difference between the market price at the ~~[time when the buyer learned of the breach]~~time for tender under the agreement and the contract price together with any incidental and consequential damages provided in this Article (Section 2–715), but less expenses saved in consequence of the seller's breach; and

(2) the measure of damages for repudiation by the seller is the difference between the market price at the expiration of a commercially reasonable time after the buyer learned of the repudiation, but no later than the time stated in paragraph (1), and the contract price together with any incidental or consequential damages provided in this Article (Section 2-710), but less expenses saved in consequence of the seller's breach.

(b) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

*[Reporter's Note – This section now provides a rule for anticipatory repudiation cases. This is consistent with the new rule in section for 2-708(1) and resolves a problem that is in the current Code.]*

*[Reporter's Note – In a case not involving repudiation the buyer's damages will be based on the market price at the time for tender under the agreement.]*

## **SECTION 2-714. BUYER'S DAMAGES FOR BREACH IN REGARD TO ACCEPTED GOODS ~~AND REMEDIAL PROMISES.~~**

(a) Where the buyer has accepted goods and given notification (subsection (c) of Section 2–607) the buyer may recover as damages for any nonconformity of tender the loss resulting

1 in the ordinary course of events from the seller's breach as determined in any manner which is  
2 reasonable.

3 (b) The measure of damages for breach of a warranty is the difference at the time and  
4 place of acceptance between the value of the goods accepted and the value they would have had if  
5 they had been as warranted, unless special circumstances show proximate damages of a different  
6 amount.

7 ~~(c) The measure of damages for breach of a remedial promise value is the difference~~  
8 ~~between the value of the promised remedial performance less the value of any remedial performance~~  
9 ~~made.~~

10 (d) In a proper case any incidental and consequential damages under the next section  
11 may also be recovered.

12 *[Reporter's Note – Prior drafts have added the underlined clause to subsection (a): “A buyer that*  
13 *has accepted goods and not justifiably revoked acceptance”. I have not added it, as it appears to*  
14 *be superfluous. However, we can point this out in a comment with a cross reference to 2-608(c).]*

15 ~~*[Reporter's Note – Subsection (c) is new. This section is necessary because the provisions on*~~  
16 ~~*express warranties and express warranty obligations (sections 2-313, 2-313A, and 2-313(B))*~~  
17 ~~*explicitly refer to remedial promises. Subsection (c) has been deleted. The comments will indicate*~~  
18 ~~*that the measure of damages for breach of a remedial promise is to be measured by the lost*~~  
19 ~~*expectancy, just as damages for breach of any other promise are normally measured. The only use*~~  
20 ~~*of remedial promise in the revision will be to resolve the statute-of-limitations issue.]*~~

## 21 **SECTION 2-715. BUYER'S INCIDENTAL AND CONSEQUENTIAL /DAMAGES.**

22 (a) Incidental damages resulting from the seller's breach include expenses reasonably  
23 incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any  
24 commercially reasonable charges, expenses or commissions in connection with effecting cover and  
25 any other reasonable expense incident to the delay or other breach.

26 (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 Note – There is no change from current law.]*

*[Reporter's Note – It will be useful to put in a comment as a reminder that a buyer who has justifiably revoked acceptance has the same rights as a rejecting buyer. See Section 2-608(c).]*

## **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, ~~the court may enter a decree for~~ specific performance may be decreed if the parties have agreed to that remedy. However, even if the parties agree to specific performance, ~~the court may not enter a decree for specific performance~~ may not be decreed if the breaching party's sole remaining contractual obligation is the payment of money.

(b) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(c) The buyer has a right of replevin or the like for goods identified to the contract if after reasonable effort the buyer is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

(d) The buyer's right under subsection (c) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

1 *[Reporter's Note – Consistent with the content of the section, the section heading has eliminated the*  
2 *reference to “Buyer” and has been expanded to refer to “. . . replevin or the like.” The assumption*  
3 *is that either the seller or the buyer can demand specific performance in appropriate circumstances*  
4 *(see the next Reporter's Note).]*

5 *[Reporter's Note – A comment should indicate that in subsection (a) the phrase “other proper*  
6 *circumstances” is not limited to the goods. The obligation of the parties may be more than the*  
7 *tendering of the goods or the payment of money – there may be unusual terms that neither party can*  
8 *replicate in the marketplace.]*

9 *[Reporter's Note – Subsection (a) adds the following sentence to current law: “In a contract other*  
10 *than a consumer contract, the court may enter a decree for specific performance if the parties have*  
11 *agreed to that remedy.” This recognizes that under the general principle of freedom of contract, as*  
12 *well as the development of commercial practices consistent with this principle, parties should be*  
13 *able to arrange for specific performance if they so agree.]*

14 *[Reporter's Note – The last sentence of subsection (a) is new. Because we have extended the right*  
15 *of specific performance to seller's as well as buyers, we have opened up the possibility of sellers*  
16 *using this provision to force the payment of money judgments. The specific performance provision*  
17 *should not be read as creating a new right to enforce money judgments.]*

18 *[Reporter's Note – Subsection (c) has been changed from the current provision. After the word*  
19 *“replevin” is added the clause “or the like” to reflect that under the governing state law, the right*  
20 *of replevin may be called “detinue”, “sequestration,” “claim and delivery”, or something else.*  
21 *A comment will make this point clear.]*

22 *[Reporter's Note – Subsection (d) is new, and it corresponds with Section 2-502(b), which in turn*  
23 *is derived from the conforming amendments to Article 9. This is a necessary clarification in the*  
24 *Articles 2 and 9 interrelationship.]*

25 *[Reporter's Note – Because Section 2-402 is limited to the rights of unsecured creditors, a comment*  
26 *along the following lines may be helpful in each of the referenced sections: “This rule assumes*  
27 *application of a ‘first in time’ priority rule. In other words, if the buyer's rights vest under this rule*  
28 *before a creditor acquires an in rem right to the goods, including an Article 9 security interest and*  
29 *a lien created by levy, the buyer should prevail.”]*

30 **SECTION 2–717. DEDUCTION OF DAMAGES FROM THE PRICE.** The buyer on  
31 notifying the seller of an intention to do so may deduct all or any part of the damages resulting from  
32 any breach of the contract from any part of the price still due under the same contract.

33 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

1           **SECTION 2–718. LIQUIDATION OR LIMITATION OF DAMAGES; DEPOSITS.**

2           (a) Damages for breach by either party may be liquidated in the agreement but only  
3           at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach  
4           and, in a consumer contract, in addition the difficulties of proof of loss and the inconvenience or  
5           nonfeasibility of otherwise obtaining an adequate remedy. Section 2-719 determines the  
6           enforceability of a term that limits but does not liquidate damages.

7           (b) Where the seller justifiably withholds delivery of goods or stops performance  
8           because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of  
9           the buyer's payments exceeds the amount to which the seller is entitled by virtue of terms liquidating  
10          the seller's damages in accordance with subsection (a).

11          (c) The buyer's right to restitution under subsection (b) is subject to offset to the  
12          extent that the seller establishes

13               (1) a right to recover damages under the provisions of this Article other than  
14          subsection (a), and

15               (2) the amount or value of any benefits received by the buyer directly or  
16          indirectly by reason of the contract.

17          (d) Where a seller has received payment in goods their reasonable value or the  
18          proceeds of their resale shall be treated as payments for the purposes of subsection (b); but if the  
19          seller has notice of the buyer's breach before reselling goods received in part performance, the resale  
20          is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2–706).

21          *[Reporter's Note – Subsection (a) simplifies the test for enforcing a liquidated damages clause in*  
22          *a commercial contract (but retains the original test in a consumer contract). The words “in*  
23          *addition” have been added for clarity.]*

1 *[Reporter's Note – The draft deletes the last sentence in current 2-718(1)(unreasonable liquidated-*  
2 *damages clause void as a penalty). Removing the sentence assures that it cannot be read by a court*  
3 *as imposing an additional condition. The sentence merely reiterates what is in the first sentence and*  
4 *may cause more harm than good.]*

5 *[Reporter's Note – The last sentence in subsection (a) comes from the July 1999 Draft and is a*  
6 *useful signpost.]*

7 *[Reporter's Note – The following underlined language is added to subsection (b): “ Where the seller*  
8 *justifiably withholds delivery of goods or stops performance because of the buyer's breach”. This*  
9 *comes from the July 1999 Draft and is useful in that it points out that the seller's obligations may*  
10 *well be greater than mere delivery of the goods.]*

11 *[Reporter's Note – Subsection (b) also drops the statutory liquidated damages clause that operates*  
12 *in the absence of an express liquidated damages provision. In the current law, this provides that*  
13 *“in the absence of such terms, twenty per cent of the value of the total performance for which the*  
14 *buyer is obligated under the contract or \$500, whichever is smaller.”]*

15           **SECTION 2–719. CONTRACTUAL MODIFICATION OR LIMITATION OF**  
16 **REMEDY.**

17           (a) Subject to the provisions of subsections (b), (c) and (d) of this section and of the  
18 preceding section on liquidation and limitation of damages,

19                       (1) the agreement may provide for remedies in addition to or in substitution  
20 for those provided in this Article and may limit or alter the measure of damages recoverable under  
21 this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or  
22 to repair and replacement of nonconforming goods or parts; and

23                       (2) resort to a remedy as provided is optional unless the remedy is expressly  
24 agreed to be exclusive, in which case it is the sole remedy.

25           (b) Where circumstances cause an exclusive or limited remedy to fail of its essential  
26 purpose ~~in a contract other than a consumer contract~~, remedy may be had as provided in this Act.  
27 ~~However, an agreement expressly providing that consequential damages are excluded is enforceable~~

1 to the extent permitted under subsection (d):

2 ~~(c) Where circumstances cause an exclusive or limited remedy to fail of its essential~~  
3 ~~purpose in a consumer contract, remedy may be had as provided in this Act including the right to~~  
4 ~~recover consequential damages notwithstanding any term purporting to exclude or limit such~~  
5 ~~damages.~~

6 (d) ~~Subject to subsection (c)~~ Consequential damages may be limited or excluded  
7 unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury  
8 to the person in the case of consumer goods is prima facie unconscionable but limitation of damages  
9 where the loss is commercial is not.

10 *[Reporter's Note – The section returns to the language of original 2-719 per 7-1 committee vote.]*

11 **SECTION 2–720. EFFECT OF “CANCELLATION” OR “RESCISSION” ON**  
12 **CLAIMS FOR ANTECEDENT BREACH.** Unless the contrary intention clearly appears,  
13 expressions of “cancellation” or “rescission” of the contract or the like shall not be construed as a  
14 renunciation or discharge of any claim in damages for an antecedent breach.

15 *[Reporter's Note – There is no change in this section.]*

16 **SECTION 2–721. REMEDIES FOR FRAUD.** Remedies for material misrepresentation  
17 or fraud include all remedies available under this Article for nonfraudulent breach. Neither rescission  
18 or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be  
19 deemed inconsistent with a claim for damages or other remedy.

20 *[Reporter's Note – There is no change in this section.]*

21 **SECTION 2–722. WHO CAN SUE THIRD PARTIES FOR INJURY TO GOODS.**  
22 Where a third party so deals with goods which have been identified to a contract for sale as to cause

1 actionable injury to a party to that contract

2 (1) a right of action against the third party is in either party to the contract for  
3 sale who has title to or a security interest or a special property or an insurable interest in the goods;  
4 and if the goods have been destroyed or converted a right of action is also in the party who either  
5 bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the  
6 other;

7 (2) if at the time of the injury the party plaintiff did not bear the risk of loss as  
8 against the other party to the contract for sale and there is no arrangement between them for  
9 disposition of the recovery, the party plaintiff's suit or settlement is, subject to its own interest, as a  
10 fiduciary for the other party to the contract;

11 (3) either party may with the consent of the other sue for the benefit of whom  
12 it may concern.

13 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

14 **SECTION 2–723. PROOF OF MARKET PRICE: TIME AND PLACE.**

15 (a) If evidence of a price prevailing at a time or place described in this Article is not  
16 readily available the price prevailing within any reasonable time before or after the time described or  
17 at any other place that in commercial judgment or under usage of trade would serve as a reasonable  
18 substitute for the one described may be used, making any proper allowance for the cost of  
19 transporting the goods to or from such other place.

20 (b) Evidence of a relevant price prevailing at a time or place other than the one  
21 described in this Article offered by one party is not admissible unless and until that party has given  
22 the other party such notice as the court finds sufficient to prevent unfair surprise.

1 *[Reporter's Note – Current subsection (1), which deals with the measurement of market price when*  
2 *there has been an anticipatory repudiation, has been deleted as unnecessary, as this has now been*  
3 *incorporated into sections 2-708(1) and 2-713.]*

4       **SECTION 2–724. ADMISSIBILITY OF MARKET QUOTATIONS.** Whenever the  
5 prevailing price or value of any goods regularly bought and sold in any established commodity market  
6 is in issue, reports in official publications or trade journals or in newspapers, periodicals or other  
7 means of communication in general circulation published as the reports of such market shall be  
8 admissible in evidence. The circumstances of the preparation of such a report may be shown to affect  
9 its weight but not its admissibility.

10 *[Reporter's Note – The only change from current Article 2 is the addition of the language “or other*  
11 *means of communication in . . .” This addition is made to reflect nonpaper media and other forms*  
12 *of communication in common usage.]*

13       **SECTION 2–725. STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE.**

14           (a) An action for breach of any contract for sale must be commenced within the later  
15 of four years after the cause of action has accrued under subsection (b) or (c) or one year after the  
16 breach was or should have been discovered, but no longer than five years after the cause of action  
17 accrued. ~~Except in a consumer contract, the original agreement may reduce the period of limitation~~  
18 ~~to not less than one year but may not extend it. By the original agreement the parties may reduce the~~  
19 ~~period of limitation to not less than one year but may not extend it; however, in a consumer contract,~~  
20 ~~the period of limitation may not be reduced.~~

21           (b) Except as otherwise provided in subsection (c), the follow rules apply:

22                   (1) Except as otherwise provided in this subsection, a cause of action for  
23 breach of a contract accrues when the breach occurs, even if the aggrieved party did not have  
24 knowledge of the breach.

1                   (2) For breach of a contract by repudiation, a cause of action accrues at the  
2 earlier of when the aggrieved party elects to treat the repudiation as a breach or when a commercially  
3 reasonable time for awaiting performance has expired.

4                   (3) For breach of a remedial promise, a cause of action accrues when the  
5 remedial promise is not performed when due.

6                   (4) In an action by a buyer against a person that is answerable over to the  
7 buyer for a claim asserted against the buyer, the buyer's cause of action against the person answerable  
8 over accrues at the time the claim was originally asserted against the buyer.

9                   (c) If a breach of a warranty arising under Section 2-312, 2-313, 2-314, or 2-315, or  
10 a breach of an obligation arising under Section 2-313A or 2-313B, is claimed the definitions in  
11 Sections 2-313, 2-313A and 2-313B and the following rules apply:

12                   (1) Except as otherwise provided in paragraph (4), a cause of action for  
13 breach of warranty arising under Section 2-313, 2-314 or 2-315 accrues when the seller has tendered  
14 delivery to the immediate buyer and has completed performance of any agreed installation or assembly  
15 of the goods.

16                   (2) Except as otherwise provided in paragraph (4), a cause of action for  
17 breach of an obligation arising under Section 2-313A or 2-313B accrues when the remote purchaser  
18 receives the goods.

19                   (3) A cause of action for breach of warranty arising under Section 2-312  
20 accrues when the aggrieved party discovers or should have discovered the breach. However, an  
21 action for breach of the warranty of noninfringement may not be commenced more than [six] years  
22 after tender of delivery of the goods to the aggrieved party.



1 (4) Where a warranty or obligation arising under Section 2-313, 2-313A or  
2 2-313B explicitly extends to future performance of the goods and discovery of the breach must await  
3 the time for performance the cause of action accrues when the immediate buyer or the remote  
4 purchaser discovers or should have discovered the breach.

5 (d) Where an action commenced within the time limited by subsection (b) or (c) is so  
6 terminated as to leave available a remedy by another action for the same breach such other action may  
7 be commenced after the expiration of the time limited and within six months after the termination of  
8 the first action unless the termination resulted from voluntary discontinuance or from dismissal for  
9 failure or neglect to prosecute.

10 (e) This section does not alter the law on tolling of the statute of limitations nor does  
11 it apply to causes of action which have accrued before this Act becomes effective.

12 *[Reporter's Note – Consistent with the July 1999 Draft, subsection (a) changes the flat four-year*  
13 *rule of current law and provides for a limited one-year discovery rule with a five-year cap.*  
14 *Subsection (a) has been redrafted to conform with the November, not the December Draft.]*

15 *[Reporter's Note – Subsection (a) differs from current law in that it does not permit reduction of the*  
16 *limitations period in consumer contracts.]*

17 *[Reporter's Note – The change in subsection (a) represents a return to the language of the*  
18 *November Draft. The language of the December Draft was less clear and could have been read to*  
19 *permit extension of the limitations period in a consumer contract.]*

20 *[Reporter's Note – This section contains a new provision governing a breach of the warranty of*  
21 *noninfringement under section 2-312. This period is stated in brackets as six years. The July 1999*  
22 *Draft used eight years.]*

23 *[Reporter's Note – There are new rules governing remedial promises, express warranty obligations*  
24 *under new sections 2-313A and 2-313B, and repudiations.]*