

DRAFT

FOR DISCUSSION ONLY

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

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

NOVEMBER, 2000

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

With Reporter's Notes

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

NOVEMBER 2000 DRAFTING COMMITTEE MEETING DRAFT

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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 **SECTION 2–102. DEFINITIONS.**

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

7 (1) “Authenticate” means i) to sign, or ii) ~~to execute or otherwise adopt a~~
8 ~~symbol, or encrypt or similarly process a record in whole or in part, with present intent of the~~
9 ~~authenticating person to identify the person or to adopt or accept a record or term~~ to execute or
10 adopt a record with the intent to sign, and to attach to or logically associate with the record an
11 electronic sound, symbol, or process.

12 **Preliminary Comment**

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

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

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

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

25 (5) “Commercial unit” means such a unit of goods as by commercial usage

1 is a single whole for purposes of sale and division of which materially impairs its character or
2 value on the market or in use. A commercial unit may be a single article, as a machine; or a set of
3 articles, as a suite of furniture or an assortment of sizes; or a quantity, as a gross or carload; or
4 any other unit treated in use or in the relevant market as a single whole.

5 (6) [Definition relating to scope omitted but numbering preserved.]

6 (7) [Definition relating to scope omitted but numbering preserved.]

7 (8) [Definition relating to scope omitted but numbering preserved.]

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

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

16 (A) with respect to a person:

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

20 (ii) language in the body of a record or display in larger type
21 than the surrounding text, or in contrasting type, font, or color to the surrounding text of the
22 same size, or set off from surrounding text of the same size by symbols or other marks that call

1 attention to the language; and

2 (B) with respect to a person or an electronic agent, a term that is so
3 placed in a record or display that the person or electronic agent cannot proceed without taking
4 action with respect to the particular term.

5 **Preliminary Comment**

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

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

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

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

25 **Preliminary Comment**

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

29 (12) “Consumer contract” means a contract between a merchant seller and

1 a consumer.

2 **Preliminary Comment**

3 This term is limited to a contract for sale between a seller that is a “merchant” (Section 2-
4 102(a)(30)) and a buyer that is a “consumer” (Section 2-102(a)(11)). Thus, neither a sale by a
5 consumer to a consumer nor or a sale by a merchant to an individual who intends that the goods
6 be used primarily in a home business qualify as a consumer contract.

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

9 (14) [Definition relating to scope omitted but numbering preserved.]

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

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

14 **Preliminary Comment**

15 The electronic contracting provisions, including the definitions of “electronic,” “electronic
16 agent,” “record,” “electronic record,” “information processing system,” and certain the electronic
17 aspects of “receive” are based on the provisions of the Uniform Electronic Transactions Act and
18 are consistent with the federal Electronic Signatures in Global and National Commerce Act.

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

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

24 (19) “Financing agency” means a bank, finance company or other person
25 that in the ordinary course of business makes advances against goods or documents of title or

1 which by arrangement with either the seller or the buyer intervenes in ordinary course to make or
2 collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's
3 draft or making advances against it or by merely taking it for collection whether or not documents
4 of title accompany the draft. The term includes also a bank or other person that similarly
5 intervenes between persons that are in the position of seller and buyer in respect to the goods.

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

16 **Preliminary Comment**

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

20 (21) "Future goods" means goods that are not both existing and identified.

21 (22) "Good faith" means honesty in fact and the observance of reasonable
22 commercial standards of fair dealing.

23 (23) "Goods" means all things, including specially manufactured goods,

1 that are movable at the time of identification to the contract for sale. The term includes the
2 unborn young of animals, growing crops, and other identified things to be severed from realty
3 under Section 2-107. The term does not include money in which the price is to be paid, the
4 subject matter of foreign exchange transactions, documents, letters of credit, letter-of-credit
5 rights, instruments, investment property, accounts, chattel paper, deposit accounts, or general
6 intangibles.

7 (24) [Definition relating to scope omitted but numbering preserved.]

8 (25) [Definition relating to scope omitted but numbering preserved.]

9 (26) [Definition relating to scope omitted but numbering preserved.]

10 (27) "Information processing system" means an electronic system for
11 creating, generating, sending, receiving, storing, displaying, or processing information.

12 (28) "Installment contract" means a contract that requires or authorizes
13 the delivery of goods in separate lots to be separately accepted, even though the contract contains
14 the term "each delivery is a separate contract" or its equivalent.

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

17 (30) "Merchant" means a person that deals in goods of the kind or
18 otherwise by its occupation holds itself out as having knowledge or skill peculiar to the practices
19 or goods involved in the transaction or to which such knowledge or skill may be attributed by its
20 employment of an agent or broker or other intermediary that by its occupation holds itself out as
21 having such knowledge or skill.

22 (31) "Present sale" means a sale that is accomplished by the making of the

1 contract.

2 (32) "Receipt" means:

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

4 (B) with respect to a notice:

5 (i) coming to a person's attention; or

6 (ii) being delivered to and available at a location, or at an
7 information processing system designated by agreement for that purpose in a form capable of
8 being processed by and, if the recipient does not utilize an electronic agent, perceived from a
9 system of that type by the recipient, but a notice that is an electronic record is not received if the
10 sender or its information processing system inhibits the ability of the recipient to print or store the
11 record; or, in the absence of an agreed location or system:

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

16 (II) in the case of a notice that is an electronic
17 record, being delivered to and available at a system or at an address in that system in a form
18 capable of being processed by and, if the recipient does not utilize an electronic agent, perceived
19 from a system of that type by a recipient, if the recipient uses, or otherwise holds out, that system
20 or address for receipt of notices of the kind to be given and the sender does not know that the
21 notice cannot be accessed from that place, but a notice that is an electronic record is not received
22 if the sender or its information processing system inhibits the ability of the recipient to print or

store the record.

Preliminary Comment

This definition deals with receipt of goods and notices. It does not determine the time of receipt of a communication that is not a notice but that might be required by a contract. For example, nothing in this definition precludes a party that is contractually obligated to provide information regarding a trade secret from sending it in an electronic communication that cannot be printed or stored. To the extent that the definition deals with nonelectronic ~~communications~~ notices, this definition is based on existing Section 1-201(26). To the extent that it deals with electronic ~~communications~~ notices, it is based on Section 15 of the Uniform Electronic Transactions Act.

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

(33) “Receive” means to take receipt.

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

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

Preliminary Comment

A “remedial promise” is a promise by the seller to take remedial action upon the happening of a specified event. The types of remediation contemplated are specified in the definition – repair or replacement of the goods, or refund of all or part of the price. No other promise by a seller qualifies as a remedial promise. Further, the seller is entitled to specify precisely the event that will trigger its obligation. Typical examples include a commitment to repair any parts that prove to be defective, or a commitment to refund the purchase price if the goods fail to perform in a certain manner. A post-sale promise to fix a problem that the seller is not obligated to fix in order to placate a dissatisfied customer is not within the definition of remedial promise.

It is irrelevant whether the promised remedy is exclusive under Section 2-719(a) or merely additional to the buyer’s normal Code remedies. Whether the promised remedy is exclusive, and if so whether it has failed its essential purpose, is determined under Section 2-719.

Use of the term resolves a statute-of-limitations problem. Under original Section 2-725, a

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

9 This Act takes the position that a promise by the seller to take remedial action is not a
10 warranty at all and therefore is not subject to either the time-of-tender or discovery rule. Section
11 2-725(b)(3) separately addresses the accrual of a right of action for a remedial promise. For
12 further explanation, *see* Preliminary Comment 2 to Section 2-725.

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

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

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

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

19 (1) “Account” Section 9-102(a)(2).

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

21 (3) “Check” Section 3-104(f).

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

23 (5) “Dishonor” Section 3-502.

24 (6) “Draft” Section 3-104(e).

25 (7) “General intangible” Section 9-102(a)(42)

26 (8) “Injunction against honor” Section 5-109(b).

27 (9) “Instrument” Section 3-104(b).

1 (10) “Investment property” Section 9-102(a)(49).

2 (11) “Letter of credit” Section 5-102(a)(10).

3 (12) “Letter-of-credit right” Section 9-102(a)(51).

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

6 **Preliminary Comment**

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

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

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

15 **SECTION 2–103. SCOPE. [OMITTED]**

16 **SECTION 2–104. TRANSACTION SUBJECT TO OTHER LAW.**

17 (a) This article does not impair or repeal:

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

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

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

(A) the sale or lease of agricultural products;

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

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

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

(E) the misbranding or adulteration of food products or drugs; and

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

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

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

(d) Subject to subsection (a)(2), this article modifies, limits, and supersedes the application of the Electronic Signatures in Global Commerce Act (___ U.S.C. ___).

Preliminary Comment

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

Comments:

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

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

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

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

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

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

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
38 laws will vary from transaction to transaction and from State to State. For example, the

1 Magnuson-Moss Warranty Act, 15 U.S.C.A. §§ 2301 *et. seq.*, may or may not apply to the
2 consumer dispute in question and the applicable state “lemon law” may provide more or less
3 protection than Magnuson-Moss. To the extent of application, the other laws control.
4 Otherwise, Article 2 applies.

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

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

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

20 4. Subsection (d) takes advantage of a provision of the federal Electronic Signatures in
21 Global and National Commerce Act (E-Sign). E-Sign permits state law to modify, limit or
22 supersede its provisions if the state law is consistent with Titles I and II of E-Sign, gives no
23 special legal effect or validity to and does not require the implementation or application of specific
24 technologies or technical specifications, and if enacted subsequent to E-Sign makes specific
25 reference to E-Sign.

26 **SECTION 2–105. INTEREST AND PART INTEREST IN GOODS.**

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

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

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

32 (d) An undivided share in an identified bulk of fungible goods is sufficiently

1 identified to be sold although the quantity of the bulk is not determined. Any agreed proportion
2 of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to
3 the extent of the seller's interest in the bulk be sold to the buyer, which then becomes an owner in
4 common.

5 *[Reporter's Note – This section reflects current law.]*

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

11 **Preliminary Comment**

12 This section reflects current law except that the definitions of “termination” and
13 “cancellation” have been moved to Section 2-102.

14 In addition to the rights that survive termination or cancellation by statute, other rights
15 survive to the extent necessary to achieve the purposes of the parties. Examples of rights that
16 may survive termination or cancellation include rights based on terms that limit disclosure of
17 information, select a body of law or particular forum, or select a method of dispute resolution
18 other than litigation.

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

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

24 (b) A contract for the sale apart from the land of growing crops or other things

1 attached to realty and capable of severance without material harm thereto but not described in
2 subsection (a) or of timber to be cut is a contract for the sale of goods within this Article whether
3 the subject matter is to be severed by the buyer or by the seller even though it forms part of the
4 realty at the time of contracting, and the parties can by identification effect a present sale before
5 severance.

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

10 *[Reporter's Note – This section reflects current law.]*

11 **PART 2**

12 **FORM, FORMATION, TERMS, AND READJUSTMENT** 13 **OF CONTRACT; ELECTRONIC CONTRACTING**

14 **SECTION 2–201. FORMAL REQUIREMENTS; STATUTE OF FRAUDS.**

15 (a) A contract for sale for the price of \$5,000 or more is not enforceable by way
16 of action or defense unless there is some record sufficient to indicate that a contract has been
17 made between the parties and authenticated by the party against which enforcement is sought or
18 by its authorized agent or broker. A record is not insufficient because it omits or incorrectly
19 states a term agreed upon but the contract is not enforceable under this subsection beyond the
20 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, the record satisfies the requirements of subsection (a) against the party receiving it
3 unless notice of objection to its contents is given in a record within 10 days after it is received.

4 (c) A contract that does not satisfy the requirements of subsection (a) but which is
5 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 that reasonably indicate that the goods
9 are for the buyer, has made either a substantial beginning of their manufacture or commitments for
10 their procurement; or

11 (2) if the party against which 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 paragraph beyond the quantity of goods admitted;
14 or

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

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

20 **Preliminary Comment**

21 **Changes:** Original Section 2-201 has been changed as follows: 1) the threshold for
22 application of the statute has been increased to \$5,000 or more; 2) the introductory phrase to
23 original subsection (1) ("Except as otherwise provided in this section") has been eliminated; 3) in

keeping with the principle of medium neutrality, the statute may be satisfied by an authenticated 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 entered 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 is bound to pay and the seller to accept a reasonable price, which the trier of the fact will 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 record, 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 2-102(a)(1)); 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

1 apportionment, therefore, the agreed price of any goods actually delivered can be recovered
2 without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable
3 part of the goods. The overt actions of the parties make admissible evidence of the other terms of
4 the contract necessary to a just apportionment. This is true even though the actions of the parties
5 are not in themselves inconsistent with a different transaction such as a consignment for resale or
6 a mere loan of money.

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

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

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

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

28 5. It is not necessary that the record be delivered to anybody, nor is this section intended
29 to displace decisions that have given effect to lost records. It need not be authenticated by both
30 parties, but except as stated in subsection (b) it is not sufficient against a party that has not
31 authenticated it. Prior to a dispute, no one can determine which party's authentication of the
32 memorandum may be necessary, but from the time of contracting each party should be aware that
33 it is the authentication by the other which is important.

34 7. If the making of a contract is admitted in court, either in a written pleading, by
35 stipulation or by oral statement before the court, or is admitted under oath but not in court, as by
36 testimony in a deposition or an affidavit filed with a motion, no additional record is necessary ~~for~~
37 ~~protection against fraud~~. Subsection (c)(2) makes it impossible to admit the contract in these

1 contexts and still use the Statute of Frauds as a defense. However, the contract is not thus
2 conclusively established. The admission is evidential against the maker of the truth of the facts
3 admitted and of nothing more; as against the other party, it is not evidential at all.

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

9 **SECTION 2–202. PAROL OR EXTRINSIC EVIDENCE.**

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

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

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

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

21 **Preliminary Comment**

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

27 **Comments:**

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

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

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

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

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

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

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

5 *[Reporter’s Notes – This section reflects current law except that “writing” has been changed to*
6 *“record”.]*

7 **SECTION 2–204. FORMATION IN GENERAL.**

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

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

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

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

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

21 (2) A contract may be formed by the interaction of an electronic agent and
22 an individual acting on the individual’s own behalf or for another person. A contract is formed if

1 the individual takes actions that the individual is free to refuse to take or makes a statement that
2 the individual has reason to know will:

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

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

7 **Preliminary Comment**

8 **Changes:** There is no change from the general policies of existing law; however, the text
9 now expressly recognizes electronic modes of contracting. Subsections (d)(1) and (2) are derived
10 from Sections 14(a) and (b) of the Uniform Electronic Transactions Act (UETA).

11 **Comments:**

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

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

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

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

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

7 5. Subsection (d)(2) validates contracts formed by an individual and an electronic agent.
8 This subsection substantiates an anonymous click-through transaction. As with subsection (d)(1),
9 the intent to contract by the electronic agent flows from the programming and use of the machine.
10 The requisite intent to contract by the individual is found by the acts of the individual that the
11 individual has reason to know will be interpreted by the machine as allowing the machine to
12 complete the transaction or performance, or that will be interpreted by the machine as signifying
13 acceptance on the part of the individual. This intent is only found, though, when the individual is
14 free to refuse to take the actions that the machine will interpret as acceptance or allowance to
15 complete the transaction. For example, if A goes to a website that provides for purchasing goods
16 over the Internet, and after choosing items to be purchased is confronted by a screen which
17 advises her that the transaction will be completed if A clicks "I agree" then A will be bound by the
18 click as long as A was free to refuse the click.

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

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

30 *[Reporter's Note – This section reflects current law except that "signed writing" is changed to*
31 *"authenticated record" and "form" is changed to "form record".]*

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

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

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

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

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

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

Preliminary Comment

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

Comments:

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

2. Either shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment. In accordance with ordinary commercial understanding the section interprets an order looking to current shipment as allowing acceptance either by actual shipment or by a prompt promise to ship and rejects the artificial theory that only a single mode of

1 acceptance is normally envisaged by an offer. This is true even though the language of the offer
2 happens to be “ship at once” or the like. “Shipment” is used here in the same sense as in Section
3 2-504; it does not include the beginning of delivery by the seller’s own truck or by messenger.
4 But loading on the seller’s own truck might be a beginning of performance under subsection (b).

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

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

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

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

24 (i) conduct by both parties recognizes the existence of a contract although their records do not
25 otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a
26 contract formed in any manner is confirmed by a record that contains terms additional to or
27 different from those in the contract being confirmed, the terms of the contract, subject to Section
28 2-202, are:

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

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

31 (3) terms supplied or incorporated under any provision of [the Uniform

Commercial Code].

Preliminary Comment

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

Comments:

1. This section 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 original Section 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 section. (Of course where one party’s record insists on its own terms as a condition to contract formation, where that party does not thereafter perform or otherwise acknowledge the existence of a contract, and where the other party does not agree to those terms, 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 original Section 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 “agrees” to the other party’s terms, the text recognizes the enormous variety of circumstances that may be presented to a court under this section, and the section gives the court greater discretion to include or exclude certain terms than original Section 2-207 did. In many cases mere performance should not be construed to be agreement to terms in another’s record by one that has sent or will send its own record with additional or different terms. Thus a party that sends a record (however labeled or characterized, including an offer, counteroffer, acceptance, acknowledgment, purchase order, confirmation or invoice) 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 paragraph (1) (terms in both records) and paragraph (3) (supplied or incorporated by this Act). 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 in the other’s record unless that record is part of the original agreement.

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

Of course, an offeree’s unqualified verbal response, such as “I accept,” to an offer that

1 contained many terms would show agreement to all of the offer's terms. In some cases an
2 expression of acceptance accompanied by one or more additional terms also might demonstrate
3 the offeree's agreement to the terms of the offer. For example, consider a buyer that sends a
4 purchase order with technical specifications and a seller that responds with a record stating
5 "Thank you for your order. We will fill it promptly. Note that we do not make deliveries after
6 3:00 p.m. on Fridays." Here a court could find that both parties agreed to the technical
7 specifications.

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

19 In a rare case terms in the records of both parties might not become part of the contract;
20 that might happen where the parties contemplated agreement to a single negotiated record, each
21 exchanged similar proposals and commenced interim performance but never reached a negotiated
22 agreement because of differences over crucial terms. There is a limitless variety of verbal and
23 nonverbal behavior that may be claimed to be an agreement to another's record. The section
24 leaves the interpretation of that behavior to the wise discretion of the courts.

25 3. An "agreement" may include terms derived from a course of performance, a course of
26 dealing, and usage of trade. See Section 1-201. If the members of a trade or if the contracting
27 parties expect to be bound by a term that appears in the record of only one contracting party, that
28 term is part of the agreement. However, repeated use of a particular term or repeated failure to
29 object to a term on another's record is not normally sufficient in itself to establish a course of
30 performance, a course of dealing or a trade usage.

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

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

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

7 (b) The express terms of the agreement and any such course of performance, as
8 well as any course of dealing and usage of trade, shall be construed whenever reasonable as
9 consistent with each other; but when such construction is unreasonable, express terms shall
10 control course of performance and course of performance shall control both course of dealing and
11 usage of trade.

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

14 *[Reporter’s Note – This section reflects current law. A legislative note might be placed here to*
15 *indicate that this section will be deleted upon adoption of revised Article 1, which will cover this*
16 *area.]*

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

18 (a) An agreement modifying a contract subject to this article needs no
19 consideration to be binding.

20 (b) An agreement in an authenticated record which excludes modification or

rescission except by an authenticated record cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form record supplied by a merchant must be separately authenticated by the other party.

(c) Section 2–201 must be satisfied if the contract as modified is subject to its provisions.

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

(e) A party that has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Preliminary Comment

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

Comments:

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

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

1 The effective use of bad faith to escape performance on the original contract terms is
2 barred, and the extortion of a “modification” without legitimate commercial reason is ineffective
3 as a violation of the duty of good faith. Nominal consideration cannot support a modification
4 made in bad faith. The test of “good faith” includes “observance of reasonable commercial
5 standards of fair dealing” (Section 2–102(a)(22)), and may in some situations require an
6 objectively demonstrable reason for seeking a modification. But such matters as a market shift
7 which makes performance come to involve a loss may provide such a reason even though there is
8 no such unforeseen difficulty as would make out a legal excuse from performance under Sections
9 2–615 and 2–616.

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

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

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

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

29 As an example of the interplay between these sections, suppose that a buyer insists on a
30 no-oral-modification clause to control the extra work of a seller of manufactured goods. The
31 buyer asks the seller to make a change to increase the quality of an important component and
32 indicates a willingness to pay for the change. If the buyer tells the seller “not to worry about
33 getting a change order” the NOM clause has clearly been waived, but the waiver can be retracted
34 unless the retraction would be unjust in view of a material change of position by the seller. If the
35 buyer does not expressly waive the condition, the clause stands waived by conduct if a material

1 change of position by the seller would render a contrary result unjust. Decisions such as *C.I.T.*
2 *Corp. v. Jonnet*, 3 U.C.C. Rep. Serv. 321 (Pa. C.P. 1965), *aff'd* 3 U.C.C. Rep. Serv. 968, 419
3 Pa. 435, 214 A.2d 620 (1965) holding that waiver requires that a no-oral-modification clause be
4 addressed directly by the party in whose favor it operates are disapproved.

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

12 **SECTION 2-210. ASSIGNMENT OF RIGHTS; DELEGATION OF**
13 **PERFORMANCE.**

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

16 (1) Subject to paragraph (2) and except as otherwise provided in Section
17 9-406 or as otherwise agreed, all rights of either seller or buyer may be assigned unless the
18 assignment would materially change the duty of the other party, increase materially the burden or
19 risk imposed on that party by the contract, or impair materially that party's chance of obtaining
20 return performance. A right to damages for breach of the whole contract or a right arising out of
21 the assignor's due performance of its entire obligation can be assigned despite an agreement
22 otherwise.

23 (2) The creation, attachment, perfection, or enforcement of a security
24 interest in the seller's interest under a contract is not an assignment that materially changes the
25 duty of or materially increases the burden or risk imposed on the buyer or materially impairs the

1 buyer's chance of obtaining return performance within paragraph (1) unless, and then only to the
2 extent that, enforcement of the security interest results in a delegation of a material performance
3 of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the
4 security interest remain effective. However, the seller is liable to the buyer for damages caused by
5 the delegation to the extent that the damages could not reasonably be prevented by the buyer, and
6 a court having jurisdiction may grant other appropriate relief, including cancellation of the
7 contract or an injunction against enforcement of the security interest or consummation of the
8 enforcement.

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

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

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

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

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

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

(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.

Preliminary Comment

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

Comments:

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

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

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

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

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

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

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

28 Second, if the third person accepts the delegation, an enforceable promise is made to both
29 the delegator and the person entitled under the contract to perform those duties. Subsection
30 (b)(2). In short, as to the person entitled under the contract a third party beneficiary contract is
31 created. However, the delegator’s duty to perform under the contract is not discharged unless the
32 person entitled to performance agrees to substitute the delegatee for the delegator (a novation).
33 See subsection (b)(1), last sentence.

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

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

7 5. Subsection (c) provides rules of interpretation as to when one party to a contract has
8 both assigned rights and delegated duties arising from the contract. If the intention to transfer the
9 entire contract is clear, the treatment of the rights assigned and the duties delegated is covered by
10 subsections (a) and (b). In cases where ambiguous language is used, such as an “assignment for
11 security,” the preference is to construe the language to cover an assignment of rights only.

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

18 **SECTION 2–211. LEGAL RECOGNITION OF ELECTRONIC CONTRACTS,**
19 **RECORDS AND AUTHENTICATIONS.**

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

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

24 (c) This article does not require a record or authentication to be created,
25 generated, sent, communicated, received, stored, or otherwise processed by electronic means or
26 in electronic form.

(d) A contract formed by the interaction of an individual and an electronic agent under Section 2-204(d)(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.

Preliminary Comment

Changes: This section is new. Subsections (a) and (b) are derived from Section 7(a) and (b) of the Uniform Electronic Transactions Act (UETA), and subsection (c) is derived from Section 5(b) of UETA. Subsection (d) is based on Section 206(c) of the Uniform Computer Information Transactions Act (UCITA). Each subsection conforms to the federal Electronic Signatures in Global and National Commerce Act.

Comments:

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

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

For example, though a contract may be unenforceable, the parties' electronic records may have collateral effects, as in the case of a buyer that insures goods purchased under a contract that is unenforceable under Section 2-201. The insurance company may not deny a claim on the ground that the buyer is not the owner, though the buyer may have no direct remedy against the seller for failure to deliver. *See* Restatement 2d Contracts, Section 8, Illustration 4. Whether an 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.

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;

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

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

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

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

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

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

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

30 **SECTION 2-213 . ELECTRONIC COMMUNICATION.**

31 (a) ~~To the extent that~~ If the receipt of an electronic communication has a legal
32 effect, ~~it is effective~~ has that effect even though no individual is aware of its receipt.

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

Preliminary Comment

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

Comments:

1. This section deals with electronic communications generally and is not limited to electronic records, which must be retrievable in perceivable form. The section does not resolve the questions of when or where electronic communications are determined to be sent or received; nor does it indicate that a communication has any particular substantive legal effect. This Article determines the time of receipt of a notice that is an electronic record (Section 2-102(a)(32)).

2. Subsection (a) makes clear that receipt is not dependent on a person having notice that the communication is in the person's electronic system. The paper analog is the recipient who never reads a mail notice.

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

4. This section does not address the question of whether the exchange of electronic communications constitutes the formation of a contract. Questions of formation are addressed by Sections 2-204 and 2-206.

PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

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

4 *[Reporter’s Note – This section reflects current law.]*

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

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

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

13 **Preliminary Comment**

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

15 **Comments:**

16 1. This section is intended to make it possible for the courts to police explicitly against the
17 contracts or terms which they find to be unconscionable instead of by adverse construction of
18 language, by manipulation of the rules of offer and acceptance or by determinations that the term is
19 contrary to public policy or to the dominant purpose of the contract. The section is intended to allow
20 a court to pass directly on the unconscionability of the contract or a particular term of the contract
21 and to make a conclusion of law as to its unconscionability. The underlying principle is the
22 prevention of oppression and unfair surprise. The basic test is whether, in the light of the general
23 commercial background and the commercial needs of the particular trade or case, the term or contract

involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. However, a court ought not, on the basis of substantive unconscionability alone, refuse to enforce a term disclaiming an implied warranty that complies with the requirements of Section 2-316 or a term that provides for a remedy that is exclusive under Section 2-719 (as long as that term provides a minimum adequate remedy). *See, e.g.,* Hornberger v. General Motors Corp., 929 F. Supp. 884 (E.D. Pa. 1996) (limitation of remedy to repair not unconscionable where consumer lessee, who incurred repair costs after expiration of express warranty, based claim on breach of implied warranty of merchantability); Moore v. Coachmen Industries, 499 S.E.2d 772 (N.C. 1998)(conspicuous term limiting warranty coverage on recreational vehicle to one year or 15,000 miles not unconscionable).

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

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

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

1 variations); *Austin Co. v. J. H. Tillman Co.*, 104 Or. 541, 209 P. 131 (1922) (clause limiting
2 the buyer's remedy to return held to be applicable only if the seller had delivered a machine
3 needed for a construction job which reasonably met the contract description).

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

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

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

16 **SECTION 2–303. ALLOCATION OR DIVISION OF RISKS.** Where this article
17 allocates a risk or a burden as between the parties “unless otherwise agreed”, the agreement may not
18 only shift the allocation but may also divide the risk or burden.

19 *[Reporter's Note – This section reflects current law.]*

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

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

24 (b) Even though all or part of the price is payable in an interest in realty the transfer
25 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 reflects current law.]

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

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

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

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

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

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

1 *[Reporter's Note – This section reflects current law.]*

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

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

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

10 *[Reporter's Note – This section reflects current law.]*

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

15 *[Reporter's Note – This section reflects current law.]*

16 **SECTION 2–308. ABSENCE OF SPECIFIED PLACE FOR DELIVERY.** Unless
17 otherwise agreed:

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

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

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

[Reporter's Note – This section reflects current law.]

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

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

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

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

[Reporter's Note – This section reflects current law except for the last of subsection (c), which provides for greater party autonomy. Thus, for example the comments will specify that, if reasonable, the parties might agree that the standard of notice is no notice at all.]

SECTION 2–310. OPEN TIME FOR PAYMENT OR RUNNING OF CREDIT; AUTHORITY TO SHIP UNDER RESERVATION. Unless otherwise agreed:

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

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

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

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

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

[Reporter's Note – Although no substantive change is intended, paragraph (3) has been modified for clarification.]

SECTION 2-311. OPTIONS AND COOPERATION RESPECTING PERFORMANCE.

(a) An agreement for sale that is otherwise sufficiently definite to be a contract is not

made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

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

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

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

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

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

SECTION 2–312. WARRANTY OF TITLE AND AGAINST INFRINGEMENT; BUYER'S OBLIGATION AGAINST INFRINGEMENT.

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

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

1 and

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

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

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

12 Preliminary Comment

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

15 Comments:

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

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

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

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

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

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

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

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

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

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

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

10 4. Subsection (c) deals with the disclaimer or modification of the warranties of title or
11 against infringement. This is a self-contained provision governing the modification or disclaimer of
12 warranties under this section; the warranties in this section are not designated as "implied"
13 warranties, and hence are not subject to the modification and disclaimer provisions of Section
14 2-316(b) and (c). Unlike Section 2-316, subsection (c) of this section does not have any specific
15 requirements that the disclaimer or modification be contained in a record or be conspicuous.

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

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

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

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

32 (a) In this section, "immediate buyer" means a buyer that enters into a contract with

1 the seller.

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

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

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

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

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

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

16 Preliminary Comment

17 **Changes:** Subsections (a) through (c) are identical to original Article 2 except that the term
18 “immediate buyer” is used to make clear that the section is limited to express warranties and remedial
19 promises made by a seller to a buyer with which the seller has a contractual relationship. Sections
20 2-313A and 2-313B address obligations that run directly from a seller to a remote purchaser.

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

5 **Comments:**

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

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

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

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

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

31 4. In view of the principle that the whole purpose of the law of warranty is to determine what

1 it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse
2 except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a
3 contract is normally a contract for a sale of something describable and described. A clause generally
4 disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to
5 such description and therefore cannot be given literal effect under Section 2-316.

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

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

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

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

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

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

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

15 There are a number of factors relevant to determining whether an expression creates
16 a warranty under this section or is merely puffing. For example, the relevant factors may include
17 whether the seller's representations taken in context, (1) were general rather than specific, (2) related
18 to the consequences of buying rather than the goods themselves, (3) were "hedged" in some way, (4)
19 were related to experimental rather than standard goods, (5) were concerned some aspects of the
20 goods but not a hidden or unexpected non-conformity, (6) were informal statements made in a formal
21 contracting process, (7) were phrased in terms of opinion rather than fact, or (8) were not capable
22 of objective measurement.

23 9. The use of the word "promise" in subsection (a)(1) is unusual in that it refers to statements
24 about the quality or performance characteristics of the goods. For example, a seller might make an
25 affirmation of fact to the buyer that the goods are of a certain quality, or may promise that the goods
26 when delivered will be of a certain quality, or may promise that the goods will perform in a certain
27 manner after delivery. In normal usage, "promise" refers to a what a person, not goods, will do; that
28 is, a promise is a commitment to act, or refrain from acting, in a certain manner in the future. A
29 promise about the quality or performance characteristics of the goods creates an express warranty
30 if the other elements of such a warranty are present whereas a promise by which the seller commits
31 itself to take remedial action upon the happening of a specified event is a remedial promise. The
32 distinction has meaning in the context of the statute of limitations. A right of action for breach of an
33 express warranty accrues when the goods are tendered to the immediate buyer (Section 2-725(c)(1))
34 unless the warranty consists of a promise that explicitly extends to the future performance of the
35 goods and discovery must await the time for performance, in which case accrual occurs when the
36 immediate buyer discovers or should have discovered the breach (Section 2-725(c)(4)). Section 2-
37 725(b)(3) separately addresses the accrual of a right of action for breach of a remedial promise.

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

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

6 (a) This section applies only to new goods and goods sold or leased as new goods
7 in a transaction of purchase in the normal chain of distribution. In this section:

8 ~~(1) “Goods” means new goods and goods sold or leased as new goods in a~~
9 ~~transaction of purchase that occurs in the normal chain of distribution.~~

10 ~~(2) (1) “Immediate buyer”~~ means a buyer that enters into a contract with the
11 seller.

12 ~~(3) (2) “Remote purchaser”~~ means a person that buys or leases goods from an
13 immediate buyer or other person in the normal chain of distribution.

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

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

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

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

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

8 (1) The seller may modify or limit the remedies available to the remote
9 purchaser if the modification or limitation is furnished to the remote purchaser no later than the time
10 of purchase or if the modification or limitation is contained in the record that contains the affirmation
11 of fact, promise or description.

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

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

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

Preliminary Comment

Changes: This section is new.

Comments:

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

No direct contract exists between the seller and the remote purchaser, and thus the seller's obligation under this section is not referred to as an "express warranty." Use of "obligation" rather than "express warranty" avoids any inference that the basis of the bargain test is applicable here. The test for whether an obligation other than a remedial promise arises is similar in some respects to the basis of the bargain test, but the test set forth in this section is exclusive. Because "remedial promise" in Section 2-313 is not subject to the basis of the bargain test, that term is used in this section.

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

3. The application of this section is limited to new goods and goods sold or leased as new goods within the normal chain of distribution. It does not apply to goods that are sold outside the normal chain, such as "gray" goods or salvaged goods, nor does it apply if the goods are unused but sold as seconds. The concept is flexible, and determining whether goods have been sold or leased

1 in the normal chain of distribution requires consideration of the seller's expectations with regard to
2 the manner in which its goods will reach the remote purchaser. For example, a car manufacturer may
3 be aware that its certain of its dealers frequently transfer cars among themselves, and under the
4 particular circumstances of the case a court might find that a new car sold initially to one dealer but
5 leased to the remote purchaser by another dealer ~~would have been~~ was leased in the normal chain of
6 distribution. The concept may also include such practices as door-to-door sales and distribution
7 through a nonprofit organization (e.g., Girl Scout cookies).

8 The phrase "goods sold or leased as new goods" refers to goods that in the normal course of
9 business would be considered new. There are many instances in which goods might be used for a
10 limited purpose yet be sold or leased in the normal chain of distribution as new goods. For example,
11 goods that have been returned to a dealer by a purchaser and placed back into the dealer's inventory
12 might be sold or leased as new goods in the normal chain of distribution. Other examples might
13 include goods that have been used for the purpose of inspection (e.g., a car that has been test-driven)
14 and goods that have been returned by a sale-or-return buyer (Section 2-326).

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

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

25 5. Obligations other than remedial promises created under this section are analogous to
26 express warranties and are subject to a test that is akin to the basis of the bargain test of Section 2-
27 313(b). The seller is entitled to shape the scope of the obligation, and the seller's language tending
28 to create an obligation must be considered in context. If a reasonable person in the position of the
29 remote purchaser, reading the seller's language ~~as a whole in its entirety~~, would not believe that an
30 affirmation of fact, promise or description created an obligation, there is no liability under this section.

31 6. There is no difference between remedial promise as used in this section (and Section 2-
32 313B) and the same term as used in Section 2-313.

33 7. Subsection (d)(1) makes clear that the seller may employ the provisions of Section 2-719

1 to modify or limit the remedies available to the remote purchaser for breach of the seller's obligation
2 hereunder. The modification or limitation may appear on the same record as the one which creates
3 the obligation, or it may be provided to the remote purchaser separately, but in no event may it be
4 furnished to the remote purchaser any later than the time of purchase.

5 The requirements and limitations set forth in Section 2-719, such as the requirement of an
6 express statement of exclusivity and the ~~test tests~~ for failure of essential purpose (Section 2-719(b))
7 and unconscionability (Section 2-719(c)) are applicable to a modification or limitation of remedy
8 under this section.

9 ~~7.~~ 8. 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 Just as a seller can limit the extent to which its language creates an express warranty under
15 Section 2-313 by placing that language in a broader context, so too can a seller under this section or
16 Section 2-313B limit the extent of its liability to a remote purchaser (subsection(d)(1)). In other
17 words, the seller, in undertaking an obligation under these sections, can spell out the scope and limits
18 of that obligation.

19 ~~8.~~ 9. As a rule, a remote purchaser may recover monetary damages measured in the same
20 manner as in the case of an aggrieved buyer under Section 2-714, including incidental and
21 consequential damages to the extent they would be available to an aggrieved buyer. Subsection
22 (d)(3) parallels Section 2-714(a) in allowing the buyer to recover for loss resulting in the ordinary
23 course of events as determined in any manner which is reasonable. In the case of an obligation that
24 is not a remedial promise, the normal measure of damages would be the difference between the value
25 of the goods if they had conformed to the seller's statements and their actual value, and the normal
26 measure of damages for breach of a remedial promise would be the difference between the value of
27 the promised remedial performance and the value of the actual performance received.

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

30 *Legislative Note: In order to maintain their relative positions in this Act, Sections 2-313A*
31 *and 2-313B may have to be renumbered according to the convention used by a particular*
32 *state. For example, in some states they may be designated as 2-313.1 and 2-313.2.*

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

3 (a) This section applies only to new goods and goods sold or leased as new goods
4 in a transaction of purchase in the normal chain of distribution. In this section:

5 ~~(1) “Goods” means new goods and goods sold or leased as new goods in a~~
6 ~~transaction of purchase that occurs in the normal chain of distribution.~~

7 ~~(2)~~ (1) “Immediate buyer” means a buyer that enters into a contract with the
8 seller.

9 ~~(3)~~ (2) “Remote purchaser” means a person that buys or leases goods from an
10 immediate buyer or other person in the normal chain of distribution.

11 (b) If a seller makes an affirmation of fact or promise that relates to the goods,
12 provides a description that relates to the goods, or makes a remedial promise in advertising or a
13 similar communication to the public and the remote purchaser enters into a transaction of purchase
14 with knowledge of and with the expectation that the goods will conform to the affirmation of fact,
15 promise, or description, or that the seller will perform the remedial promise, the seller has an
16 obligation to the remote purchaser that:

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

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

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

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

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

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

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

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

Preliminary Comment

Changes: This section is new.

Comments:

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

If the seller's advertisement is made to an immediate buyer, whether the seller incurs liability 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 in the normal chain of distribution), Comment 4 (reasonable person in the position of the remote purchaser), Comment 6 (modification or limitation of remedy), Comment 7 (puffing and limitations on extent of obligation) 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.

In determining whether the tests set forth in this section are satisfied, a court should consider the temporal relationship between the communication and the purchase. For example, the remote purchaser may acquire the goods years after the seller's advertising campaign. In such a circumstance, it would be highly unusual for the advertisement to have created the level of expectation in the remote purchaser or belief in the reasonable person in the position of the remote person necessary for the creation of an obligation under this section.

5. In determining whether an obligation arises under this Section, all information known to the remote purchaser at the time of contracting must be considered. For example, a news release by a manufacturer limiting the statements made in its advertising and known by the remote purchaser, or a communication to the remote purchaser by the immediate seller limiting the statements made in the manufacturer's advertising must be considered in determining whether the expectation test applicable to the remote purchaser and the belief test applicable to the reasonable person in the position of the remote purchaser are satisfied.

6. The remedies for breach of an obligation arising under this section may be modified or limited as set forth in Section 2-719. The modification or limitation may be contained in the advertisement that creates the obligation, or it may be separately furnished to the remote purchaser no later than the time of purchase.

~~4.~~ 7. Section 2-318 deals with the extension of obligations to certain third-party beneficiaries. Of course, no extension is necessary if the goods are purchased by an agent. In such a case, the knowledge and expectation of the principal, not the agent, are relevant in determining whether an obligation arises under this section. Nothing in this Act precludes a court from determining that a household operates as a buying unit under the law of agency.

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

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

(a) Unless excluded or modified under Section 2-316, a warranty that the goods shall

1 be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods
2 of that kind. Under this section the serving for value of food or drink to be consumed either on the
3 premises or elsewhere is a sale.

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

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

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

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

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

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

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

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

18 **Preliminary Comment**

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

4 **Comments:**

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

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

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

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

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

30 6. Suppose that an unmerchantable lawn mower causes personal injury to the buyer, who is
31 operating the mower. Without more, the buyer can sue the seller for breach of the implied warranty

1 of merchantability and recover for injury to person “proximately resulting” from the breach. Section
2 2-715(b)(2).

3 This opportunity does not resolve the tension between warranty law and tort law where goods
4 cause personal injury or property damage. The primary source of that tension arises from
5 disagreement over whether the concept of defect in tort and the concept of merchantability in Article
6 2 are coextensive where personal injuries are involved, *i.e.*, if goods are merchantable under warranty
7 law can they still be defective under tort law, and if goods are not defective under tort law can they
8 be unmerchantable under warranty law? The answer to both questions should be no, and the tension
9 between merchantability in warranty and defect in tort where personal injury or property damage is
10 involved should be resolved as follows:

11 When recovery is sought for injury to person or property, whether goods are merchantable
12 is to be determined by applicable state products liability law. When, however, a claim for
13 injury to person or property is based on an implied warranty of fitness under Section 2-315
14 or an express warranty under Section 2-313 or an obligation arising under Section 2-313A
15 or 2-313B, this Article determines whether an implied warranty of fitness or an express
16 warranty was made and breached, as well as what damages are recoverable under Section
17 2-715.

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

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

28 8. Paragraphs (1) and (2) of subsection (b) are to be read together. Both refer, as indicated
29 above, to the standards of that line of the trade which fits the transaction and the seller's business.
30 “Fair average” is a term directly appropriate to agricultural bulk products and means goods centering
31 around the middle belt of quality, not the least or the worst that can be understood in the particular
32 trade by the designation, but such as can pass “without objection.” Of course a fair percentage of the
33 least is permissible but the goods are not “fair average” if they are all of the least or worst quality
34 possible under the description. In cases of doubt as to what quality is intended, the price at which
35 a merchant closes a contract is an excellent indication of the nature and scope of the merchant’s

obligation under the present section.

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

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

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

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

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

14. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the

warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following the seller's delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

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 Section 2-316 an implied warranty that the goods shall be fit for such purpose.

Preliminary Comment

Changes: None.

Comments:

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

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

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

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

8 3. In connection with the warranty of fitness for a particular purpose the provisions of this
9 Article on the allocation or division of risks are particularly applicable in any transaction in which the
10 purpose for which the goods are to be used combines requirements both as to the quality of the goods
11 themselves and compliance with certain laws or regulations. How the risks are divided is a question
12 of fact to be determined, where not expressly contained in the agreement, from the circumstances of
13 contracting, usage of trade, course of performance and the like, matters which may constitute the
14 “otherwise agreement” of the parties by which they may divide the risk or burden.

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

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

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

27 **SECTION 2–316. EXCLUSION OR MODIFICATION OF WARRANTIES.**

28 (a) Words or conduct relevant to the creation of an express warranty and words or
29 conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with

1 each other; but subject to Section 2–202 negation or limitation is inoperative to the extent that such
2 construction is unreasonable.

3 (b) Notwithstanding subsection (c), unless the circumstances indicate otherwise, all
4 implied warranties are excluded by expressions such as “as is” or “with all faults” or similar language
5 or conduct that in common understanding make it clear to the buyer that the seller assumes no
6 responsibility for the quality or fitness of the goods. In a consumer contract evidenced by a record,
7 the requirements of this subsection must be satisfied by conspicuous language in the record.

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

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

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

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

18 (2) In a contract other than a consumer contract, the language ~~is sufficient if~~
19 must:

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

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

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

(d) An implied warranty may also be excluded 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 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.

Preliminary Comment

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

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

1 **Comments:**

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

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

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

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

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

31 5. Whether or not oral language of disclaimer satisfies the requirements of subsection (b) or,
32 in a commercial contract, subsection (c), such language may be relevant under other sections to the
33 question whether the warranty was ever in fact created. Thus, unless the provisions of this Article

1 on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to
2 whether reliance by the buyer occurred and whether the seller had “reason to know” under the section
3 on implied warranty of fitness for a particular purpose.

4 6. The exceptions to the general rule set forth in subsections (d) and (e) are common factual
5 situations in which the circumstances surrounding the transaction are in themselves sufficient to call
6 the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty
7 is being excluded.

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

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

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

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

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

11 **SECTION 2–317. CUMULATION AND CONFLICT OF WARRANTIES EXPRESS**
12 **OR IMPLIED.** Warranties whether express or implied shall be construed as consistent with each
13 other and as cumulative, but if such construction is unreasonable the intention of the parties shall
14 determine which warranty is dominant. In ascertaining that intention the following rules apply:

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

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

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

21 **Preliminary Comment**

22 **Changes:** None.

23 **Comments:**

24 1. This section rests on the basic policy of this Article that no warranty is created except by

1 some conduct (either affirmative action or failure to disclose) on the part of the seller. Therefore, all
2 warranties are made cumulative unless this construction of the contract is impossible or unreasonable.

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

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

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

16 (a) In this section:

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

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

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

22 (b) A seller's warranty whether express or implied to an immediate buyer, a seller's
23 remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section
24 2-313A or 2-313B extends to any natural person who is in the family or household of the immediate

1 buyer or the remote purchaser or who is a guest in the home of either if it is reasonable to expect that
2 such person may use, consume or be affected by the goods and who is injured in person by breach
3 of the warranty, remedial promise or obligation. A seller may not exclude or limit the operation of
4 this section.

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

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

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

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

18 **Preliminary Comment**

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

1 **Comments:**

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

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

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

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

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

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

1 ~~The second alternative is designed for states where the case law has already developed further~~
2 ~~and for those that desire to expand the class of beneficiaries. The third alternative goes further,~~
3 ~~following the trend of modern decisions as indicated by Restatement of Torts 2d § 402A.~~

4 **SECTION 2–319 THROUGH 2–324. RESERVED.**

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

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

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

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

14 *[Reporter’s Note – This section has been modified to conform to revised Article 5.]*

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

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

18 (1) a “sale on approval” if the goods are delivered primarily for use; or

19 (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 under Section 2–201 and as contradicting the sale aspect of the contract under Section 2–202).

[Reporter’s Note – This section has been modified to conform to revised Article 9.]

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

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

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

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

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

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

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

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

[Reporter's Note – This section reflects current law.]

SECTION 2–328. SALE BY AUCTION.

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

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

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

(d) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the

1 buyer may at its option avoid the sale or take the goods at the price of the last good faith bid prior
2 to the completion of the sale. This subsection shall not apply to any bid at an auction required by law.

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

8 **PART 4**

9 **TITLE, CREDITORS AND GOOD FAITH PURCHASERS**

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

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

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

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

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

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

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

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

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

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

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

2 (a) Except as provided in subsections (b) and (c), rights of unsecured creditors of the
3 seller with respect to goods that have been identified to a contract for sale are subject to the buyer's
4 rights to recover the goods under Sections 2–502 and 2–716.

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

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

12 (1) under Article 9; or

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

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

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

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

8 (1) the transferor was deceived as to the identity of the purchaser;

9 (2) the delivery was in exchange for a check which is later dishonored;

10 (3) it was agreed that the transaction was to be a "cash sale"; or

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

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

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

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

Article 9 [,Article 6 [if the state has not repealed Article 6],] and 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.]

PART 5

PERFORMANCE

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

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

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

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

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

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

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

11 *[Reporter's Note – This section reflects current law.]*

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

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

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

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

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

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

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

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

SECTION 2–503. MANNER OF SELLER'S TENDER OF DELIVERY.

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

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

(2) unless otherwise agreed the buyer must furnish facilities reasonably suited

1 to the receipt of the goods.

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

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

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

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

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

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

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

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

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

[Reporter's Note – In subsection (d)(2), "of a written direction to the bailee" is changed to "a record directing the bailee" and "except as otherwise provided in Article 9" has been added to conform to revised Article 9.]

[Reporter's Note – The current version of what is now designated as subsection (e)(2) has the language "except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323". This has been deleted because of the deletion of Section 2-323. However, a comment will refer to bills in a set and indicate that if they are used they must be in "correct form" (emphasizing the language of subsection (e)(1)).]

SECTION 2-504. SHIPMENT BY SELLER. Where the seller is required or authorized 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;

(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

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

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

4 *[Reporter's Note – This section reflects current law except for the addition of “conforming” in*
5 *paragraph (1), which clarifies the application of the perfect tender rule in the context of a seller's*
6 *obligations under a shipment contract.]*

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

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

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

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

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

1 *[Reporter's Note – The change in subsection (a)(2) corresponds with a change in Section 2-507,*
2 *which no longer uses the language of conditional delivery but instead grants a right of reclamation.]*

3 **SECTION 2–506. RIGHTS OF FINANCING AGENCY.**

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

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

13 *[Reporter's Note - This section reflects current law except that it now explicitly provides that Article*
14 *5 governs in the event of a conflict.]*

15 **SECTION 2–507. EFFECT OF SELLER'S TENDER; DELIVERY ON CONDITION.**

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

19 (b) Where payment is due and demanded on the delivery to the buyer of goods or
20 documents of title, the seller may reclaim the goods delivered upon a demand made within a

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

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

4 *[Reporter's Note – Subsection (a) reflects current law. A comment might state: "If the seller has*
5 *agreed to assemble or install the tendered goods, completion of that performance is also a condition*
6 *to the buyer's duty to accept and pay for the goods."]*

7 *[Reporter's Note – Subsection (b) has been changed to state more directly the seller's right of*
8 *reclamation from a nonpaying buyer in a cash-sale transaction. The subsection now parallels*
9 *Section 2-702(b), which conforms to the original intent.]*

10 *[Reporter's Note – A comment will clarify that "due and demanded" in subsection (b) refers to the*
11 *situation where the seller takes a check. The comment will also explain the relationship between*
12 *subsection (b) and Section 2-403.]*

13 **SECTION 2–508. CURE BY SELLER OF IMPROPER TENDER OR DELIVERY;**
14 **REPLACEMENT.**

15 (a) Where the buyer rejects goods or a tender of delivery under Section 2-601 or 2-
16 612 or except in a consumer contract justifiably revokes acceptance under Section 2-608(a)(2) and
17 the agreed time for performance has not expired, a seller that has performed in good faith, upon
18 reasonable notice to the buyer and at the seller's own expense, may cure the breach of contract by
19 making a conforming tender of delivery within the agreed time. The seller shall compensate the buyer
20 for all of the buyer's reasonable expenses caused by the seller's breach of contract and subsequent
21 cure.

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

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

Preliminary Comment

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

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

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

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

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

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

3 **Comments:**

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

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

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

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

31 4. The seller's cure under both subsection (a) and subsection (b) must be of conforming
32 goods. Conforming goods includes not only conformity to the contracted-for quality but also as to
33 quantity or assortment or other similar obligations under the contract. Since the time for performance

has expired in a case governed by subsection (b), however, the seller's tender of conforming goods required to effect a cure under this section could not conform to the contracted time for performance. Thus, subsection (a) requires that cure be tendered "within the agreed time" while subsection (b) requires that the tender be "appropriate and timely under the circumstances."

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

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

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

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

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

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

(b) Where the goods are held by a bailee to be delivered without being moved, the risk

of loss passes to the buyer:

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

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

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

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

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

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

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

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

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

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

5 *[Reporter's Note – This section reflects current law.]*

6 **SECTION 2–511. TENDER OF PAYMENT BY BUYER; PAYMENT BY CHECK.**

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

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

12 (c) Subject to Section 3–310, payment by check is conditional and is defeated as
13 between the parties by dishonor of the check on due presentment.

14 *[Reporter's Note – This section reflects current law.]*

15 **SECTION 2–512. PAYMENT BY BUYER BEFORE INSPECTION.**

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

18 (1) the nonconformity appears without inspection; or

1 (2) despite tender of the required documents the circumstances would justify
2 injunction against honor under Section 5-109(b).

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

5 *[Reporter's Note – This section reflects current law.]*

6 **SECTION 2–513. BUYER'S RIGHT TO INSPECTION OF GOODS.**

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

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

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

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

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

19 (d) A place, method or standard of inspection fixed by the parties is presumed to be

exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place 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 standard of inspection.]

[Reporter's Note – Subsection (c)(1) has been modified in light of the deletion of the sections on shipping terms (section 2-319 to 2-324).]

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 – The phrase “except as provide by Article 5” is new. This section is designed to track Section 4-503, which states that it is subject to 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

1 including such of them as may be in the possession or control of the other; and

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

5 *[Reporter's Note – This section reflects current law.]*

6 **PART 6**

7 **BREACH, REPUDIATION AND EXCUSE**

8 **SECTION 2–601. BUYER'S RIGHTS ON IMPROPER DELIVERY.** Subject to
9 Sections 2-504 and 2-612 and unless otherwise agreed under Sections 2–718 and 2–719, if the goods
10 or the tender of delivery fail in any respect to conform to the contract, the buyer may:

11 (1) reject the whole;

12 (2) accept the whole; or

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

14 *[Reporter's Note – This section reflects current law. The cross-reference to Section 2-504 has been*
15 *added because that section, like Section 2-612, contains a limitation on the perfect tender rule.]*

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

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

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

2 (b) Subject to Sections 2–603, 2–604 and 2-608(d):

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

5 (2) if the buyer has before rejection taken physical possession of goods in
6 which the buyer does not have a security interest under Section 2–711(c), the buyer is under a duty
7 after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to
8 permit the seller to remove them; but

9 (3) the buyer has no further obligations with regard to goods rightfully
10 rejected.

11 (c) The seller's rights with respect to goods wrongfully rejected are governed by the
12 provisions of this article on seller's remedies in general.

13 *[Reporter's Note – This section reflects current law except for the cross-reference to Section 2-*
14 *608(d), which contains the rule governing reasonable post-rejection and post-revocation use. The*
15 *title has been changed to eliminate the word “rightful” before “rejection” since the section deals*
16 *with both rightful rejections and rejections that are wrongful but effective.]*

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

18 (a) Subject to any security interest in the buyer under Section 2–711(c), when the
19 seller has no agent or place of business at the market of rejection a merchant buyer is under a duty
20 after rejection of goods in its possession or control to follow any reasonable instructions received
21 from the seller with respect to the goods and in the absence of such instructions to make reasonable

1 efforts to sell them for the seller's account if they are perishable or threaten to decline in value
2 speedily. In the case of a rightful rejection instructions are not reasonable if on demand indemnity
3 for expenses is not forthcoming.

4 (b) When the buyer sells goods under subsection (a) following a rightful rejection, the
5 buyer is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of
6 caring for and selling them, and if the expenses include no selling commission then to such
7 commission as is usual in the trade or if there is none to a reasonable sum not exceeding 10 percent
8 on the gross proceeds.

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

11 *[Reporter's Note – "Rightful" has been eliminated from the title (see Reporter's Note to Section 2-*
12 *602) and the text has been modified to make it clear that a buyer is not entitled to indemnity for*
13 *expenses (subsection (a)) or to a commission (subsection (b)) following a wrongful rejection.]*

14 *[Reporter's Note – Rather than incorporate references to revocation of acceptance in this section,*
15 *this draft continues the practice of tying the revoking buyer's rights to those of the rejecting buyer.*
16 *Note that Section 2-608(c) contains an expanded cross-reference that includes Sections 2-603 and*
17 *2-604.]*

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

19 Subject to Section 2-603, the buyer may store the rejected goods for the seller's account or reship
20 them to the seller or resell them for the seller's account with reimbursement as provided in Section
21 2-603. Such action is not acceptance or conversion.

22 *[Reporter's Note – The format (but not the effect) of the introductory clause has been changed to*
23 *emphasize that this section is available to all buyers, including nonmerchants.]*

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

3 (a) The buyer's failure to state in connection with rejection a particular defect or in
4 connection with revocation of acceptance a defect that justifies revocation precludes the buyer from
5 relying on the unstated defect to justify rejection or revocation of acceptance if the defect is
6 ascertainable by reasonable inspection

7 (1) where the seller had a right to cure the defect and could have cured it if
8 stated seasonably; or

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

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

15 **Preliminary Comment**

16 **Changes:** Subsection (a) is revised so that a failure to particularize waives only the right to
17 rely on the unstated defect to justify the remedies of rejection and revocation of acceptance, not other
18 remedies. The scope of subsection (a) is expanded to include revocation of acceptance as well as
19 rejection. Subsection (a)(1) is revised to make clear that the seller must have had both the right and
20 the ability to cure. Subsection (b) has been revised to make clear that a buyer that makes payment
21 upon presentation of the documents to the buyer may waive defects, but a person that is not the buyer
22 (*e.g.*, a letter-of-credit issuer) does not waive the buyer's right to assert defects in the documents as
23 against the seller.

24 **Comments:**

1 1. This section rests upon a policy of permitting the buyer to give a quick and informal notice
2 of defects in a tender without penalizing the buyer for omissions, while at the same time protecting
3 a seller that is reasonably misled by the buyer's failure to state curable defects. Where the defect in
4 a tender is one which could have been cured by the seller, a buyer that merely rejects the delivery
5 without stating any objections to the tender is probably acting in commercial bad faith and seeking
6 to get out of a deal which has become unprofitable. Following the general policy of this Article to
7 preserve the deal wherever possible, subsection (a)(1) requires that the seller's right to correct the
8 tender in such circumstances be protected.

9 Subsection (a) as revised makes three substantive changes. First, failure to particularize
10 affects only the buyer's right to reject or revoke acceptance, not the buyer's right to establish breach.
11 Waiver of a right to damages for breach because of a failure properly to notify the seller is governed
12 by Section 2-607(c).

13 Second, subsection (a) now requires the seller to have had a right to cure under Section 2-
14 508 in addition to having the ability to cure. This point was perhaps implicit in the prior provision,
15 but it is now expressly stated to avoid any question of whether this section creates a seller's right to
16 cure independent of the right enumerated in section 2-508. Thus if the defect is one that could be
17 cured under Section 2-508, the buyer will have waived that defect as a basis for rejecting the goods,
18 or possibly revoking acceptance, if the buyer fails to state the defect with sufficient particularity to
19 facilitate the seller's exercise of its right to cure as provided in Section 2-508.

20 Subsection (a) as revised has been extended to include not only rejection but also revocation
21 of acceptance. This is necessitated by the expansion of the right to cure (Section 2-508) to cover
22 revocation of acceptance in nonconsumer contracts. The application of the subsection to revocation
23 cases is limited in the following ways: 1) because a revocation under Section 2-608(a)(1) does not
24 trigger a right to cure under Section 2-508, such a revocation does not trigger subsection (a); 2)
25 because Section 2-608(a)(2) involves defects that are by definition difficult to discover, there is no
26 waiver under subsection (a) unless the defect at issue justifies the revocation and the buyer has notice
27 of it; and 3) because the right to cure following revocation of acceptance is restricted under Section
28 2-508 to nonconsumer contracts, this section cannot be asserted against a consumer who is seeking
29 to revoke acceptance. The consequences of a consumer's failure to give proper notice are governed
30 by Section 2-607(c).

31 2. When the time for cure is past, subsection (a)(2) makes plain that a merchant seller is
32 entitled upon request to a final statement of objections by a merchant buyer upon which the seller can
33 rely. What is needed is a clear statement to the buyer of exactly what is being sought. A formal
34 demand will be sufficient in the case of a merchant-buyer.

35 3. Subsection (b) has been revised to make clear that the buyer that makes payment upon
36 presentation of the documents to the buyer may waive defects, but that a person that is not the buyer,
37 such as the issuer of a letter of credit, that pays as against documents is not waiving the buyer's right
38 to assert defects in the documents as against the seller.

1 Subsection (b) applies to documents the same principle contained in section 2-606(a)(1) for
2 the acceptance of goods; that is, if the buyer accepts documents that have apparent defects, the buyer
3 is presumed to have waived the defects as a basis for rejecting the documents. Subsection (b) is
4 limited to defects which are apparent on the face of the documents. When payment is required
5 against documents, the documents must be inspected before the payment, and the payment constitutes
6 acceptance of the documents. When the documents are delivered without requiring a contemporary
7 payment by the buyer, the acceptance of the documents by nonobjection is postponed until after a
8 reasonable time for the buyer to inspect the documents. In either situation, however, the buyer
9 “waives” only what is apparent on the face of the documents. Moreover, in either case, the
10 acceptance of the documents does not constitute an acceptance of the goods and does not impair any
11 options or remedies of the buyer for improper delivery of the goods. See Section 2-512(b).

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

13 (a) Acceptance of goods occurs when the buyer:

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

16 (2) fails to make an effective rejection, but such acceptance does not occur
17 until the buyer has had a reasonable opportunity to inspect them; or

18 (3) except as otherwise provided in Section 2-608(d), does any act inconsistent
19 with the seller’s ownership; but if such act is ratified by the seller it is an acceptance.

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

21 *[Reporter’s Note – The only substantive change is a cross-reference to Section 2-608(d), which deals*
22 *with reasonable use following rejection or revocation of acceptance.]*

23 **SECTION 2–607. EFFECT OF ACCEPTANCE; NOTICE OF BREACH; BURDEN** 24 **OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM OR** 25 **LITIGATION TO PERSON ANSWERABLE OVER.**

26 (a) The buyer must pay at the contract rate for any goods accepted.

27 (b) Acceptance of goods by the buyer precludes rejection of the goods accepted and

1 if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance
2 was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance
3 does not of itself impair any other remedy provided by this article for nonconformity.

4 (c) Where a tender has been accepted

5 (1) the buyer must within a reasonable time after the buyer discovers or should
6 have discovered any breach notify the seller; however, failure to give timely notice bars the buyer
7 from a remedy only to the extent that the seller is prejudiced by the failure.

8 (2) if the claim is one for infringement or the like and the buyer is sued as a
9 result of such a breach it must so notify the seller within a reasonable time after the buyer receives
10 notice of the litigation or be barred from any remedy over for liability established by the litigation.

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

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

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

20 (2) if the claim is one for infringement or the like the original seller may
21 demand in a record that its buyer turn over to it control of the litigation including settlement or else
22 be barred from any remedy over and if it also agrees to bear all expense and to satisfy any adverse

1 judgment, then unless the buyer after seasonable receipt of the demand does turn over control the
2 buyer is so barred.

3 (f) Subsections (c), (d) and (e) apply to any obligation of a buyer to hold the seller
4 harmless against infringement or the like.

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

9 *[Reporter's Note – The vouching-in procedure in subsection (e) has been expanded to include*
10 *indemnity actions and persons other than the seller that are answerable over.]*

11 **SECTION 2–608. REVOCATION OF ACCEPTANCE IN WHOLE OR IN PART;**
12 **USE OF GOODS FOLLOWING RIGHTFUL REJECTION OR JUSTIFIABLE**
13 **REVOCATION OF ACCEPTANCE.**

14 (a) The buyer may revoke acceptance of a lot or commercial unit whose
15 nonconformity substantially impairs its value to the buyer if the buyer has accepted it

16 (1) on the reasonable assumption that its nonconformity would be cured and
17 it has not been seasonably cured; or

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

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

24 (c) A buyer that so revokes has the same rights and duties with regard to the goods

involved as if the buyer had rejected them.

(d) If a buyer uses the goods after a rightful rejection or justifiable revocation of acceptance, the following rules apply:

(1) Any use by the buyer that is unreasonable under the circumstances is wrongful as against the seller and is an acceptance only if ratified by the seller.

(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

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

12 5. Under subsection (b), the buyer's ability to revoke is limited to those circumstances where
13 the goods have not materially deteriorated unless that deterioration is caused by the nonconformity
14 of the goods. Worthless goods, however, need not be offered back and minor defects in the goods
15 should be ignored.

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

21 7. Subsection (d), which is new, deals with the problem of post-rejection or revocation use
22 of the goods. The courts have developed several alternative approaches. Under original Article 2,
23 a buyer's post-rejection or revocation use of the goods could be treated as an acceptance, thus
24 undoing the rejection or revocation, could be a violation of the buyer's obligation of reasonable care,
25 or could be a reasonable use for which the buyer must compensate the seller. Subsection (d) adopts
26 the third approach. If the buyer's use after an effective rejection or a justified revocation of
27 acceptance is unreasonable under the circumstances, it is inconsistent with the rejection or revocation
28 of acceptance and is wrongful as against the seller. This gives the seller the option of ratifying the
29 use, thereby treating it as an acceptance, or pursuing a non-Code remedy for conversion.

30 If the buyer's use is reasonable under the circumstances, the buyer's actions cannot be treated
31 as an acceptance. The buyer must compensate the seller for the value of the use of the goods to the
32 buyer. Determining the appropriate level of compensation requires a consideration of the buyer's
33 particular circumstances and should take into account the defective condition of the goods. There
34 may be circumstances, such as where the use is solely for the purpose of protecting the buyer's
35 security interest in the goods, where no compensation is due the seller. In other circumstances, the
36 seller's right to compensation must be netted out against any right of the buyer to damages.

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

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

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

8 (c) Acceptance of any improper delivery or payment does not prejudice the aggrieved
9 party's right to demand adequate assurance of future performance.

10 (d) After receipt of a justified demand failure to provide within a reasonable time not
11 exceeding 30 days such assurance of due performance as is adequate under the circumstances of the
12 particular case is a repudiation of the contract.

13 *[Reporter's Note – This section reflects current law.]*

14 **SECTION 2-610. ANTICIPATORY REPUDIATION.**

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

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

20 (2) resort to any remedy for breach, even though the aggrieved party has
21 notified the repudiating party that it would await the latter's performance and has urged retraction;
22 and

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

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

8 *[Reporter's Note – Subsection (a) reflects current law. Subsection (b) is new.]*

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

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

13 (b) Retraction may be by any method that clearly indicates to the aggrieved party that
14 the repudiating party intends to perform, but must include any assurance justifiably demanded under
15 Section 2–609.

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

18 *[Reporter's Note – This section reflects current law.]*

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

20 (a) In an installment contract, the buyer may reject any installment that is
21 nonconforming if the nonconformity substantially impairs the value of that installment to the buyer
22 or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall

1 within subsection (b) and the seller gives adequate assurance of cure the buyer must accept that
2 installment.

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

8 *[Reporter's Note – The title has been changed because the definition of installment contract now*
9 *appears in Section 2-102. Concomitantly, original subsection (1), where installment contracts are*
10 *defined, has been deleted.]*

11 *[Reporter's Note – The words “to the buyer” in subsections (a) and (b) are added to equate the*
12 *standard for rejecting an installment with the standard for revocation of acceptance.]*

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

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

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

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

24 *[Reporter's Note – The following underlined language from the introductory phrase that appears*
25 *in current law has been deleted because of the deletion of Section 2-324 in this draft: “ before the*

1 *risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section*
2 *2-324)."* *The point will be made by comment.]*

3 *[Reporter's Note – Paragraphs (1) and (2) have been revised to use "terminated" rather than the*
4 *current law's "avoided." This preserves pre-termination breaches.]*

5 **SECTION 2-614. SUBSTITUTED PERFORMANCE.**

6 (a) Where without fault of either party the agreed berthing, loading, or unloading
7 facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery
8 otherwise becomes commercially impracticable but a commercially reasonable substitute is available,
9 such substitute performance must be tendered and accepted.

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

15 *[Reporter's Note – This section reflects current law.]*

16 **SECTION 2-615. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.**

17 Except so far as a seller may have assumed a greater obligation and subject to Section 2-614, the
18 following rules apply:

19 (1) Delay in performance or nonperformance in whole or in part by a seller that
20 complies with paragraphs (2) and (3) is not a breach of the seller's duty under a contract for sale if
21 performance as agreed has been made impracticable by the occurrence of a contingency the
22 nonoccurrence of which was a basic assumption on which the contract was made or by compliance
23 in good faith with any applicable foreign or domestic governmental regulation or order whether or

not it later proves to be invalid.

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

(3) The seller must notify the buyer seasonably that there will be delay or nonperformance and, when allocation is required under paragraph (2), of the estimated quota thus made available for the buyer.

[Reporter's Note – Paragraph (1) is changed to cover delays “in performance or nonperformance” rather than “in delivery or nondelivery.” This change reflects the broad range of obligations a seller may have other than the obligation to deliver the goods.]

SECTION 2–616. PROCEDURE ON NOTICE CLAIMING EXCUSE.

(a) Where the buyer receives notification of a material or indefinite delay or an allocation justified under Section 2-615 the buyer may by notification in a record to the seller as to any performance concerned, and where the prospective deficiency substantially impairs the value of the whole contract under Section 2–612, then also as to the whole,

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

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

(b) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract is terminated with respect to any

1 performance affected.

2 (c) This section may not be negated by agreement except in so far as the seller has
3 assumed a greater obligation under Section 2-615.

4 *[Reporter's Note – Consistent with Section 2-613, subsection (b) refers to “termination” rather than*
5 *“avoidance.” Consistent with Section 2-615, subsection (b) refers to “performance” rather than*
6 *“delivery.”]*

7 **PART 7**

8 **REMEDIES**

9 **SECTION 2–701. REMEDIES FOR BREACH OF COLLATERAL CONTRACTS**

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

12 *[Reporter's Note – This section reflects current law.]*

13 **SECTION 2–702. SELLER'S REMEDIES ON DISCOVERY OF BUYER'S** 14 **INSOLVENCY.**

15 (a) Where the seller discovers the buyer to be insolvent the seller may refuse delivery
16 except for cash including payment for all goods theretofore delivered under the contract, and stop
17 delivery under Section 2–705.

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

22 (c) The seller's right to reclaim under subsection (b) is subject to the rights of a buyer

1 in ordinary course of business or other good-faith purchaser for value. Successful reclamation of
2 goods under this section excludes all other remedies with respect to them.

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

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

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

12 (b) If the buyer is in breach of contract the seller may to the extent provided for by
13 [the Uniform Commercial Code] or other law:

- 14 (1) withhold delivery of the goods;
- 15 (2) stop delivery of the goods under Section 2-705;
- 16 (3) proceed under Section 2-704 with respect to goods unidentified to the
17 contract or unfinished;
- 18 (4) reclaim the goods under Section 2-507(b) or 2-702(b);
- 19 (5) cancel;
- 20 (6) resell and recover damages under Section 2-706;
- 21 (7) recover damages for nonacceptance or repudiation under Section 2-708(a);
- 22 (8) recover lost profits under Section 2-708(b);
- 23 (9) recover the price under Section 2-709;
- 24 (10) obtain specific performance under Section 2-716;

(11) recover liquidated damages under Section 2-718;

(12) in other cases, recover damages in any manner that is reasonable under the circumstances.

(c) If a buyer becomes insolvent, the seller may:

(1) withhold delivery under Section 2-702(a);

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

(3) reclaim the goods under Section 2-702(b).

~~*[Reporter's Note – This section is a substantial revision of current 2-703 and gives a complete list of the seller's statutory remedies for breach. Subsection (b). In addition, the section now states each of the seller's statutory remedies upon the buyer's insolvency. Subsection (c). It also defines the buyer's statutory breaches with more specificity, although in this context it is drafted to be inclusive rather than exclusive. Subsection (a).]*~~

[Reporter's Note – Subsection (b) contains a complete list of the statutory remedies for breach that are provided by other sections of this Article. The subsection does not address the extent to which other law provides additional remedies or supplements the statutory remedies. See Section 1-103. Subsection (c) contains a complete list of this Article's statutory remedies in the event the buyer becomes insolvent.]

[Reporter's Note – A comment will indicate that this Section does not contain a cross-reference to remedies that become available upon a justified demand for adequate assurances of performance (Section 2-609).]

[Reporter's Note – A comment will indicate that subsection (b)(12), which is open-ended, is designed to deal with remedies for contractually defined breaches.]

SECTION 2-704. SELLER'S RIGHT TO IDENTIFY GOODS TO THE CONTRACT NOTWITHSTANDING BREACH OR TO SALVAGE UNFINISHED GOODS.

(a) An aggrieved seller under Section 2-703 may:

(1) identify to the contract conforming goods not already identified if at the time the seller learned of the breach they are in the seller's possession or control;

1 (2) treat as the subject of resale goods that have demonstrably been intended
2 for the particular contract even though those goods are unfinished.

3 (b) Where the goods are unfinished an aggrieved seller may in the exercise of
4 reasonable commercial judgment for the purposes of avoiding loss and of effective realization either
5 complete the manufacture and wholly identify the goods to the contract or cease manufacture and
6 resell for scrap or salvage value or proceed in any other reasonable manner.

7 *[Reporter's Note – This section reflects current law.]*

8 **SECTION 2-705. SELLER'S STOPPAGE OF DELIVERY IN TRANSIT OR**
9 **OTHERWISE.**

10 (a) The seller may stop delivery of goods in the possession of a carrier or other bailee
11 when the seller discovers the buyer to be insolvent or when the buyer repudiates or fails to make a
12 payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the
13 goods.

14 (b) As against such buyer the seller may stop delivery until:

15 (1) receipt of the goods by the buyer;

16 (2) acknowledgment to the buyer by any bailee of the goods except a carrier
17 that the bailee holds the goods for the buyer; or

18 (3) such acknowledgment to the buyer by a carrier by reshipment or as
19 warehouseman; or

20 (4) negotiation to the buyer of any negotiable document of title covering the
21 goods.

22 (c)(1) To stop delivery the seller must so notify as to enable the bailee by reasonable

1 diligence to prevent delivery of the goods.

2 (2) After such notification the bailee must hold and deliver the goods according
3 to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

4 (3) If a negotiable document of title has been issued for goods the bailee is
5 not obliged to obey a notification to stop until surrender of the document.

6 (4) A carrier that has issued a nonnegotiable bill of lading is not obliged to
7 obey a notification to stop received from a person other than the consignor.

8 *[Reporter's Note – Subsection (a) eliminates the restriction on the right of stoppage in transit to*
9 *“carload, truckload, planeload or larger shipments” when the buyer fails to pay or repudiates the*
10 *agreement. The limitation is incompatible with current shipping capabilities.]*

11 **SECTION 2–706. SELLER'S RESALE INCLUDING CONTRACT FOR RESALE.**

12 (a) In an appropriate case involving breach by the buyer, the seller may resell the
13 goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in
14 a commercially reasonable manner the seller may recover the difference between the contract price
15 and the resale price together with any incidental and consequential damages provided under Section
16 2–710, but less expenses saved in consequence of the buyer's breach.

17 (b) Except as otherwise agreed a resale may be at public or private sale including sale
18 by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale
19 may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale
20 including the method, manner, time, place and terms must be commercially reasonable. The resale
21 must be reasonably identified as referring to the broken contract, but it is not necessary that the goods
22 be in existence or that any or all of them have been identified to the contract before the breach.

23 (c) Where the resale is at private sale the seller must give reasonable notification of

an intention to resell.

(d) Where the resale is at public sale:

(1) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind;

(2) the sale must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods that are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale;

(3) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(4) the seller may buy.

(e) A purchaser that buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(f) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller or a buyer that has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of any security interest under Section 2-711(c).

(g) Failure of a seller to resell within this section does not bar the seller from any other remedy.

Preliminary Comment

Changes: Consistent with the revision of Section 2-710, this section now provides for

1 consequential as well as incidental damages. Subsection (g) is new, and parallels the provision for
2 buyer cover in 2-713. Original Section 2-706(1) measures damages by the difference between the
3 resale price and the contract price; subsection (a) reverses these terms (“difference between the
4 contract price and the resale price”) because the contract price must be the larger number for there
5 to be direct damages.

6 **Comments.**

7 1. The right of resale under this section arises when a seller reclaims goods under Section 2-
8 507 or a buyer repudiates or makes a wrongful but effective rejection. In addition, there is a right
9 of resale if the buyer unjustifiably attempts to revoke acceptance and the seller takes back the goods.
10 However, the seller may choose to ignore the buyer’s unjustifiable attempt to revoke acceptance, in
11 which case the appropriate remedy is an action for the price under Section 2-709. Application of the
12 right of resale to cases of buyer repudiation is supplemented by subsection (b), which authorizes a
13 resale of goods which are not in existence or were not identified to the contract before the breach.

14 Subsection (a) allows the seller to resell the goods after a buyer’s breach of contract if the
15 seller has possession or control of the goods. The seller may have possession or control of the goods
16 at the time of the breach or may have regained possession of the goods upon the buyer’s wrongful
17 rejection. If the seller has regained possession of the goods from the buyer pursuant to Article 9, that
18 Article controls the seller’s rights of resale.

19 2. Under this Article the seller resells by authority of law, on the seller’s own behalf, for the
20 seller’s own benefit and for the purpose of setting the seller’s damages. The theory of a seller’s
21 agency is thus rejected. The question of whether the title to the goods has or has not passed to the
22 buyer is not relevant for the operation of this section.

23 3. To recover the damages prescribed in subsection (a) the seller must act “in good faith and
24 in a commercially reasonable manner” in making the resale. If the seller complies with the prescribed
25 standards in making the resale, the seller may recover from the buyer the damages provided for in
26 subsection (a). Evidence of market or current prices at any particular time or place is relevant only
27 for the question of whether the seller acted in a commercially reasonable manner in making the resale.

28 4. Subsection (b) enables the seller to resell in accordance with reasonable commercial
29 practices so as to realize as high a price as possible in the circumstances. A seller may sell at a public
30 sale or a private sale as long as the choice is commercially reasonable. A “public” sale is one to
31 which members of the public are admitted. A public sale is usually a sale by auction, but all auctions
32 are not public auctions. A private sale may be effected by an auction or by solicitation and
33 negotiation conducted either directly or through a broker. In choosing between a public and private
34 sale, the character of the goods must be considered and relevant trade practices and usages must be
35 observed. A public sale has further requirements stated in subsection (d).

36 The purpose of subsection (b) is to enable the seller to dispose of the goods to the best

1 advantage, and therefore the seller is permitted in making the resale to depart from the terms and
2 conditions of the original contract for sale to any extent “commercially reasonable” in the
3 circumstances.

4 As for the place for resale, the focus is on the commercial reasonableness of the seller's choice
5 as to the place for an advantageous resale. This section rejects the theory that the seller should
6 normally resell at the agreed place for delivery and that a resale elsewhere can be permitted only in
7 exceptional cases.

8 The time for resale is a reasonable time after the buyer's breach. What is a reasonable time
9 depends on the nature of the goods, the condition of the market and the other circumstances of the
10 case; its length cannot be measured by any legal yardstick or divided into degrees. When a seller
11 contemplating resale receives a demand from the buyer for inspection under Section 2-515, the time
12 for resale may be appropriately lengthened.

13 5. The provision of subsection (b) that the goods need not be in existence to be resold
14 applies when the buyer is guilty of anticipatory repudiation of a contract for future goods before the
15 goods or some of the goods have come into existence. In this case, the seller may exercise the right
16 of resale and fix the damages by “one or more contracts to sell” the quantity of conforming future
17 goods affected by the repudiation.

18 The companion provision of subsection (b), that resale may be made although the goods were
19 not identified to the contract prior to the buyer's breach, likewise contemplates an anticipatory
20 repudiation by the buyer, but one occurring after the goods are in existence. The seller may identify
21 goods to the contract after the breach, but must identify the goods being sold as pertaining to the
22 breached contract. If the identified goods conform to the contract, their resale will fix the seller's
23 damages as satisfactorily as if the goods had been identified before the breach.

24 6. If the resale is to be by private sale, subsection (c) requires that reasonable notification of
25 the seller's intention to resell must be given to the buyer. Notification of the time and place of a
26 private resale is not required.

27 7. Subsection (d) states requirements for a public resale. The requirements of this subsection
28 are in addition to the requirements of subsection (b), which pertain to all resales under this section.

29 Paragraph (1) of subsection (d) qualifies the last sentence of subsection (b) with respect to
30 resales of unidentified and future goods at public sale. If conforming goods are in existence the seller
31 may identify them to the contract after the buyer's breach and then resell them at public sale. If the
32 goods have not been identified, however, the seller may resell them at public sale only as “future”
33 goods and only if there is a recognized market for public sale of futures in goods of the kind.
34

35 Subsection (d)(2) requires that the seller give the buyer reasonable notice of the time and
36 place of a public resale so that the buyer may have an opportunity to bid or to secure the attendance

1 of other bidders. An exception is made in the case of goods “which are perishable or threaten to
2 decline speedily in value.”

3 Since there would be no reasonable prospect of competitive bidding elsewhere, subsection
4 (d)(2) requires that a public resale “must be made at a usual place or market for public sale if one is
5 reasonably available”; *i.e.*, a place or market which prospective bidders may reasonably be expected
6 to attend. The market may still be “reasonably available” under this subsection, although at a
7 considerable distance from the place where the goods are located. In this case, the expense of
8 transporting the goods for resale is recoverable from the buyer as part of the seller's incidental
9 damages under subsection (a). However, the question of availability is one of commercial
10 reasonableness in the circumstances and if such “usual” place or market is not reasonably available,
11 a duly advertised public resale may be held at another place if it is one which prospective bidders may
12 reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever
13 for goods of the kind.

14 Subsection (d)(3) is designed to permit intelligent bidding. Subsection (d)(4), which permits
15 the seller to bid and, of course, to become the purchaser, benefits the original buyer by tending to
16 increase the resale price and thus decreasing the damages the buyer will have to pay.

17 8. Subsection (e) allows a purchaser to take the goods free of the rights of the buyer even
18 if the seller has not complied with this section. The policy of resolving any doubts in favor of the
19 resale purchaser operates to the benefit of the buyer by increasing the price the purchaser should be
20 willing to pay.

21 9. Subsection (f) recognizes that when the seller is entitled to resell under this Article, the
22 goods are the seller's goods and the purpose of resale under this section is to set the seller's damages
23 as against the buyer. However, a person in the position of the seller under section 2-707 or a buyer
24 asserting a security interest in the goods under Section 2-711(c) has only a limited right in the goods
25 and so must account to the seller for any excess over the limited amount necessary to satisfy that
26 right.

27 10. Subsection (g) expresses the policy that resale is not a mandatory remedy for the seller.
28 The seller is always free to choose between resale and damages for repudiation or nonacceptance
29 under Section 2-708.

30 **Relation to other remedies:** Subsection (g) parallels the provision in the cover section,
31 Section 2-712. A seller that fails to comply with the requirements of this section may recover
32 damages under Section 2-708(1). In addition, a seller may recover both incidental and consequential
33 damages under Section 2-710 assuming the seller's damages have not been liquidated under Section
34 2-718 or limited under Section 2-719.

35 **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 that has paid or become responsible for the price of goods on behalf of the principal or any person that otherwise holds a security interest or other right in goods similar to that of a seller.

(b) A person in the position of a seller has the same remedies as a seller under this article.

[Reporter's Note – This section has been changed to allow the “person in the position of a seller” to have the full range of remedies that the seller would have. The current provision is more limited, providing that “[a] person in the position of a seller may as provided in this Article withhold or stop delivery (Section 2–705) and resell (Section 2–706) and recover incidental damages (Section 2–710).”]

SECTION 2–708. SELLER'S DAMAGES FOR NONACCEPTANCE OR REPUDIATION.

(a) Subject to subsection (b) and to Section 2–723:

(1) the measure of damages for nonacceptance by the buyer is the difference between the contract price and the market price at the time and place for tender together with any incidental or consequential damages provided under Section 2–710, but less expenses saved in consequence of the buyer's breach; and

(2) the measure of damages for repudiation by the buyer is the difference between the contract price and the market price at the place for tender at the expiration of a commercially reasonable time after the seller learned of the repudiation, but no later than the time stated in paragraph (1), together with any incidental or consequential damages provided under Section 2-710, but less expenses saved in consequence of the buyer's breach.

(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 under Section 2-710.

Preliminary Comment

Changes: This section contains the following changes from original Section 2-708:

1) Consistent with the revision of Section 2-710, this section now provides for consequential as well as incidental damages. 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 Section 2-713 on buyer's market-based damage claims.

2) Original Section 2-706(1) sets the measure of damages as the difference between the market price and the unpaid contract price. The word "unpaid" has been deleted as superfluous and misleading. A buyer that has already paid a portion of the price is of course entitled to recover it in restitution under Section 2-718.

3) Original Section 2-708(1) 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. *Compare* Sections 2-712 and 2-713 on buyer's remedies, where the contract price is listed after the cover or market price.

4) 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 original Section 2-708(2) was an alternative to Section 2-706 as well as Section 2-708(1) but still have had to ask and analyze the question. *See, e.g., R.E. Davis Chemical Corp. v. Disonics, Inc.*, 826 F.2d 678 (7th Cir. 1987). The change makes this result explicit. Original Section 2-708(2) also contains the phrase "due allowance for costs reasonably incurred". This draft deletes that language.

5) In subsection (b), the phrase "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, 4th ed.), the language makes no sense in the context of the lost-volume seller and has been universally ignored in that context to make the provision work as it was intended. It is assumed as obvious that when a seller ceases manufacture and resells component parts

1 for scrap or salvage value under Section 2-704(b), a credit for the proceeds is due the buyer
2 to offset the damages under this section.

3 **Comments.**

4 1. The right to damages under this section arises when a seller reclaims goods under Section
5 2-507 or a buyer repudiates or makes a wrongful but effective rejection. In addition, there is a right
6 if the buyer unjustifiably attempts to revoke acceptance and the seller takes back the goods.
7 However, the seller may choose to ignore the buyer's unjustifiable attempt to revoke acceptance, in
8 which case the appropriate remedy is an action for the price under Section 2-709.

9 2. The current market price at the time and place for tender is the standard by which damages
10 for nonacceptance are to be determined. The time and place of tender is determined by Section 2-503
11 on tender of delivery and by the use of common shipping terms. The provisions of Section 2-723 are
12 relevant in determining the market price

13 In the event that there is no evidence available of the current market price at the time and
14 place of tender, proof of a substitute market may be made as provided in Section 2-723.
15 Furthermore, the section on the admissibility of market quotations is intended to ease materially the
16 problem of providing competent evidence.

17 The price term in a long-term contract may or may not have an escalation clause. The time
18 for determining the contract price in a long-term contract should not necessarily be tied to the time
19 for measuring the market price in the repudiation situation. The appropriate contract price should
20 be determined in light of the general principle of full compensation for the aggrieved party.

21 3. Subsection (a)(2) addresses the question of when the market price should be measured in
22 the case of an anticipatory repudiation by the buyer. This section provides that the market price
23 should be measured in a repudiation case at the place of tender under the agreement at a commercially
24 reasonable time after the seller learned of the repudiation, but no later than the time of tender under
25 the agreement. This time is designed to approximate the market price at the time the seller would
26 have resold the goods, even though the seller has not done so under section 2-706. This subsection
27 is designed to put the seller in the position the seller would have been in if the buyer had performed
28 by approximating the harm the seller has suffered without allowing the seller an unreasonable time
29 to speculate on the market at the buyer's expense.

30 4. The seller must deduct from damages under subsection (a) any expenses saved as a result
31 of the breach.

32 5. Subsection (b) is used in the cases of uncompleted goods, jobbers or middlemen, or lost-
33 volume sellers. This remedy is an alternative to the remedy under subsection (a) or section 2-706 and
34 is available when the damages based upon resale of the goods or market price of the goods does not
35 achieve the goal of full compensation for harm caused by the buyer's breach. No effort has been

made to state how lost profits should be calculated because of the variety of situations in which this measurement may be appropriate and the variety of ways in which courts have measured lost profits. This subsection permits the recovery of lost profits in all appropriate cases. This would generally include all standard priced goods. The normal measure of lost profits for standard priced goods would be the list price less the cost to the dealer or the list price less the manufacturing cost to the manufacturer. It is not necessary to a recovery of "profit" to show a history of earnings, especially if a new venture is involved.

This subsection, which permits recovery of expected profit including reasonable overhead when the measure of damages is inadequate under subsection (a) or section 2-706, together with the requirement that an action for the price under Section 2-709 may be sustained only where resale is impractical, is designed to eliminate the unfair and economically wasteful result when fixed price articles are involved.

When a seller ceases manufacture and resells component parts for scrap or salvage value under Section 2-704(b), a credit for the proceeds is due the buyer to offset the damages under this section.

6. In addition to the damages recoverable under this section, when appropriate and subject to Sections 2-718 and Section 2-719, the seller may also recover incidental and consequential damages under Section 2-710.

SECTION 2-709. ACTION FOR THE PRICE.

(a) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental or consequential damages provided under Section 2-710, the price of:

(1) goods accepted;

(2) conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(3) goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(b) A seller that sues for the price must hold for the buyer any goods that have been identified to the contract and are still in the seller's control except that if resale becomes possible the

1 seller may resell them at any time prior to the collection of the judgment. The net proceeds of any
2 such resale must be credited to the buyer and payment of the judgment entitles the buyer to any goods
3 not resold.

4 (c) After the buyer has wrongfully rejected or revoked acceptance of the goods or has
5 failed to make a payment due or has repudiated, a seller that is held not entitled to the price under this
6 section shall nevertheless be awarded damages for nonacceptance under Section 2-708.

7 *[Reporter's Note – Consistent with the revision of Section 2-710, this section now provides for*
8 *consequential as well as incidental damages.]*

9 **SECTION 2-710. SELLER'S INCIDENTAL AND CONSEQUENTIAL DAMAGES.**

10 (a) Incidental damages to an aggrieved seller include any commercially reasonable
11 charges, expenses or commissions incurred in stopping delivery, in the transportation, care and
12 custody of goods after the buyer's breach, in connection with return or resale of the goods or
13 otherwise resulting from the breach.

14 (b) Consequential damages resulting from the buyer's breach include any loss
15 resulting from general or particular requirements and needs of which the buyer at the time of
16 contracting had reason to know and which could not reasonably be prevented by resale or otherwise.

17 (c) In a consumer contract, a seller may not recover consequential damages from a
18 consumer.

19 *[Reporter's Note – This section now provides for a seller's consequential as well as incidental*
20 *damages except in consumer contracts. A comment will make it clear (with examples) that cases in*
21 *which sellers will recover consequential damages are rare.]*

22 **SECTION 2-711. BUYER'S REMEDIES IN GENERAL; BUYER'S SECURITY**
23 **INTEREST.**

1 (a) A breach of contract by the seller includes the seller's wrongful failure to deliver
2 or to perform a contractual obligation, making of a nonconforming tender of delivery or performance,
3 or repudiation.

4 (b) If the seller is in breach of contract under subsection (a) the buyer may to the
5 extent provided for by [the Uniform Commercial Code] or other law:

6 (1) in the case of rightful cancellation, rightful rejection or justifiable
7 revocation of acceptance recover so much of the price as has been paid;

8 (2) deduct damages from any part of the price still due under Section 2-717;

9 (3) cancel;

10 (4) cover and have damages under Section 2-712 as to all goods affected
11 whether or not they have been identified to the contract;

12 (5) recover damages for nondelivery or repudiation under Section 2-713;

13 (6) recover damages for breach with regard to accepted goods or breach with
14 regard to a remedial promise under Section 2-714;

15 (7) recover identified goods under Section 2-502;

16 (8) obtain specific performance or obtain the goods by replevin or the like
17 under Section 2-716;

18 (9) recover liquidated damages under Section 2-718;

19 (10) in other cases, recover damages in any manner that is reasonable under
20 the circumstances.

21 (c) On rightful rejection or justifiable revocation of acceptance a buyer has a security
22 interest in goods in the buyer's possession or control for any payments made on their price and any

1 expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may
2 hold such goods and resell them in like manner as an aggrieved seller under Section 2–706.

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 **SECTION 2–712. COVER; BUYER'S PROCUREMENT OF SUBSTITUTE GOODS.**

6 (a) If the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects
7 or justifiably revokes acceptance, the buyer may cover by making in good faith and without
8 unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those
9 due from the seller.

10 (b) The buyer may recover from the seller as damages the difference between the cost
11 of cover and the contract price together with any incidental or consequential damages provided under
12 Section 2–715 but less expenses saved in consequence of the seller's breach.

13 (c) Failure of the buyer to effect cover within this section does not bar the buyer from
14 any other remedy.

15 **Preliminary Comment**

16 **Changes:** Original Section 2-712(1) refers to a seller’s “breach” as the basis for the remedy
17 in this section. The language has been changed to make it clear that there is a right to cover “[i]f the
18 seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or justifiably revokes
19 acceptance.”

20 **Comments.**

21 1. The purpose of this section is to provide the buyer with a remedy to enable the buyer to
22 obtain the goods the buyer is entitled to under the contract with the seller. This remedy is the buyer's
23 equivalent of the seller's right to resell.

24 The buyer is entitled to this remedy if the seller wrongfully fails to deliver the goods or
25 repudiates the contract or if the buyer rightfully rejects or justifiably revokes acceptance. Cover is
26 not available under this section if the buyer accepts the goods and does not rightfully revoke the

1 acceptance.

2 2. Subsection (b) allows a buyer that has appropriately covered to measure damages by the
3 difference between the cover price and the contract price. In addition, the buyer is entitled to
4 incidental damages, and when appropriate, consequential damages under Section 2-715.

5 3. The definition of “cover” is necessarily flexible, and therefore cover includes a series of
6 contracts or sales as well as a single contract or sale, goods not identical with those involved but
7 commercially usable as reasonable substitutes under the circumstances, and contracts on credit or
8 delivery terms differing from the contract in breach but reasonable under the circumstances. The test
9 of proper cover is whether at the time and place of cover the buyer acted in good faith and in a
10 reasonable manner. It is immaterial that hindsight may later prove that the method of cover used was
11 not the cheapest or most effective.

12 4. The requirement in subsection (a) that the buyer must cover “without unreasonable delay”
13 is not intended to limit the time necessary for the buyer to examine reasonable options and decide
14 how best to effect cover.

15 5. Subsection (c) expresses the policy that cover is not a mandatory remedy for the buyer.
16 The buyer is always free to choose between cover and damages for nondelivery under Section 2-713.
17 However, this subsection must be read in conjunction with the section 2-715(b)(1), which limits the
18 recovery of consequential damages to those damages that could not reasonably be prevented by
19 cover. Moreover, the operation of Section 2-716(c) on replevin and the like must be considered
20 because the inability to cover is made an express condition to the right of the buyer to replevy the
21 goods.

22 **SECTION 2-713. BUYER'S DAMAGES FOR NONDELIVERY OR REPUDIATION.**

23 (a) Subject to Section 2-723, if the seller wrongfully fails to deliver or repudiates or
24 the buyer rightfully rejects or justifiably revokes acceptance the following rules apply:

25 (1) The measure of damages in the case of wrongful failure to deliver by the
26 seller or rightful rejection or justifiable revocation of acceptance by the buyer is the difference
27 between the market price at the time for tender under the agreement and the contract price together
28 with any incidental and consequential damages provided under Section 2-715, but less expenses
29 saved in consequence of the seller's breach.

30 (2) The measure of damages for repudiation by the seller is the difference

1 between the market price at the expiration of a commercially reasonable time after the buyer learned
2 of the repudiation, but no later than the time stated in paragraph (1), and the contract price together
3 with any incidental or consequential damages provided under Section 2-710, but less expenses saved
4 in consequence of the seller's breach.

5 (b) Market price is to be determined as of the place for tender or, in cases of rejection
6 after arrival or revocation of acceptance, as of the place of arrival.

7 **Preliminary Comment**

8 **Changes:** This section now provides a rule for anticipatory repudiation cases. This is
9 consistent with the new rule for sellers in Section 2-708(a)(2). In a case not involving repudiation,
10 the buyer's damages will be based on the market price at the time for tender under the agreement.
11 This changes the former rule where the time for measuring damages was at the time the buyer learned
12 of the breach.

13 **Comments.**

14 1. This section provides for a buyer's expectancy damages when the seller wrongfully fails
15 to deliver the goods or repudiates the contract or the buyer rightfully rejects or justifiably revokes
16 acceptance. This section provides an alternative measure of damages to the cover remedy provided
17 for in Section 2-712.

18 2. Under subsection (a)(1), the measure of damages for a wrongful failure to deliver the
19 goods by the seller or a rightful rejection or justifiable revocation of acceptance by the buyer is the
20 difference between the market price at the time for tender under the agreement and the contract price.

21 3. Subsection (a)(2) addresses the question of when the market price should be measured in
22 the case of an anticipatory repudiation by the seller. The market price should be measured in a
23 repudiation case at the place where the buyer would have covered at a commercially reasonable time
24 after the buyer learned of the repudiation, but no later than the time of tender under the agreement.
25 This time is designed to approximate the market price at the time the buyer would have covered even
26 though the buyer has not done so under Section 2-712. This subsection is designed to put the buyer
27 in the position the buyer would have been in if the seller had performed by approximating the harm
28 the buyer has suffered without allowing the buyer an unreasonable time to speculate on the market
29 at the seller's expense.

30 4. The market or current price to be used in comparison with the contract price under this
31 section is the price for goods of the same kind and in the same branch of trade.

1 When the current market price under this section is difficult to prove, Section 2-723 on
2 determination and proof of market price is available to permit a showing of a comparable market
3 price. When no market price is available, evidence of spot sale prices may be used to determine
4 damages under this section. When the unavailability of a market price is caused by a scarcity of
5 goods of the type involved, a good case is normally made for specific performance under Section 2-
6 716. Moreover, the condition of scarcity may indicate that the price has risen. This may warrant
7 under Section 1-106, which provides for the liberal administration of remedies, opinion evidence
8 about the value of the goods in the absence of a market price.

9 The price term in a long-term contract may or may not have an escalation clause. The time
10 for determining the contract price in a long-term contract should not necessarily be tied to the time
11 for measuring the market price in the repudiation situation. The appropriate contract price should
12 be determined in light of the general principle of full compensation for the aggrieved party.

13 5. The buyer must deduct from damages under this section any expenses saved as a result of
14 the breach.

15 6. In addition to the damages provided in this section, the buyer is entitled to incidental and
16 consequential damages under section 2-715.

17 **SECTION 2-714. BUYER'S DAMAGES FOR BREACH IN REGARD TO**
18 **ACCEPTED GOODS.**

19 (a) Where the buyer has accepted goods and given notification under Section 2-607(c)
20 the buyer may recover as damages for any nonconformity of tender the loss resulting in the ordinary
21 course of events from the seller's breach as determined in any manner which is reasonable.

22 (b) The measure of damages for breach of a warranty is the difference at the time and
23 place of acceptance between the value of the goods accepted and the value they would have had if
24 they had been as warranted, unless special circumstances show proximate damages of a different
25 amount.

26 (c) In a proper case any incidental and consequential damages provided under Section
27 2-715 may also be recovered.

28 *[Reporter's Note – This section reflects current law.]*

1 **SECTION 2–715. BUYER’S INCIDENTAL AND CONSEQUENTIAL /DAMAGES.**

2 (a) Incidental damages resulting from the seller’s breach include expenses reasonably
3 incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any
4 commercially reasonable charges, expenses or commissions in connection with effecting cover and
5 any other reasonable expense incident to the delay or other breach.

6 (b) Consequential damages resulting from the seller’s breach include:

7 (1) any loss resulting from general or particular requirements and needs of
8 which the seller at the time of contracting had reason to know and which could not reasonably be
9 prevented by cover or otherwise; and

10 (2) injury to person or property proximately resulting from any breach of
11 warranty.

12 *[Reporter’s Note – This section reflects current law.]*

13 **SECTION 2–716. RIGHT TO SPECIFIC PERFORMANCE OR REPLEVIN OR THE**
14 **LIKE.**

15 (a) Specific performance may be decreed where the goods are unique or in other
16 proper circumstances. In a contract other than a consumer contract, specific performance may be
17 decreed if the parties have agreed to that remedy. However, even if the parties agree to specific
18 performance, specific performance may not be decreed if the breaching party’s sole remaining
19 contractual obligation is the payment of money.

20 (b) The decree for specific performance may include such terms and conditions as to
21 payment of the price, damages, or other relief as the court may deem just.

22 (c) The buyer has a right of replevin or the like for goods identified to the contract if

1 after reasonable effort the buyer is unable to effect cover for such goods or the circumstances
2 reasonably indicate that such effort will be unavailing or if the goods have been shipped under
3 reservation and satisfaction of the security interest in them has been made or tendered.

4 (d) The buyer's right under subsection (c) vests upon acquisition of a special
5 property, even if the seller had not then repudiated or failed to deliver.

6 **Preliminary Comment**

7 **Changes:** This section contains the following changes from original Section 2-716:

8 1) The original heading to this section refers to a "buyer's" right to specific
9 performance. The word "buyer" has been omitted in recognition of the fact that either the
10 seller or the buyer may seek the remedy of specific performance. The right of replevin is by
11 its very nature limited to buyers.

12 2) Subsection (a) encourages courts to decree specific performance in contracts other
13 than consumer contracts but provides protection for a party whose sole remaining obligation
14 is to pay money.

15 3) In subsection (c), the phrase "or the like" has been added after "replevin" to reflect
16 the fact that under the governing state law the right may be called "detinue," "sequestration,"
17 "claim and delivery," or something else.

18 4) Subsection (d) is new and corresponds with Section 2-502(b), which in turn is
19 derived from (but broader than) the conforming amendments to Article 9. It provides a
20 vesting rule for cases in which there is a right of replevin.

21 **Comments.**

22 1. Subsection (a) continues the policy of seeking to further a liberal attitude in connection
23 with the remedy of specific performance. It is available when the goods or the performance are
24 unique as well as in other appropriate circumstances. Uniqueness should be determined in light of
25 the total circumstances surrounding the contract and is not limited to goods identified when the
26 contract is formed. The typical specific performance situation today involves an output or
27 requirements contract rather than a contract for the sale of an heirloom or priceless work of art. A
28 buyer's inability to cover is strong evidence of a circumstance in which a decree of specific
29 performance is appropriate.

30 2. Subsection (a) provides that a court may decree specific performance if the parties have

1 agreed to such a remedy. ~~Such an agreement is symbolized by the “take or pay” contracts in the oil~~
2 ~~and gas industry, where the buyer has agreed to accept and pay for goods under the contract and to~~
3 ~~specific performance of that obligation.~~ Under subsection (a), the parties’ agreement to specific
4 performance can be enforced even if legal remedies are entirely adequate. Enforcing an agreement
5 to specific performance is limited to commercial cases in order to avoid having a consumer buyer be
6 forced to take and pay for goods that the consumer may not want. Even in a commercial contract,
7 the third sentence of subsection (a) prevents the aggrieved party from obtaining specific performance
8 if the only obligation of the party in breach is the payment of money. Thus if a commercial buyer is
9 obligated to pay the price, that obligation should be enforced through an action for the price under
10 Section 2-709 rather than through an action for specific performance under this section.

11 Nothing in this section constrains the court’s exercise of its equitable discretion in deciding
12 whether to enter a decree for specific performance or in determining the conditions or terms of such
13 a decree. This section assumes that the decree for specific performance will be conditioned on a
14 tender of full performance by the party that is seeking the remedy. ~~Thus, a seller seeking to enforce~~
15 ~~a “take or pay” term should be required to tender goods that conform to the contract.~~

16 3. The legal remedy of replevin or the like is also available for cases in which cover is
17 reasonably unavailable and the goods have been identified to the contract. This is in addition to the
18 prepaying buyer’s right to recover identified goods upon the seller’s insolvency or, when the goods
19 have been bought for a personal, family, or household purpose, upon the seller’s repudiation or failure
20 to deliver (Section 2-502). If a negotiable document of title is outstanding, the buyer’s right of
21 replevin relates to the document and does not directly relate to the goods. See Article 7, especially
22 Section 7-602.

23 4. Subsection (d) provides that a buyer’s right to replevin or the like vests upon the buyer’s
24 acquisition of a special property in the goods (Section 2-501) even if the seller has not at that time
25 repudiated or failed to make a required delivery. This vesting rule assumes application of a “first in
26 time” priority rule. In other words, if the buyer’s rights vest under this rule before a creditor acquires
27 an *in rem* right to the goods, including an Article 9 security interest and a lien created by levy, the
28 buyer should prevail.

29 **SECTION 2-717. DEDUCTION OF DAMAGES FROM THE PRICE.** The buyer on
30 notifying the seller of an intention to do so may deduct all or any part of the damages resulting from
31 any breach of the contract from any part of the price still due under the same contract.

32 *[Reporter’s Note – This section reflects current law.]*

33 **SECTION 2-718. LIQUIDATION OR LIMITATION OF DAMAGES; DEPOSITS.**

34 (a) Damages for breach by either party may be liquidated in the agreement but only

1 at an amount that is reasonable in the light of the anticipated or actual harm caused by the breach and,
2 in a consumer contract, in addition the difficulties of proof of loss and the inconvenience or
3 nonfeasibility of otherwise obtaining an adequate remedy. Section 2-719 determines the
4 enforceability of a term that limits but does not liquidate damages.

5 (b) Where the seller justifiably withholds delivery of goods or stops performance
6 because of the buyer's breach or insolvency, the buyer is entitled to restitution of any amount by
7 which the sum of the buyer's payments exceeds the amount to which the seller is entitled by virtue
8 of terms liquidating the seller's damages in accordance with subsection (a).

9 (c) The buyer's right to restitution under subsection (b) is subject to offset to the
10 extent that the seller establishes:

11 (1) a right to recover damages under the provisions of this article other than
12 subsection (a); and

13 (2) the amount or value of any benefits received by the buyer directly or
14 indirectly by reason of the contract.

15 (d) Where a seller has received payment in goods their reasonable value or the
16 proceeds of their resale shall be treated as payments for the purposes of subsection (b); but if the
17 seller has notice of the buyer's breach before reselling goods received in part performance, the resale
18 is subject to Section 2-706.

19 Preliminary Comment

20 **Changes:** This section contains the following changes from original Section 2-718:

21 1) In subsection (a), the requirements that the party seeking to enforce a term
22 liquidating damages demonstrate "difficulties of proof of loss" and "inconvenience or
23 nonfeasibility of otherwise obtaining an adequate remedy" have been eliminated in commercial

1 contracts.

2 2) In subsection (a), the sentence “[a] term fixing unreasonably large liquidated
3 damages is void as a penalty” has been eliminated as unnecessary and capable of causing
4 confusion.

5 3) The last sentence of subsection (a) has been added to clarify the relationship
6 between this section and Section 2-719.

7 4) In subsection (b), the circumstances in which restitution is available have been
8 expanded to cover any situation where the seller stops performance on account of the buyer’s
9 breach or insolvency.

10 5) In subsection (b), the buyer’s right to restitution is not limited by a statutory
11 liquidated damages provision.

12 **Comments.**

13 1. A valid liquidated damages term may liquidate the amount of all damages, including
14 consequential and incidental damages. As under former law, liquidated damages clauses should be
15 enforced if the amount is reasonable in light of the factors provided in subsection (a). This section
16 thus respects the parties’ ability to contract for damages while providing some control by requiring
17 reasonableness based upon the circumstances of the particular case.

18 Under original Section 2-718, a party seeking to enforce a liquidated damages term had to
19 demonstrate the difficulty of proving the loss and the inconvenience or nonfeasibility of obtaining an
20 adequate remedy. These tests have been eliminated in commercial contracts but retained in consumer
21 contracts.

22 2. The sentence from original Section 2-718(1) stating that an unreasonably large liquidated
23 damages term is void as a penalty has been eliminated as unnecessary and misleading. If the
24 liquidated damages are reasonable in light of the test of subsection (a), the term should be enforced,
25 rendering the penalty language of the former law redundant. The sentence is also misleading because
26 of its emphasis on unreasonably large damages. A liquidated damages term providing for damages
27 that are unreasonably small under the test of subsection (a) is likewise unenforceable.

28 3. If a liquidated damages term is unenforceable, the remedies of this Article become available
29 to the aggrieved party.

30 4. Under subsection (b), only the buyer’s payments that are more than the amount of an
31 enforceable liquidated damages term need be returned to the buyer. If the buyer has made payment
32 by virtue of a trade-in or other goods deposited with the seller, subsection (d) provides that the
33 reasonable value of such goods or their resale price should be used to determine what the buyer has

1 paid, not the value the seller allowed the buyer in the trade-in. To assure that the seller obtains a
2 reasonable price for such goods, the seller must comply with the resale provisions of Section 2-706
3 if the seller knows of the buyer's breach before it has otherwise resold them.

4 Subsection (b) expands the situations in which restitution is available. Original Section 2-
5 718(2) was limited to circumstances in which the seller justifiably withheld delivery because of the
6 buyer's breach. Subsection (b) extends the right to situations where the seller stops performance
7 because of the buyer's breach or insolvency.

8 5. Subsection (c) continues the rule from former law without change. If there is no
9 enforceable liquidated damages term, the buyer is entitled to restitution under subsection (b) subject
10 to a set off of the seller for any damages to which it is otherwise entitled to under this Article.

11 **SECTION 2-719. CONTRACTUAL MODIFICATION OR LIMITATION OF**
12 **REMEDY.**

13 (a) Subject to subsections (b), (c) and (d) and Section 2-718:

14 (1) the agreement may provide for remedies in addition to or in substitution
15 for those provided in this article and may limit or alter the measure of damages recoverable under this
16 article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to
17 repair and replacement of nonconforming goods or parts; and

18 (2) resort to a remedy as provided is optional unless the remedy is expressly
19 agreed to be exclusive, in which case it is the sole remedy.

20 (b) Where circumstances cause an exclusive or limited remedy to fail of its essential
21 purpose, remedy may be had as provided in [the Uniform Commercial Code].

22 (c) Consequential damages may be limited or excluded unless the limitation or
23 exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case
24 of consumer goods is prima facie unconscionable but limitation of damages where the loss is
25 commercial is not.

1 *[Reporter's Note – This section reflects current law.]*

2 **SECTION 2–720. EFFECT OF “CANCELLATION” OR “RESCISSION” ON**
3 **CLAIMS FOR ANTECEDENT BREACH.** Unless the contrary intention clearly appears,
4 expressions of “cancellation” or “rescission” of the contract or the like shall not be construed as a
5 renunciation or discharge of any claim in damages for an antecedent breach.

6 *[Reporter's Note – This section reflects current law.]*

7 **SECTION 2–721. REMEDIES FOR FRAUD.** Remedies for material misrepresentation
8 or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission
9 or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be
10 deemed inconsistent with a claim for damages or other remedy.

11 *[Reporter's Note – This section reflects current law.]*

12 **SECTION 2–722. WHO CAN SUE THIRD PARTIES FOR INJURY TO GOODS.**
13 Where a third party so deals with goods which have been identified to a contract for sale as to cause
14 actionable injury to a party to that contract:

15 (1) a right of action against the third party is in either party to the contract for sale that
16 has title to or a security interest or a special property or an insurable interest in the goods; and if the
17 goods have been destroyed or converted a right of action is also in the party that either bore the risk
18 of loss under the contract for sale or has since the injury assumed that risk as against the other;

19 (2) if at the time of the injury the party plaintiff did not bear the risk of loss as against
20 the other party to the contract for sale and there is no arrangement between them for disposition of
21 the recovery, the party plaintiff's suit or settlement is, subject to its own interest, as a fiduciary for
22 the other party to the contract; and

(3) either party may with the consent of the other sue for the benefit of a person that it may concern.

[Reporter's Note – This section reflects current law.]

SECTION 2–723. PROOF OF MARKET PRICE: TIME AND PLACE.

(a) If evidence of a price prevailing at a time or place described in this article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place that in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(b) Evidence of a relevant price prevailing at a time or place other than the one described in this article offered by one party is not admissible unless and until that party has given the other party such notice as the court finds sufficient to prevent unfair surprise.

[Reporter's Note – Current subsection (1), which deals with the measurement of market price when there has been an anticipatory repudiation, has been deleted as unnecessary in light of Sections 2-708(a) and 2-713(a).]

SECTION 2–724. ADMISSIBILITY OF MARKET QUOTATIONS. Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers, periodicals or other means of communication in general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

[Reporter's Note – The only change from current law is the addition of the language “or other means of communication in . . .” This addition reflects the common use of nonpaper media.]

1 **SECTION 2-725. STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE.**

2 (a) Except as otherwise provided in this section, an action for breach of any contract
3 for sale must be commenced within the later of four years after the right of action has accrued under
4 subsection (b) or (c) or one year after the breach was or should have been discovered, but no longer
5 than five years after the right of action accrued. By the original agreement the parties may reduce
6 the period of limitation to not less than one year but may not extend it; however, in a consumer
7 contract, the period of limitation may not be reduced.

8 (b) Except as otherwise provided in subsection (c), the following rules apply:

9 (1) Except as otherwise provided in this subsection, a right of action for
10 breach of a contract accrues when the breach occurs, even if the aggrieved party did not have
11 knowledge of the breach.

12 (2) For breach of a contract by repudiation, a right of action accrues at the
13 earlier of when the aggrieved party elects to treat the repudiation as a breach or when a commercially
14 reasonable time for awaiting performance has expired.

15 (3) For breach of a remedial promise, a right of action accrues when the
16 remedial promise is not performed when due. However

17 (A) if the remedial promise is not made in connection with a warranty
18 arising under Section 2-313, 2-314 or 2-315 or ~~another obligation~~ an obligation other than the
19 remedial promise arising under Section 2-313A or 2-313B, an action may not be commenced after
20 the later of i) two years after the right of action accrues, or ii) four years after tender of delivery to
21 the immediate buyer, defined in Section 2-313, or receipt of the goods by the remote purchaser,
22 defined in Sections 2-313A and 2-313B; and

1 (B) if the remedial promise is made in connection with a warranty
2 arising under Section 2-313, 2-314 or 2-315 or ~~another obligation~~ an obligation other than the
3 remedial promise arising under Section 2-313A or 2-313B, an action may not be commenced after
4 the later of i) two years after the right of action accrues, or ii) the period of limitations for the
5 warranty or the other obligation expires.

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 right 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 other than a remedial promise arising under Section 2-313A or 2-313B, is
11 claimed the following rules apply:

12 (1) Except as otherwise provided in paragraph (3), a right of action for breach
13 of a warranty arising under Section 2-313, 2-314 or 2-315 accrues when the seller has tendered
14 delivery to the immediate buyer, as defined in Section 2-313, and has completed performance of any
15 agreed installation or assembly of the goods.

16 (2) Except as otherwise provided in paragraph (3), a right of action for breach
17 of an obligation other than a remedial promise arising under Section 2-313A or 2-313B accrues when
18 the remote purchaser, as defined in sections 2-313A and 2-313B, receives the goods.

19 (3) Where a warranty arising under Section 2-313, 2-314 or 2-315 or an
20 obligation other than a remedial promise arising under Section 2-313, 2-313A or 2-313B explicitly
21 extends to future performance of the goods and discovery of the breach must await the time for

1 performance the right of action accrues when the immediate buyer as defined in Section 2-313 or the
2 remote purchaser as defined in Sections 2-313A and 2-313B discovers or should have discovered the
3 breach.

4 (4) A right of action for breach of warranty arising under Section 2-312
5 accrues when the aggrieved party discovers or should have discovered the breach. However, an
6 action for breach of the warranty of noninfringement may not be commenced more than six years after
7 tender of delivery of the goods to the aggrieved party.

8 (d) Where an action commenced within the time limited by subsection (b) or (c) is so
9 terminated as to leave available a remedy by another action for the same breach such other action may
10 be commenced after the expiration of the time limited and within six months after the termination of
11 the first action unless the termination resulted from voluntary discontinuance or from dismissal for
12 failure or neglect to prosecute.

13 (e) This section does not alter the law on tolling of the statute of limitations nor does
14 it apply to rights of action which have accrued before this article becomes effective.

15 Preliminary Comment

16 **Changes:** Original Section 2-725 has been changed as follows: 1) The basic four-year
17 limitation period in subsection (a) has been supplemented by a discovery rule that permits a cause of
18 action to be brought within one year after the breach was or should have been discovered, although
19 no later than five years after the time the cause would otherwise have accrued; 2) The applicable
20 limitation period cannot be reduced in a consumer contract (subsection (a)); 3) Subsection (b)
21 contains specific rules for cases of repudiation, breach of a remedial promise, and actions where
22 another person is answerable over; 4) Subsection (c)(1) provides that the limitation period for breach
23 of warranty accrues when tender of delivery has occurred and the seller has completed any agreed
24 installation or assembly of the goods; 5) Subsection (c) contains specific rules for breach of an
25 obligation arising under Section 2-313A or 2-313B, for breach of a warranty arising under Section
26 2-312, and for breach of a warranty against infringement.

27 Comments:

1 1. Subsection (a) continues the four-year limitation period of original Article 2 but provides
2 for a possible one-year extension to accommodate a discovery of the breach late in the four year
3 period after accrual. The four year period under this Article is shorter than many other statutes of
4 limitation for breach of contract and provides a period which is appropriate given the nature of the
5 contracts under this Article and modern business practices. As under original Article 2, the period
6 of limitation can be reduced to one year by an agreement in a commercial contract, but no reduction
7 is permitted in consumer contracts.

8 2. Subsections (b) and (c) provide rules for accrual of the various types of action that this
9 Article allows. Certainty of commercial relationships is advanced when such rules are clearly set
10 forth. Subsection (b) deals with accrual rules for actions other than for breach of a warranty,
11 including actions based on repudiation or breach of a remedial promise and actions where another
12 person is answerable over. Subsection (c) deals with the accrual rules for the various claims based
13 on a warranty, including a warranty of title and a warranty against infringement, or on an obligation
14 other than a remedial promise arising under Section 2-313A or 2-313B.

15 Subsection (b)(1) states the general rule from prior law that a right of action for breach of
16 contract accrues when the breach occurs without regard to the aggrieved party's knowledge of the
17 breach. This general rule is then subject to the three more explicit rules in subsection (b) and to the
18 rules for breach of warranty stated in subsection (c).

19 Subsection (b)(2) provides an explicit rule about repudiation cases. In a repudiation, the
20 aggrieved party may await performance for a commercially reasonable time or resort to any remedy
21 for breach. Section 2-610. The accrual rule for breach of contract in a repudiation case is keyed to
22 the earlier of those two time periods.

23 Subsection (b)(3) addresses the accrual of a cause of action for breach of a remedial promise.
24 A remedial promise may be made in the absence of a warranty running to an immediate buyer arising
25 under Section 2-313, 2-314 or 2-315 or ~~another obligation~~ an obligation (other than the remedial
26 promise itself) arising under Section 2-313A or 2-313B, as where a seller promises that it will repair
27 or replace any part that proves to be defective but does not warrant that the parts will not fail, ~~or it~~.
28 Conversely, a remedial promise may be made in conjunction with such a warranty or other obligation.

29 When there is no warranty or other obligation, a cause of action for breach of a remedial
30 promise accrues when the promise is not performed when due, and an action may not be brought after
31 the later of two years after the accrual date for the promise or four years after tender of delivery.
32 Thus, if the seller breaches the remedial promise in the first year after tender of delivery the buyer has
33 until the end of the fourth year after tender to commence an action; however, if the breach occurs
34 during the fourth year after tender the buyer may commence an action for two years after the breach.
35 Likewise, if the seller's remedial promise expressly extends for five years and is breached during the
36 fifth year, the buyer has until two years after the breach to commence an action.

37 When the remedial promise is made in connection with a warranty or other obligation, the

1 limitation period is the later of two years after the accrual date for breach of the promise or the time
2 when a cause of action for breach of the warranty or other obligation would otherwise expire. Thus,
3 if the seller undertakes an obligation to a remote purchaser under Section 2-313A that no parts will
4 be defective at the time the goods leave the seller's control and in connection with that obligation
5 promises to repair or replace any part that fails during a three-year period commencing with the
6 remote purchaser's receipt of the goods, the remote purchaser's cause of action for breach of the
7 remedial promise expires at the later of two years after the promise is not performed when due or four
8 years after the remote purchaser receives the goods (subsection (c)(2)).

9 Subsection (b)(4) addresses the problem that has arisen in the cases when an intermediary
10 party is sued for a breach of obligation for which its seller or another person is answerable over, but
11 the limitations period in the upstream lawsuit has already expired. This subsection allows a party four
12 years, or if reduced in the agreement, not less than one year, from when the claim is originally
13 asserted against the buyer for the buyer to sue the person that is answerable over. Whether a party
14 is in fact answerable over to the buyer is not addressed in this section.

15 3. Subsection (c) addresses the accrual rules for breach of a warranty arising under Section
16 2-312, 2-313, 2-314 or 2-315, or of an obligation relating to the goods arising under Section 2-313A
17 or 2-313B. The accrual rules explicitly incorporate the definitions of "immediate buyer" and "remote
18 purchaser" in Sections 2-313, 2-313A and 2-313B. Any cause of action brought by another person
19 to which the warranty or obligation extends is derivative in nature. Thus, the time period applicable
20 to the immediate buyer or remote purchaser governs even if the action is brought by a person to
21 which the warranty or obligation extends under Section 2-318.

22 Subsection (c)(1) continues the general rule that an action for breach of warranty accrues in
23 the case of an express or implied warranty to an immediate buyer upon completion of tender of
24 delivery of nonconforming goods to the immediate buyer but makes explicit that accrual is deferred
25 until the completion of any installation or assembly that the seller has agreed to undertake. This
26 extension of the time of accrual in the case of installation or assembly applies only in the case of the
27 seller promising to install or assemble and not in the case of a third party, independent of the seller,
28 undertaking that action.

29 Subsection (c)(2) addresses the accrual of a cause of action for breach of an obligation other
30 than a remedial promise arising under Section 2-313A or 2-313B. In such cases case, the cause of
31 action accrues when the remote purchaser (as defined in those sections) receives the goods. This
32 accrual rule balances the rights of the remote buyer or remote lessee to be able to have a cause of
33 action based upon the warranty obligation the seller has created against the rights of the seller to have
34 some limit on the length of time the seller is liable.

35 Both of these accrual rules are subject to the exception in subsection (c)(3) for a warranty or
36 obligation that explicitly extends to the future performance of the goods and discovery of the breach
37 must await the time for performance. In such a case, the cause of action does not accrue until the
38 buyer or remote purchaser discovers or should have discovered the breach.

1 With regard to a warranty of title or a warranty of noninfringement under Section 2-312,
2 subsection (c)(4) provides that a cause of action accrues when the aggrieved party discovers or
3 should have discovered the breach. In a typical case, the aggrieved party will not discover the breach
4 until it is sued by a party asserting title to the goods or an infringement, an event which could be many
5 years after the buyer acquired the goods. The accrual rule allows the aggrieved party appropriate
6 leeway to then bring a claim against the person that made the warranty. In recognition of a need to
7 have a time of repose in an infringement case, a party may not bring an action based upon a warranty
8 of noninfringement more than six years after tender of delivery.

9 4. Subsection (d) states the saving provision included in many state statutes and permits an
10 additional short period for bringing new actions where suits begun within the four year period have
11 been terminated so as to leave a remedy still available for the same breach.

12 5. Subsection (e) makes it clear that this Article does not purport to alter or modify in any
13 respect the law on tolling of the Statute of Limitations as it now prevails in the various jurisdictions.

14 **PART 8**

15 **TRANSITION PROVISIONS**

16 **SECTION 2–801. EFFECTIVE DATE.** This [Act] shall become effective on _____,
17 20__.

18 **SECTION 2–802. REPEAL.** This [Act] [repeals] [amends] [insert citation to existing
19 Article 2].

20 **SECTION 2–803. APPLICABILITY.** This [Act] applies to a transaction within its scope
21 that is entered into on or after the effective date of this [Act]. This [Act] does not apply to a
22 transaction that is entered into before the effective date of this [Act] even if the transaction would be
23 subject to this [Act] if it had been entered into after the effective date of this [Act]. This [Act] does
24 not apply to a cause of action that has accrued before the effective date of this [Act].

25 **SECTION 2–804. SAVINGS CLAUSE.** A transaction entered into before the effective
26 date of this [Act] and the rights, obligations, and interests flowing from that transaction are governed

1 by any statute or other law amended or repealed by this [Act] as if amendment or repeal had not
2 occurred and may be terminated, completed, consummated, or enforced under that statute or other
3 law.

4 **SECTION 2–805. PRESUMPTION THAT RULE OF LAW CONTINUES**
5 **UNCHANGED.** Unless a change in law has clearly been made, the provisions of this [Act] shall be
6 deemed declaratory of the meaning of [insert citation to existing Article 2].