PARTIAL REDRAFT

FOR DISCUSSION ONLY

REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 2 - SALES

DECEMBER, 1997

Prefatory Note

The following is a partial redraft of the July, 1997 Draft of Revised Article 2, Sales. It is circulated to solicit responses to the Reporters and to provide the basis for discussion at the March, 1998 meeting of the Article 2 Drafting Committee. The partial redraft will be incorporated into a complete redraft of the July, 1997 Draft for the March, 1998 meeting.

The sections redrafted were selected from the written objections or concerns communicated by interested observers to the Commissioners at the NCCUSL Annual Meeting in July, 1997. The substance of the partial redraft is taken from responses to a questionnaire submitted to members of the Article 2 Drafting Committee in October, 1997. Further discussion of each section is contained in the Notes.

PART 1

SECTION 2-102. DEFINITIONS

(7) (A) "Conspicuous", with reference to a term or clause, means so written, displayed or presented that a reasonable person against whom it is to operate ought to have noticed it or, in the case of an electronic message intended to evoke a response without the need for review by an individual, in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the message by an individual.

(B) In a written record:

(I) A heading is conspicuous if it is all capitals (as: NEGOTIABLE BILL OF LADING) equal to or greater in size than the surrounding text;

(ii) A term or clause in the body of a record or display is conspicuous if it is in

larger or other contrasting type or color than other language;

(iii) Any term or clause in a telegram or other similar communication is conspicuous.

(C) In an electronic record or display a term or clause is conspicuous if it is so positioned that a party cannot proceed without taking some additional action with respect to the term or any prominent reference thereto.

Notes

1. The general definition of "conspicuous in sub (A) conforms to the first sentence in 2B-102(a)(7) (Dec. 1997). Unlike current UCC 1-201(10), neither 2B nor revised 2 state that "whether a term or clause is 'conspicuous or not is for decision by the court. See Revised 1-201(11) (July, 1997)(accord).

2. The Drafting Committee agreed that there should be a "safe harbor for conspicuous and that the safe harbor should vary depending upon the medium used in the record. Thus, sub (B) proposes a safe harbor for a written record and sub (C) proposes a safe harbor for an electronic record. The safe harbor language is derived from but is somewhat narrower than UCC 2B-102(a)(7) (Dec. 1997).

SECTION 2-105. UNCONSCIONABLE CONTRACT OR TERM.

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

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

SOURCE: Sales, Section 2-302 (December, 1994).

Notes

1. The Drafting Committee voted to delete the phrase "induced by unconscionable conduct. The phrase was in the July, 1997 Draft and was approved by the Conference at the 1996 Annual Meeting.

2. Section 2-105 is revised to conform to UCC 2-302 in the 1995 Official Text. See UCC 2B-105 (Dec. 1997). The word "term , which is defined in Article 2, is bracketed as a possible substitute for the word "clause which is not defined.

PART 2

FORMATION, TERMS, AND READJUSTMENT OF CONTRACT

SECTION 2-201. FORMAL REQUIREMENTS.

(a) Except as otherwise provided in this section, a claim for breach of contract for sale where the price is ~~$10,000~~ $5,000 or more is not enforceable by way of action or defense [against a person that denies that an agreement was made,] unless there is a record authenticated by the person against which the claim is asserted as the record of that person and which is sufficient to indicate that a contract was made. A record is not insufficient merely because it omits or incorrectly states a term, including a quantity term. If the record contains a quantity term, the claim is not enforceable beyond that quantity.

(b) If an authenticated record in confirmation of a contract is sufficient against the sender under subsection (a) and is sent within a reasonable, the record is sufficient against the party receiving it who is a merchant, unless written notice of objection to its contents is given within 10 days after it is received.

(c) A claim for breach of an otherwise valid contract which is ~~barred~~ not enforceable under subsection (a) is enforceable if:

(1) the goods are to be specially manufactured or processed for the buyer, the seller substantially manufactures or processes or makes commitments for the procurement of the goods in performance of a contract the seller believes in good faith to exist, and the seller cannot resell the goods at a reasonable price;

(2) the conduct of both parties in performing the agreement recognizes that a contract was formed;

(3) ~~reliance by one party on representations~~ by ~~or an agreement with the other party estops that party under law outside of this [Act] from raising the lack of a sufficient authenticated record as a defense; or~~

(3 ~~4~~) the party against whom enforcement is sought, in pleading or testimony in court or otherwise under oath, admits facts from which a contract for sale can be found.

(d) A claim for breach of contract enforceable under this section is not unenforceable on the ground that it is not capable of being performed within one year or any other applicable period after its making.

SOURCE: Sections 2-201 and 2-203 (October, 1995)

Notes

1. The Drafting Committee agreed, some grudgingly, that Article 2 should have a statute of frauds.

2. A plurality of the Drafting Committee selected $5,000 as the threshold and that figure is inserted in subsection (a). One member selected $20,000, three members were happy with $10,000 and two members selected $3,000.

3. The Drafting Committee split on whether to delete the requirement that the party raising the defense must deny that an agreement was made. That language in subsection (a) is bracketed for further discussion.

4. The Drafting Committee voted to leave the "estoppel exception in subsection (c)(3) to a comment. Some stated that the comment should make it clear that such an exception should be available in a proper case.

SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE. Terms on which confirmatory records of the parties agree, or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to the included terms [such terms as are included therein], may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. However, terms in such a record may be explained by relevant evidence and, in addition, may be supplemented by evidence of:

(1) non-contradictory additional terms unless the court finds that:

(A) the record was intended as a complete and exclusive statement of the terms of the agreement or

(B) the terms if agreed upon by the parties would certainly have been included in the record; and

(2) course of performance, usage of trade, or course of dealing.

SOURCE: Sales, Section 2-202 (March, 1995).

Notes

1. Section 2-202 has been revised for clarity. Thus, an integrated record may be explained by relevant evidence, including evidence from a course of performance, usage or trade or course of dealing, and may be supplemented to the extent stated in the underlined language.

2. The Drafting Committee agreed that a merger clause should not be conclusive evidence of an intention to integrate but that this principle should be stated in a comment rather than in the text. One member thought that a merger clause raised a strong presumption on the intention question and three members noted the need in consumer contracts that the clause not be conclusive.

3. The Drafting Committee agreed to retain the phrase that the terms in an integrated

record may be explained by relevant evidence. This is intended to moderate the so-called "plain meaning rule (i.e., there is no need first to first show a patent or latent ambiguity before evidence is admissible) in cases other than where the source is trade usage, etc., but does not supply a threshold test for admissibility other than those found in the law of evidence. The Reporters believe that the comments should state that when the court holds a preliminary hearing on the admissibility of evidence for purposes of interpretation the court should follow the interpretation process set forth in Section 212 and Sections 200-203 of the Restatement, Second, of Contracts. See Winet v. Price, 6 Cal. Rptr.2d 554, 557 (Cal. App. 1992), where the court said:

> The decision whether to admit parol evidence [to interpret a term] involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity, i.e., whether the language is "reasonably susceptible to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the contract.

SECTION 2-203. FORMATION IN GENERAL.

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

(b) If the parties intend to make a contract, an agreement sufficient to constitute [form] a contract may be found even if the time that the agreement was made cannot be determined, or one or more terms are left open or to be agreed upon, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.

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

(d) Conspicuous language in a record which expressly conditions the intention of the proposing party to contract ~~only~~ upon agreement by the other party to terms proposed in the

record prevents contract formation unless the required agreement is given.

(e) Subject to Sections 2-206 and 2-207, if, after the buyer has become obligated to pay for or taken delivery of the goods, the seller proposes terms in a record additional to or different from those already agreed to, the terms do not become part of the contract unless the buyer, with knowledge of the terms or after having an opportunity to review the record proposing the terms, authenticates the record or engages in other affirmative conduct that the record or the circumstances clearly indicate constitutes an acceptance. In this section, a party has an opportunity to review a record or term if it is made available in a manner that calls it to the attention of the party and permits review of its terms or enables the electronic agent to react.

SOURCE: Sales, Section 2-204.

Notes

1. With regard to the so-called "Gateway problem, [Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), cert. denied, 1997 WL 250455 (S.Ct. 1997)], the Drafting Committee favors some statutory solution, perhaps a solution adapted in part from 2B. A slim majority of the Drafting Committee favors a solution keyed to whether the record is a standard form or not. But there was no support for a "mass market concept for Article 2. See 2B-208 (Dec. 1997). Some members, however, favor a solution that excludes the later furnished terms in a record unless the buyer has manifested assent after an opportunity to review. See 2B-112, 2B-113, 2B-207(b). New subsection (e), above, provides a draft possible solution based on that model. If the concept is approved, the revised text should also provide that the "circumstances do not include the mere retention of the goods or the record. See 2B-112(b).

2. New subsection (e) adopts the "rolling contract concept. See 2B-208, note 4. The objective is to reduce the risk of unfair surprise when a buyer receives previously undisclosed terms after paying for or taking delivery of the goods. Note, however, that if a consumer is involved the test for assent with be 2-206. Further, if a contract is formed by conduct and both parties have records, terms upon which the records do not agree may be "knocked out under 2-207.

This draft does not provide a remedy if the buyer discovers and objects to the terms in the record. The solution in 2B-208, which applies only to direct contractual relations, permits the licensee to either accept the terms or return the goods and obtain a refund. See 2-

408.

SECTION 2-206. CONSUMER CONTRACTS; RECORDS.

Alternative A

(a) In a consumer contract, if a consumer agrees to a record, any non-negotiated term that a reasonable consumer in a transaction of this type would not reasonably expect to be in the record is excluded from the contract, unless the consumer had knowledge of the term before agreeing to the record.

(b) Before deciding whether to exclude a term under subsection (a), the court, on motion of a party or its own motion, shall afford the parties a reasonable and expeditious opportunity to present evidence on whether the term should be included or excluded from the contract. The court may exclude a term under this section only if it finds that the term is bizarre or oppressive [harsh or "one-sided] by industry standards or commercial practices, abrogates or substantially conflicts with other essential negotiated terms, eliminates the dominate purpose of the contract, or conflicts with other consumer protection laws.

(c) This section shall not operate to exclude an otherwise enforceable term disclaiming or modifying an implied warranty.

Alternative B

(a) In a consumer contract, a consumer adopts the terms of a [standard form] record by manifesting assent to the record [2B-112] after having an opportunity to review. [2B-113]. However, a term does not become part of the contract if it is unconscionable or conflicts with any negotiated term of the agreement between the parties. [2B-208(a)]

(b) This section shall not operate to exclude an otherwise enforceable term disclaiming or modifying an implied warranty

SOURCE: New.

Notes

1. It is clear that the Drafting Committee is not satisfied with the current draft of 2-206. A majority appears to support the Roger Henderson proposed amendment. Other members appear to favor a revision based upon the distinction between standard form and other records with terms incorporated by manifesting assent after an opportunity to review. Assuming that a return to the standard form distinction is not forthcoming, another possibility is some variation on 2-205(e), previously discussed.

2. Two alternatives have been drafted to facilitate discussion. Alterative A states an unexpurgated version of the Henderson solution. Alternative B works with manifested assent and follows Article 2B.

SECTION 2-209. MODIFICATION, RESCISSION, AND WAIVER.

(a) An agreement made in good faith modifying a contract within this article needs no consideration to be binding.

(b) Except in a consumer contract, a term in an authenticated agreement which excludes modification or rescission except by an authenticated record cannot be otherwise modified or rescinded. However, a party whose language or conduct is inconsistent with that term may not assert it if the language or conduct induced the other party to change its position reasonably and in good faith.

(c) Subject to subsection (b), a term [condition] in a contract may be waived by the party for whose benefit it was included. Language, conduct or a course of performance between the parties may be relevant to show a waiver. The waiver of an executory portion of a contract, however, may be retracted by reasonable notification received by the other party that strict

performance will be required of any term waived, unless the waiver induced the other party to change its position reasonably and in good faith.

SOURCE: Sales, Section 2-209.

Notes

1. The Drafting Committee approved the deletion now in the July, 1997 Draft of any requirement that a modification of a contract originally outside the statute of frauds that brings the agreement within the statute must satisfy the statute.

2. The Drafting Committee approved the exception of consumer contracts from subsection(b) on the effect of "no oral modification clauses.

PART 4.

WARRANTIES

SECTION 2-401. DEFINITIONS. In this part:

(1) "Damage" means all loss resulting in the ordinary course from a breach of warranty, including injury to a person or property as permitted in Section 2-806.

(2) "Goods" includes a component incorporated in substantially the same condition into other goods.

(3) "Immediate buyer" means a buyer in a contractual relationship with the seller.

(4) "Remote buyer" means a buyer or lessee from a person other than the seller against which a claim for breach of warranty breach is asserted.

(5) "Representation means a description ~~demonstration or depiction~~ of the goods, an affirmation of fact relating to the goods, or a sample or model of the goods.

(6) "Seller includes an auctioneer or liquidator that fails to disclose that it is acting on behalf of a principal.

Notes

1. The Drafting Committee voted to delete the phrase "demonstration or depiction from 2-401(5).

SECTION 2-403. EXPRESS WARRANTY TO IMMEDIATE BUYER.

(a) If a seller makes a representation or promise relating to the goods to an immediate buyer, the representation or the promise becomes part of the agreement unless a reasonable person in the position of the immediate buyer would not believe that the representation or promise became part of the agreement or would believe that the representation was merely of the value of the goods or purported merely to be the seller's opinion or commendation of the goods. It is not necessary to create an obligation under this section that the seller use formal words such as "warranty or "guarantee or have a specific intention to make a warranty.

(b) ~~A~~ If a representation or a promise ~~that~~ becomes part of the agreement, ~~an express warranty and~~ the seller has an obligation to the immediate buyer that the goods will conform to the representation or, if a sample is involved, that the whole of the goods will conform to the sample, or that the promise will be performed. The obligation is breached if the goods do not conform to any representation at the time when the tender of delivery is completed or if the promise was not performed when due.

(c) A seller's obligation under this section may be created by representations and promises made in a medium for communication to the public, including advertising, if the immediate buyer had knowledge of [and believed] them at the time of the agreement.

SOURCE: Sales, Section 2-313.

Notes

1. The proposal to restore the "basis of the bargain language was rejected by two-thirds of the Drafting Committee.

2. The proposal to clarify by adding that the buyer must believe (subjective) was rejected by the Drafting Committee. One member argued that the so-called "Vermont compromise requires the subjective component when express warranties are made by advertising. The bracketed language in subsection (c) illustrates how this would work.

3. A recurring objection to the "basis of the bargain language in current 2-313 is the disagreement over what it means. This objective might be removed by both using and defining "basis of the bargain. Consider this variation on subsection (a):

> If a seller makes a representation or promise relating to the goods to an immediate buyer, the representation or the promise becomes part of the basis of the bargain unless a reasonable person in the position of the immediate buyer would not believe the that the representation or promise became part of the basis of the bargain or would believe that the representation was merely of the value of the goods or purported merely to be the seller's opinion or commendation of the goods.

SECTION 2-404. IMPLIED WARRANTY OF MERCHANTABILITY; USAGE OF TRADE.

(a) Subject to Sections 2-406 and 2-407, 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 on the premises or elsewhere is a sale.

(b) Goods to be merchantable must at least:

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

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

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

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

(5) be adequately contained, packaged, and labeled as the agreement or circumstances may require; and

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

(c) Subject to Section 2-408, other implied warranties may arise from course of dealing or usage of trade.

SOURCE: Sales, Section 2-314.

4. Personal injury.

Without more, a seller who makes and breaches an implied warranty of merchantability can be liable for consequential damages to person or property proximately resulting from the breach, if the conditions of Section 2-806 are satisfied. See 2-806(3), where personal injury damages are excluded from the "disproportion limitation. Except for 2-806(3) and 2-810(c), where an exclusion of liability for consequential injury to person is prima facie unconscionable, revised Article 2 does not distinguish between economic loss and damage to person or property. The special privity rules for personal injury in former 2-318 have been deleted and proposed Section 2-319 in the July, 1996 Draft, which provided special rules for personal injury claims resulting from a breach of warranty, was not approved.

This stance does not resolve the tension between warranty law and tort law where goods cause damage to person or property. The primary source of that tension arises from disagreement over whether the concept of defect in tort and the concept of merchantability in Article 2 are coextensive where personal injuries are involved, i.e., if goods are merchantable under warranty law can they still be defective under tort law and if goods are not defective under tort law can they be unmerchantable under warranty law. The answer to both questions is yes if the contract standard for merchantability, e.g., reasonable expectations, and the tort standard for defect are different. Even though the outcome under different standards will be the same in most cases, i.e., unmerchantable goods are frequently defective and defective goods are frequently unmerchantable, there are a few exceptions, especially where design defects are involved.

The consensus is that the tension should be resolved in a comment to 2-404 rather than in the text of Article 2. The following comment was approved in principle by representatives of NCCUSL and the ALI before the ALI Annual Meeting in May, 1997.

> When recovery is sought for injury to person or property that allegedly resulted from manufacturing or design defects in goods sold or inadequate instructions or warnings, the

applicable state law of products liability determines whether the goods are merchantable under Section 2-404. Merchantability in the context of a claim to recover for injury to person or property is synonymous with the level of safety required for the goods as a matter of public policy adopted by the courts of this state or, if applicable, the Restatement of the Law (Third), Torts: Products Liability.

When, however, the claim for injury to person or property is based on an implied warranty of fitness under Section 2-405 or representations made by the seller to the buyer, such as affirmations or promises about or descriptions of the goods, this Article determines whether an implied warranty of fitness was made or breached and whether the promises, affirmations or descriptions create contractual warranties to which the goods must conform, as well as the remedies available for damage proximately resulting from any non-conformity.

At the ALI Annual Meeting in May, 1997, the membership adopted the following language:

When recovery is sought for injury to person or property, whether goods are merchantable is to be determined by applicable state products liability law.

This language was clearly a substitute for the first sentence of the pre-ALI comment. The effect is to preclude actions for injury to person or property under Section 2-404. There is some disagreement, however, whether the approved language was intended to displace the entire comment, the second paragraph of which permitted actions for injury to person or property based upon the implied warranty of fitness, §2-405, or express warranties, §§2-403 and 2-408.

Whatever the intent, there clearly was no intention to preclude actions for injury to person or property under Sections 2-405 or Sections 2-403 and 2-408. Moreover, the definition of "representations, see 2-401(5), used in the express warranty sections is broad enough to cover descriptions of or other affirmations about goods that might be extracted from Section 2-405. For clarity, however, the following paragraph should also be included with the ALI approved language:

When, however, a claim for injury to person or property is based on an implied warranty of fitness under Section 2-406 or an express warranty under Sections 2-403 or 2-408, this Article determines whether an implied warranty of fitness or an express warranty was made and breached, as well as what damages are recoverable under Section 2-806.

Notes

Except for one member who had a different impression, the Drafting Committee agreed that the above note accurately summarizes the current status of the relationship between warranty

and tort where injury to person and damage to property are involved. But see 20 ALI Reporter 4 (Fall, 1997), where a somewhat different conclusion is stated:

> A motion to substitute the following language for the two-paragraph Comment proposed by the Drafting Committee on page xxvii of the draft carried by a vote of 94-77: "When recovery is sought for injury to person or property the determination as to whether goods are merchantable is to be determined by applicable state products liability law.

SECTION 2-406. DISCLAIMER OR MODIFICATION OF WARRANTY.

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to disclaim or modify an express warranty must be construed wherever reasonable as consistent with each other. Subject to Section 2-202 with regard to parol or extrinsic evidence, words or conduct disclaiming or modifying an express warranty are ineffective to the extent that this [such] construction is unreasonable.

(b) Except as otherwise provided in Section 2-402(b) ~~and subsection (c) of this section~~, an implied warranty is disclaimed or modified by words [language] or an expression that, under the circumstances, makes it clear that the implied warranty has been disclaimed or modified. An implied warranty also may be disclaimed or modified by course of performance, course of dealing, or usage of trade.

(c) Except in a consumer contract, subsection (d), words [language] in a record disclaiming or modifying an implied warranty is sufficient to satisfy subsection (b) if the words [language] are conspicuous and:

(1) in the case of the implied warranty of merchantability, mentions merchantability;

(2) in the case of the implied warranty of fitness, states that "the goods are not

warranted to be fit for any particular purpose", or words of similar import;

(3) Unless the circumstances indicate otherwise, states that the goods are sold "as is or "with all faults or words of similar import.

(d) ~~Except in a sale by auction under Section 2-312~~ Words [Language] in a record in a consumer contract are sufficient to disclaim or modify an implied warranty ~~only~~ if:

(1) At the time of contracting, a seller in good faith passes through to a buyer an express warranty obligation created by another seller under Section 2-408(b) that is reasonable in scope, duration and remedies and there is conspicuous language stating, for example, "You are receiving an express warranty obligation from another seller instead of any implied warranty of merchantability or fitness from us; or

(2) Conspicuous language in a record ~~which language the consumer has separately authenticated~~ states: ["Unless we say otherwise in the contract, we make no promises about the quality or usefulness of the product you are buying. It may not work or it may not be fit for any specific purpose that you may have in mind.]

(d) When the buyer before entering into a contract has examined the goods, sample, or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to conditions that 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.

SOURCE: Sales, Section 2-316.

Notes

1. The Drafting Committee agreed that the general disclaimer principle in subsection (b) should also apply to consumer contracts and that subsection (e) should be an optional "safe harbor for consumer contracts just like subsection (c) is a safe harbor for commercial contracts. Accordingly, these subsections have been redrafted. The exception for sales by auction has been deleted: "As is disclaimers in consumer auction sales are now enforceable under subsection (c).

2. The Drafting Committee did not agree that there should be a different, more stringent safe harbor for disclaimers of implied warranties of fitness than for merchantability.

3. The Drafting Committee agreed that the requirement of a separate authentication should be dropped from the consumer contract safe harbor, subsection (e), and that current "plain meaning language for disclaimer needed further study and revision. The separate authentication phrase has been deleted and the "plain English language bracketed for further study.

This consider this possible redraft:

> These goods are not guaranteed to be fit for the ordinary purpose for which such goods are used nor for any particular purpose that you might have in mind for the use of the goods. Seller does not guarantee that the goods (I) are unobjectionable in the trade, (ii) are of fair and average quality, (iii) are of even kind, quality and quantity, and (iv) are adequately contained, packaged or labeled, or (v) conform to any promises or affirmations on the container or label.

SECTION 2-408. EXTENSION OF EXPRESS WARRANTY TO REMOTE BUYER AND TRANSFEREE.

(a) In this section, "goods means new goods and goods that are sold as new goods.

(b) If a seller makes a representation or a promise relating to goods on or in a container, on a label, in a record, or that is otherwise packaged with or accompanies the goods and authorizes another person to furnish the representation or promise ~~deliver the container, label, or record~~ to a remote buyer and it is so furnished ~~delivered~~, the seller has an obligation to the remote buyer and its transferee, and in the case of a remote consumer buyer, to any member of the family or household of the remote consumer buyer or a guest in the house of the remote consumer buyer, that the goods will conform to the representation or that the promise will be

performed, unless a reasonable person in the position of the remote buyer would not believe the representation or promise or would believe that any representation was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods.

(c) If a seller makes a representation or a promise relating to the goods in a medium for communication to the public, including advertising, and a remote buyer with knowledge of the representation or promise buys or leases the goods from a person [in the normal chain of distribution] the seller has an obligation to the remote buyer ~~[and its transferee]~~ and, in the case of a remote consumer buyer, to any member of the family or household of the remote consumer buyer or a guest in the home of the remote consumer buyer, that the goods will conform to the representation, or that the promise will be performed,

Alternative A (current Draft)

unless a reasonable person in the position of the remote buyer would not believe the representation or promise or would believe that the representation was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods.

Alternative B (Henning)

unless the remote buyer does not believe the representation or promise or a reasonable person in the position of the remote buyer would not believe the representation or promise or would believe that the representation was merely of the seller's opinion or commendation of the goods.

(d) An obligation may be created under this section even though the seller does not use formal words, such as "warranty" or "guaranty".

(e) An obligation arising under this section is breached when the goods are received by the remote buyer if the goods, at the time they left the seller's control, did not conform to any

representation made, or if the promise is not performed when due.

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

(1) A seller under subsections (b) and (c) may modify or limit the remedies available to a remote buyer for breach, but a modification or limitation is not effective unless it is communicated to the remote buyer with the representation or promise.

(2) Damages may be proved in any manner that is reasonable. Unless special circumstances show proximate damages of a different amount;

(A) the measure of damages if the goods do not conform to a representation is the value of the goods as represented less the value of the goods as delivered; and

(B) the measure of damages for breach of a promise is the value of the promised performance less the value of any performance made.

(3) Absent a modification or limitation of remedy, a seller in breach under this Section is liable for incidental or consequential damages under Sections 2-805 and 2-806, but is not liable for consequential damages for a remote buyer's lost profits;

~~[(4) A remote consumer buyer that bought the goods on credit and is entitled to damages under subsection (f)(2) may, upon notifying the immediate seller, deduct damages from any part of the price still due.]~~

(4 ~~5~~) An action for breach of an obligation under subsection (e) is timely if commenced within the time provided in Section 2-814.

(g) This section is subject to Section 2-409(b).

SOURCE: New.

Notes

1. The Drafting Committee agreed to continue the effort to codify "pass through warranties in subsection (b). The Drafting Committee, with one exception, was satisfied with the test of when an obligation is created in subsection (b).

2. Despite Bill Henning's spirited arguments, the Drafting Committee agreed to continue the effort to codify the extension of express warranties by advertising to remote buyers in subsection (c). Some members agreed that the present "objective test language in subsection (b) was satisfactory. One argued for a "believe in fact addition, another urged a test based upon the remote buyer's "reasonable reliance in fact and another stated that the draft needed "more work.

3. The Drafting Committee agreed that an express warranty under either subsection (b) or (c) should be extended to the family or household of a remote consumer buyer including, we presume, a guest in the remote buyer's home..

4. Some members of the Drafting Committee supported the extension of express warranties to the transferee of the remote buyer and others opposed. One member favored extension in pass through cases but not in advertising, unless the transferee heard and believed the warranty.

5. There was disagreement on whether the recovery of consequential lost profits should be denied but injury to person or property permitted under 2-408. Some favored the distinction, others appeared to oppose it and one favored it in advertising cases.

6. Some members thought that the standard for communicating limitations on warranties and remedies should be the same for pass through and advertising and others thought that the standard in advertising cases should be lower.

7. The Drafting Committee agreed that the "offset remedy in subsection (f)(4) should be deleted. . One member had an alternative.

SECTION 2-409. EXTENSION OF EXPRESS OR IMPLIED WARRANTY.

(a) A seller's express warranty under Section 2-403 or implied warranty under Section 2-404 or 2-406 made to an immediate buyer extends to any buyer or transferee of that buyer, and in the case of a consumer buyer, to any member of the family or household of the buyer <u>or a guest</u>

in that buyer's home, that may reasonably be expected to use or be affected by the goods and that is damaged by a breach of warranty. The rights and remedies of the buyer, members of a consumer buyer's family or household or a guest or a transferee against the seller for breach of a warranty extended under this subsection are determined by the terms of the contract between the seller and the immediate buyer.. However, the seller is not liable for consequential damages for lost profits for breach of warranty under this section.

(b) This Section and Sections 2-402 and 2-408 do not:

(1) diminish the rights and remedies of a third party beneficiary or assignee under the law of contracts or of persons to which goods are transferred by operation of law;

(2) displace principles of law and equity that extend an express or implied warranty to or for the benefit of a remote buyer, transferee, or other person.

(c) The operation of this section may not be excluded, modified, or limited unless the seller has a substantial interest based on the nature of the goods in having a warranty extend only to the immediate buyer.

SOURCE: Sales, Section 2-318.

Notes

1. The Drafting Committee agreed that subsection (a) should be retained. One member favoring retention urged that all consequentials, including injury to person and property, be excluded.

Part 8 Remedies

SECTION 2-803. REMEDIES IN GENERAL.

(a) In accordance with Section 1-106, the remedies provided in this article must be liberally administered with the purpose of placing the aggrieved party in as good a position as if

the other party had fully performed.

(b) Unless the contract contains an enforceable liquidated damages provision under Section 2-809 or a limited remedy enforceable under Section 2-810, 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. The burden of establishing a failure to take reasonable measures under the circumstances is on the party in breach.

Alternative A

(c) The rights granted by and remedies available under this article are cumulative, but a party may not recover more than once for the same injury. An aggrieved seller who has resold goods under Section 2-819 may not recover damages under section 2-821(a). An aggrieved buyer who has covered under Section 2-825 may not recover damages under section 2-826.

Alternative B

(c) The rights granted by and remedies available under this article are cumulative, but a party may not recover more than once for the same injury.

Alternative C

(c) The rights granted by and remedies available under this article are cumulative, but a party may not recover more than once for the same injury. Unless the contract contains an enforceable liquidated damages provision or a limited remedy enforceable under Sections 2-809 or 2-810, a court may deny or limit a remedy if, under the circumstances, it would put the aggrieved party in a substantially better position than if the party in breach had fully performed.

End Alternatives

(d) This article does not impair a remedy for breach of any obligation or promise

collateral or ancillary to a contract for sale.

SOURCE: Licenses, Section 2B-701; Sales, Section 2-701.

Notes

Alternative A states a principle that directly governs the ability to recover market price based damages when the seller resells or the buyer covers. Alternative B abandons any attempt to draft a black letter rule to govern the aggrieved party's choice of remedial measure, leaving it to the general expectation principle as the guiding light. Alternative C is the same as the July 1997 draft. Based upon the poll, most members favor the approach of Alternative A, a direct rule covering the choice between the substitute transaction remedy and the market price remedy, with one more member favoring inclusion of that principle in the comments as opposed to the black letter. Other members favor Alternative B, and one member favors Alternative C. Article 2B contains the formulation found in Alternative C. 2B-701(b) (Nov. 1997 draft).

SECTION 2-806. CONSEQUENTIAL DAMAGES.

(a) Consequential damages resulting from a breach of contract include compensation for:

(1) any loss, including loss to property other than the goods sold, the party in breach at the time of contracting had reason to know would probably result from the aggrieved party's general or particular requirements and needs and which could not have been avoided by reasonable measures under the circumstances; and

(2) injury to person proximately resulting from any breach of warranty.

(b) The aggrieved party may not recover any consequential damages pursuant to subsection (a)(1) that result in <u>unreasonably</u> disproportionate compensation to the aggrieved party. <u>Compensation is unreasonably disproportionate when such compensation would be significantly more than the benefit the party in breach has received or would have received from the contract.</u> The breaching party has the burden of establishing that consequential damages under subsection (a)(1) result in disproportionate compensation.

SOURCE: Sales, Sections 2-710(b), 2-715(b) (March, 1995), Licenses §2B-102(a)(5).

Notes

The concept of disproportionate compensation is defined by the underlined language in subsection (b) as directed by the committee. This formulation reflects the few cases to have discussed Rest. §351 and comment f to that section. See Perini Corp. v. Great Bay Hotel & Casino, Inc., 610 A.2d 364, 381-83 (N. J. 1992) (disproportion between loss suffered by aggrieved party and price charged by breaching party); International Ore & Fertilizer Corp. v. SGS Control Services, Inc. 743 F. Supp. 250 (S.D.N.Y. 1990) (same). Article 2B's formulation disallows consequential damages unreasonably disproportionate to the risk assumed by the party in breach and allows the disproportionate concept to control all consequential damages, including personal injury. 2B-102(a)(6) (Nov. 1997 draft).

The distinction between consequential economic loss and property loss on the one hand and personal injury on the other is maintained.

SECTION 2-810. CONTRACTUAL MODIFICATION OF REMEDY.

(a) Subject to Section 2-809, the following rules apply:

(1) An agreement may add to, limit, or substitute for the remedies available under this article, such as by limiting or altering the measure of damages recoverable for breach of contract or limiting the buyer's remedies to return of the goods and repayment by the seller of the price or to repair and replacement of nonconforming goods or parts by the seller.

Alternative A

(2) An exclusive agreed remedy under paragraph (1) may not be applied to deprive the aggrieved party of a minimum adequate remedy under the circumstances.

Alternative B

(2) An exclusive agreed remedy must be a minimum adequate remedy for breach of the obligations in the contract.

Alternative C

(2) An exclusive agreed remedy that is not a minimum adequate remedy for breach of the obligations in the contract is unconscionable.

End of Alternatives

(3) Resort to an agreed remedy under paragraph (1) is optional. However, if the parties expressly agree that the agreed remedy is exclusive, it is the sole remedy.

Alternative A

(b) Subject to subsection (a)(2), if, because of a breach of contract or other circumstances, an exclusive, agreed remedy fails substantially to achieve the intended purposes of the parties, the following rules apply:

(1) In a contract other than a consumer contract, the aggrieved party may pursue all remedies available under this article. However, an agreement expressly providing that incidental or consequential damages, including those resulting from the failure to provide the limited remedy, are excluded is enforceable to the extent permitted under subsection (c).

(2) In a consumer contract, an aggrieved party may reject the goods or revoke acceptance and, to the extent of the failure, may pursue all remedies available under this article including the right to recover consequential or incidental damages, despite any term purporting to exclude or limit such remedies.

Alternative B

(b) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, an aggrieved party may resort to all remedies for breach provided under this article. An exclusion of incidental and consequential damages that is otherwise enforceable under subsection (c) is not effective to preclude recovery of consequential and incidental damages that arise from

the failure of the exclusive or limited remedy.

Alternative C

(b) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, an aggrieved party may resort to all remedies for breach provided under this article. An exclusion of consequential or incidental damages otherwise enforceable under subsection (c) is enforceable only if the breaching party demonstrates that the aggrieved party agreed to assume the risk of the consequential or incidental damages in the event the exclusive or limited remedy was not provided.

End of Alternatives

(c) ~~Subject to subsection (b)~~, Consequential damages and incidental damages may be limited or excluded by agreement unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of a consumer contract is presumed to be unconscionable.

SOURCE: Sales, Section 2-719; Licenses, Section 2B-705.

Notes

1. Subsection (a)(2) has created controversy. The Committee appears to be pretty evenly divided between putting the minimum adequate remedy concept back into the comments and keeping the concept in the text with 2 of the latter not objecting to putting it in the comments. Article 2B does not reflect the minimum adequate remedy concept in the text. 2B-703 (Nov. 1997 draft).

One of the objections to Alternative A has been the argument that minimum adequate remedy concept should not be based upon what happens post contract formation but rather should be evaluated at the time of contract formation similar to the unconscionability concept and let the concept of failure of purpose take care of post formation events. See CogniTest Corp. v. Riverside Pub. Co., 107 F. 3d 493 (7th Cir. 1997). Alternatives B and C reflect an attempt to respond to that argument. On the other hand, some cases support the idea that the adequacy of the remedy depends upon the circumstances that take place post formation. See Champlain

Enterprises, Inc. v. U.S., 957 F. Supp. 26 (N.D.N.Y. 1997). In that situation, it is sometimes difficult to distinguish between a "minimum adequate remedy argument and a "failure of purpose argument. For example, assume the seller promises to replace defective parts. At the time of the contract formation, that seems just fine. But a part is defective causing the destruction of the entire good purchased. The seller stands ready and willing to replace the defective part which in effect is now a silly remedy since the entire good has been destroyed. Is that a failure of the purpose of the remedy or a failure to provide a minimum adequate remedy?

Thus, is the division of the committee a reflection of disagreement with the articulation of the principle in Alternative A above or a disagreement about codification vs. comments? If it reflects disagreement with which principle is intended, whether it be comments or code, the committee needs to be clear about which principle should be reflected. In short, when is the minimal adequacy of the limited remedy to be tested? Second, should the concept be reflected in code or comments?

2. The other issue in this section is what to do with the consequential damages excluder when the limited remedy fails. The committee is again divided between the draft subsection (b) above in Alternative A (from the July 1997 draft) and deleting the consumer provision in subsection (b)(2) and deleting both subsections (b)(1) and (2) and leaving it to the courts as under present law. If subsection (b)(2) is deleted, then the consumer contract situation would be left to the courts. Is it acceptable policy to give certainty to commercial parties and not to consumer parties?

Given the division of the committee, several other alternatives are forwarded for consideration. Alternative B limits the recoverable consequential damages to those that result from the failure to provide the limited remedy. Alternative C allows recovery of consequential damages unless the breaching party can show that the aggrieved party assumed that risk in the event the breaching party failed to provide the limited remedy. Article 2B has not yet settled on its approach to this issue. See 2B-703(c) and reporter's note. (Nov. 1997 draft).

SECTION 2-814. STATUTE OF LIMITATIONS.

(a) An action for breach of a contract under this article and an action for indemnity, must be commenced within the later of four years after the right of action has accrued under subsection (b) or one year after the breach was or should have been discovered, but no longer than five years after the right of action accrued. Except in a consumer contract or an action for indemnity, the original agreement may reduce the period of limitation to not less than one year.

(b) Except as otherwise provided in subsection (c) and (d) and Sections 2-402(e) and 2-

404(e), a right of action for breach of contract accrues when the breach occurs, even if the aggrieved party did not have knowledge of the breach. For purposes of this section, a breach by repudiation occurs when the aggrieved party learns of the repudiation.

(c) If a breach of warranty occurs, the following rules apply:

(1) Subject to paragraph (2), a right of action for breach of warranty accrues when the seller has completed tender of delivery of the nonconforming goods.

(2) If a warranty expressly extends to performance of the goods after delivery, a right of action accrues when the buyer discovers or should have discovered the breach.

(d) A right of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party.

(e) If an action for breach of contract that is commenced within the applicable time limitation is terminated but a remedy by another action for the same breach of contract is available, the other action may be commenced after the expiration of the time limitation and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure to prosecute.

(f) This section does not alter the law on tolling of a statute of limitations and does not apply to a right of action that accrued before the effective date of this article.

SOURCE: Sales, Section 2-725; Licenses § 2B-707.

Notes

The committee is supportive of the changes to the statute of limitations. The changes are clarifications suggested by one of the committee members.