

**AMENDMENTS TO**  
**UNIFORM COMMERCIAL CODE ARTICLE 2 – SALES**

as promulgated by

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-ELEVENTH YEAR  
TUCSON, ARIZONA  
JULY 26 - AUGUST 2, 2002

*WITH PRELIMINARY PREFATORY NOTE and COMMENTS*  
(Amended Sections Only)

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# AMENDMENTS TO

## UNIFORM COMMERCIAL CODE ARTICLE 2 – SALES

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**AMENDMENTS TO**  
**UNIFORM COMMERCIAL CODE ARTICLE 2 – SALES**

**Preliminary Prefatory Note**

Proposed Amendments to Article 2 (Sales) and Article 2A (Leases) were considered and approved by the membership at the ALI's 2001 Annual Meeting. In order to become part of the Official Text of the UCC, however, the amendments needed final approval by the National Conference of Commissioners on Uniform State Laws and the ALI Council. The Conference, at its 2002 Annual Meeting, finally approved a set of amendments that differ from those approved by the ALI's membership in three respects.

1. **Definition of Goods.** The most significant difference between the amendments approved by NCCUSL and those approved by the ALI membership is in relation to coverage and involves the definition of goods (Sections 2-103(1)(k), 2A-103(1)(n)). The drafting committee struggled for years to articulate the extent to which transactions that include goods and information should be governed by Article 2. There were numerous attempts to draft an appropriate scope provision, most involving bright-line tests and detailed definitions. Each failed to achieve consensus support from the committee. Ultimately, the committee reached consensus by abandoning the attempt to draft a new scope section, leaving Article 2 to apply, “[u]nless the context otherwise requires, ... to transactions in goods.” Section 2-102 (which is not being amended). Instead, the committee adopted, and NCCUSL finally approved, a change in the definition of “goods.” The amended definition explicitly states that the term “goods” does not include “information,” which is not itself a defined term. The committee also approved a Preliminary Comment that makes it clear that Article 2 thus would not apply directly to a download of information not associated with goods, for example, or to the provision of architectural plans on a computer disk, but it would apply to the sale of “smart goods” such as an automobile even though the goods incorporate computer programs. The Comment makes it clear that it is up to the court to determine whether other transactions that include goods and information are covered in whole or in part by Article 2.

2. **Statute of Frauds.** The current text of UCC Section 2-201(1) provides in relevant part as follows:

A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in the writing.

The corresponding text approved by the ALI membership states:

A record is not insufficient because it omits or incorrectly states a term agreed upon *other than a quantity term*, and the contract is not enforceable under this subsection beyond the quantity of goods shown in the record [emphasis supplied].

The corresponding text finally approved by NCCUSL states:

A record is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in the record.

The NCCUSL text is essentially identical to current Article 2 while the ALI text differs from current Article 2 by addition of the italicized language. The difference results from a motion brought by Professor Curtis Reitz at NCCUSL's 2001 Annual Meeting. Official Comment 1 to Section 2-201 in this draft contains a discussion and citations intended to satisfy other concerns that have been expressed by Professor Reitz.

3. **Liquidated Damages.** The current text of UCC Section 2-718(1) states as follows:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

The corresponding text approved by the ALI membership states:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty. Section 2-719 determines the enforceability of a term that limits but does not liquidate damages.

The corresponding text finally approved by NCCUSL states:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, and, in a consumer contract, in addition the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. Section 2-719 determines the enforceability of a term that limits but does not liquidate damages.

Current Section 2-718(1) assesses the reasonability of liquidated damages provisions in light of three factors: (1) anticipated or actual harm; (2) difficulties of proof of loss; and (3) inconvenience or nonfeasibility of obtaining an adequate remedy. The draft submitted for the 2001 ALI Annual Meeting eliminated the second two requirements except in the case of a consumer contract. The intent of the drafting committee was to simplify the law and thereby

encourage the use of such provisions in commercial contracts. At that meeting, a pre-submitted motion made by Professor Jean Braucher to restore the three-part test of existing Section 2-718(1) prevailed by a one-vote margin (69-68). At the 2001 NCCUSL Annual Meeting, a motion was made and adopted (with little debate and by voice vote), which restored the simplified approach of the draft submitted for the 2001 ALI Annual Meeting.

**Format.** Finally, a brief word about the format of the drafts of Amended Articles 2 and 2A. The complete text of Amended Article 2 as finally approved by NCCUSL is being presented to the Council, with extensive Preliminary Comments. The Reporter and Chair will continue to work on the comments, seeking input from interested persons, with the goal of having proposed Official Comments available for consideration at the 2003 ALI Annual Meeting. The text of Article 2A is complete with the exception of sections in which the only changes were related to writing/record or gender-neutral changes. The Preliminary Comments to Article 2A indicate only the reason for the change. Again, the goal of the Reporter and Chair is to present proposed Official Comments to the 2003 ALI Annual Meeting.

**AMENDMENTS TO  
UNIFORM COMMERCIAL CODE ARTICLE 2 – SALES**

**PART 1**

**SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER**

**SECTION 2–103. DEFINITIONS AND INDEX OF DEFINITIONS.**

(1) In this article unless the context otherwise requires

(a) "Buyer" means a person ~~who~~ that buys or contracts to buy goods.

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

(i) for a person:

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

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

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

*Legislative Note: The definition of “conspicuous” may be moved to revised Article 1.*

### **Preliminary Official Comment**

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

Paragraphs (i) and (ii) set out several methods for making a term conspicuous. The requirement that a term be conspicuous functions both as notice (the term ought to be noticed) and as a basis for planning (giving guidance to the party that relies on the term about how that result can be achieved).

Paragraph (i), which relates to the general standard for conspicuousness, is based on original Section 1-201(10) but is intended to give more guidance than was given in the prior version of this definition. Paragraph (ii) is new and relates to the special standard for electronic records intended to evoke a response from an electronic agent. Although these paragraphs indicate some of the methods for calling attention to a term, the test is whether notice of the term can reasonably be expected. The statutory language should not be construed to permit a result that is inconsistent with that test.

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

### **Preliminary Official Comment**

The definition is significant in determining whether a contract qualifies as a consumer contract. A consumer is a natural person (*cf.* Section 1-201(30)) who enters into a transaction for a purpose typically associated with consumers – *i.e.*, a personal, family or household purpose.

The requirement that the buyer intend that the goods be used “primarily” for personal, family or household purposes is generally consistent with the definition of consumer goods in revised Article 9. *See* Section 9-102(a)(23).

(d) “Consumer contract” means a contract between a merchant seller and a consumer.

#### **Preliminary Official Comment**

This term is limited to a contract for sale between a seller that is a “merchant” and a buyer that is a “consumer”. Thus, neither a sale by a consumer to a consumer nor a sale by a merchant to an individual who intends that the goods be used primarily in a home business qualify as a consumer contract.

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

#### **Preliminary Official Comment**

The definition of “delivery” as it applies to goods may be moved to revised Article 1, which already contains a definition of the term as it applies to an instrument, document of title or chattel paper.

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

*Legislative Note: The definition of “electronic” may be moved to revised Article 1.*

#### **Preliminary Official Comment**

The electronic contracting provisions, including the definitions of “electronic,” “electronic agent,” “record,” “electronic record,” “information processing system,” and certain the electronic aspects of “receive” are based on the provisions of the Uniform Electronic Transactions Act and are consistent with the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 *et seq.*).

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

*Legislative Note: The definition of “electronic agent” may be moved to revised Article 1.*

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

*Legislative Note: The definition of “electronic record” may be moved to revised Article 1.*

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

### **Preliminary Official Comment**

This definition, which is new, is used in the definition of goods in Section 2-103(1)(l), which now excludes “the subject matter of foreign exchange transactions.”

(b) (j) "~~Good faith~~" ~~in the case of a merchant~~ means honesty in fact and the observance of reasonable commercial standards of fair dealing ~~in the trade~~.

*Legislative Note: This definition should not be adopted if the jurisdiction has enacted revised Article 1.*

(k) "Goods" means all things that are movable at the time of identification to a contract for sale. The term includes future goods, specially manufactured goods, the unborn young of animals, growing crops, and other identified things attached to realty as described in Section 2-107. The term does not include information, the money in which the price is to be paid, investment securities under Article 8, the subject matter of foreign exchange transactions, and choses in action.

### **Preliminary Official Comment**

The definition of "goods" in this article has been amended to exclude information not associated with goods. Thus, this article does not directly apply to an electronic transfer of information, such as the transaction involved in *Specht v. Netscape*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001). However, transactions often include both goods and information: some are transactions in goods as that term is used in Section 2-102, and some are not. For example, the sale of "smart goods" such as an automobile is a transaction in goods fully within this article even though the automobile contains many computer programs. On the other hand, an architect's provision of architectural plans on a computer disk would not be a transaction in goods. When a transaction includes both the sale of goods and the transfer of rights in information, it is up to the courts to determine whether the transaction is entirely within or outside of this article, or whether or to what extent this article should be applied to a portion of the transaction. While this article may apply to a transaction including information, nothing in this Article alters, creates, or diminishes intellectual property rights.

The definition has also been amended to exclude the subject matter of "foreign exchange transactions." See Section 103(1)(j). Although a contract in which currency in the commodity exchanged is a sale of goods, an exchange in which delivery is "through funds transfer, book entry accounting, or other form of payment order, or other agreed means to transfer a credit balance is not a sale of goods and is not governed by this article. In the latter case, Article 4A or other law applies. On the other hand, if the parties agree to a forward transaction where dollars are to be physically delivered in exchange for the delivery of another currency, the transaction is not within the "foreign exchange" exclusion and this article applies.

(e) (l) “Receipt of goods” means taking physical possession of them.

(m) “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.

*Legislative Note: This definition should not be adopted if the jurisdiction has enacted revised Article 1.*

(n) “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 Official Comment**

A “remedial promise” is a promise by the seller to take remedial action upon the happening of a specified event. The types of remedies contemplated by this term as used in this Article 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 correct a problem with the goods that the seller is not obligated to correct that is made 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(1) or additional to the remedies otherwise provided to the buyer under this Article. Whether the promised remedy is exclusive, and if so whether it has failed its essential purpose, is determined under Section 2-719.

The distinction between a remedial promise and a warranty that is made in this Article resolves a statute-of-limitations problem. Under original Section 2-725, a right of action for breach of an express warranty accrued at the time of tender unless the warranty explicitly extended to the future performance of the goods, in which case a time of discovery rule applied. By contrast, a right of action for breach of an ordinary (non-warranty) promise accrued when the promise was breached. A number of courts held that commitments by sellers to take remedial action in the event the goods proved to be defective during a specified period of time constituted warranties and applied the time-of-tender rule; other courts used strained reasoning that allowed them to apply the discovery rule even though the promise at issue referred to the future performance of the seller, not the goods.

Under this Article, a promise by the seller to take remedial action is not a warranty at all and therefore is not subject to either the time-of-tender or time of discovery rule. Section 2-725(2)(c) separately addresses the accrual of a right of action for a remedial promise. For a further explanation, *see* Official Comment 2 to Section 2-725.

~~(d)~~ (o) "Seller" means a person ~~who~~ that sells or contracts to sell goods.

(p) "Sign" means, with present intent to authenticate or adopt a record,

(i) to execute or adopt a tangible symbol; or

(ii) to attach to or logically associate with the record an electronic sound, symbol,

or process.

### **Preliminary Official Comment**

The definition is broad enough to cover any record that is signed within the meaning of present Article 1 (Section 1-201(39)) or that contains an electronic signature within the meaning of the Uniform Electronic Transactions Act (Section 2(8)). It is consistent with the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 *et seq.*).

(2) Other definitions applying to this Article or to specified Parts thereof, and the sections in which they appear are:

"Acceptance". Section 2-606.

~~"Banker's credit". Section 2-325.~~

"Between merchants". Section 2-104.

"Cancellation". Section 2-106(4).

"Commercial unit". Section 2-105.

~~"Confirmed credit". Section 2-325.~~

"Conforming to contract". Section 2-106.

"Contract for sale". Section 2-106.

"Cover". Section 2-712.

"Entrusting". Section 2-403.

"Financing agency". Section 2-104.

"Future goods". Section 2-105.

~~"Goods". Section 2-105.~~

"Identification". Section 2-501.

"Installment contract". Section 2-612.  
~~"Letter of Credit". Section 2-325.~~  
"Lot". Section 2-105.  
"Merchant". Section 2-104.  
~~"Overseas". Section 2-323.~~  
"Person in position of seller". Section 2-707.  
"Present sale". Section 2-106.  
"Sale". Section 2-106.  
"Sale on approval". Section 2-326.  
"Sale or return". Section 2-326.  
"Termination". Section 2-106.

(3) The following definitions in other Articles apply to this Article:

"Check". Section 3-104(f).  
~~"Consignee". Section 7-102.~~  
~~"Consignor". Section 7-102.~~  
"Consumer goods". Section ~~9-109~~ 9-102(a)(23).  
"Dishonor". Section 3-502.  
"Draft". Section 3-104(e).  
"Injunction against honor". Section 5-109(b).  
"Letter of credit". Section 5-102(a)(10).

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

**SECTION 2-104. DEFINITIONS: "MERCHANT"; "BETWEEN MERCHANTS";  
"FINANCING AGENCY".**

(1) "Merchant" means a person ~~who~~ that deals in goods of the kind or otherwise ~~by his~~ occupation holds himself out ~~is held out by occupation as having~~ as having knowledge or skill peculiar to the practices or goods involved in the transaction or to ~~whom~~ which ~~such the~~ knowledge or skill may be attributed by ~~his~~ the person's employment of an agent or broker or other intermediary ~~who by his occupation holds himself out that~~ is held out by occupation as having ~~such the~~ the knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person ~~who~~ that in the ordinary course of business makes advances against goods or documents of title or ~~who~~ that by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person ~~who~~ that similarly intervenes between persons ~~who~~ that are in the position of seller and buyer in respect to the goods (Section 2-707).

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

**SECTION 2-105. DEFINITIONS: TRANSFERABILITY; "~~GOODS~~"; "FUTURE" GOODS; "LOT"; "COMMERCIAL UNIT".**

~~(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).~~

~~(2)~~ (1) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

~~(3)~~ (2) There may be a sale of a part interest in existing identified goods.

~~(4)~~ (3) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer ~~who~~ that then becomes an owner in common.

~~(5)~~ (4) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

~~(6)~~ (5) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

#### **SECTION 2-108. TRANSACTIONS SUBJECT TO OTHER LAW.**

(1) A transaction subject to this article is also subject to any applicable:

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

(b) rule of law that establishes a different rule for consumers; or

(c) statute of this State to which the transaction is subject, such as statutes dealing with:

(i) the sale or lease of agricultural products;

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

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

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

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

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

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

(3) For purposes of this article, failure to comply with a law referred to in subsection (1) has only the effect specified in that law.

(4) This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., except that nothing in this article modifies, limits, or supersedes Section 7001(c) of that Act or authorizes electronic delivery of any of the notices described in Section 7003(b) of that Act.

### **Preliminary Official Comment**

1. Section 2-108, which is new, follows the form of Section 2A-104(1).
2. In subsection (1), it is assumed that this article is subject to any applicable federal law, such as the United Nations Convention on Contracts for the International Sale of Goods, 15 U.S.C. App., or the Magnuson-Moss Warranty Act, 15 U.S.C. Sections 2301-2312.
3. Subsection (1)(a) permits the states to list any applicable certificate-of-title statutes and

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

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

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

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

4. This section also deals with the effect of a conflict or failure to comply with any other state law that might apply to a transaction governed by this Article. Subsection (1) provides that a transaction subject to this Article is also subject to other applicable law, and subsection (2) provides that in the event of a conflict the other law governs (except for the rights of a buyer in ordinary course of business under subsection (1)(a)).

Subsection (1)(b) provides that this Article is also subject to any rule of law that establishes a different rule for consumers. "Rule of law" includes a statute, an administrative rule properly promulgated under the statute, and final court decision.

The relationship between Article 2 and federal and state consumer laws will vary from

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

Subsection (1)(c) provides an illustrative but not exhaustive list of other applicable state statutes that may preempt all or part of Article 2. For example, franchise contracts may be regulated by state franchise acts, the seller of unmerchantable blood or human tissue may be insulated from warranty liability and disclaimers of the implied warranty of merchantability may be invalidated by non-uniform amendments to Article 2. The existence, scope, and effect of these statutes must be assessed from State to State.

Assuming that there is a conflict, subsection (3) deals with the failure of parties to the contract to comply with the applicable law. The failure has the “effect specified” in the law. Thus, the failure to obtain a required license may make the contract illegal, and therefore unenforceable, while the nonnegligent supply of unmerchantable blood under a “blood shield” statute may mean only that the supplier is insulated from liability for injury to person or property.

5. Subsection (4) takes advantage of a provision of the federal Electronic Signatures in Global and National Commerce Act (E-Sign). E-Sign permits state law to modify, limit or supersede its provisions if the state law is consistent with Titles I and II of E-Sign, gives no special legal effect or validity to and does not require the implementation or application of specific technologies or technical specifications, and if enacted subsequent to E-Sign makes specific reference to E-Sign. Subsection (4) does not apply to section 101(c) of E-Sign, nor does it authorize electronic delivery of the notices described in section 103(b) of E-Sign.

## PART 2

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

#### **SECTION 2-201. FORMAL REQUIREMENTS; STATUTE OF FRAUDS.**

(1) ~~Except as otherwise provided in this section a~~ A contract for the sale of goods for the price of ~~\$500~~ \$5,000 or more is not enforceable by way of action or defense unless there is some ~~writing~~ record sufficient to indicate that a contract for sale has been made between the parties and signed by the party against ~~whom~~ which enforcement is sought or by ~~his~~ the party's authorized agent or broker. A ~~writing~~ record is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in ~~such~~ the writing record.

(2) Between merchants if within a reasonable time a ~~writing~~ record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against ~~such party~~ the recipient unless ~~written~~ notice of objection to its contents is given in a record within 10 days after it is received.

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

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for

the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against ~~whom~~ which enforcement is sought admits in ~~his~~ the party's pleading, or in the party's testimony or otherwise in court under oath that a contract for sale was made, but the contract is not enforceable under this ~~provision~~ paragraph beyond the quantity of goods admitted; or

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

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

### **Preliminary Official Comment**

1. The record required by subsection (1) need not contain all of the material terms of the contract and the material terms that are stated need not be precise or accurate. All that is required is that the record afford a reasonable basis to determine that the offered oral evidence rests on a real transaction. The record may be written on a piece of paper or entered into a computer. It need not indicate which party is the buyer and which party is the seller. The only term which must appear is the quantity term. A term indicating the manner by which the quantity is determined is sufficient. Thus, for example, a term indicating that the quantity is based on the output of the seller or the requirements of the buyer satisfies the requirement. See e.g., *Advent Systems v. Unisys*, 925 F.2d 670 (3<sup>rd</sup> Cir. 1991); *Gestetner Corp. V. Case Equip. Co.*, 815 F.2d 806 (1<sup>st</sup> Cir. 1987). The same reasoning can be extended to a term that indicates that the contract is similar to, but does not qualify as, an output or requirement contract. See e.g., *PMC Corp. V. Houston Wire and Cable Co.* 797 A.2d 125 9N.H. 2002). Similarly, a term that refers to a master contract that provides a basis for determining a quantity satisfies this requirement. See e.g., *Reigel Fiber Corp. V. Anderson Gin Co.*, 512 F.2d 784 (5<sup>th</sup> Cir.1975). If a specific amount is stated in the record, even if not accurately stated, recovery is limited to the stated amount. However, the price, time and place of payment or delivery, the general quality of the goods, or any particular warranties need not be included.

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. Of course, if the “price” consists of goods rather than money, the quantity of goods must be stated.

There are only three definite and invariable requirements for the memorandum made by subsection (1). First, the memorandum must evidence a contract for the sale of goods, second, the memorandum must be signed, and third, the memorandum must have a quantity term or a method for determining the quantity.

2. The prior version of subsection (1) began with the phrase “Except as otherwise provided in this section.” This language has been deleted. This change was made to provide that the statement of the three statutory exceptions in subsection (3) should not be read as limiting under subsection (1) 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 record can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods. The overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.

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

4. Between merchants, failure to answer a confirmation of a contract in a record that satisfies the requirements of subsection (1) against the sender within ten days of receipt renders the record sufficient against the recipient. The only effect, however, is to take away from the party that fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the record confirmation is unaffected.

A merchant includes a person “that by occupation purports to have knowledge or skill peculiar to the *practices* or goods involved in the transaction.” Section 2-104(1)(emphasis

supplied). Thus, a professional or a farmer should be considered a merchant because the practice of objecting to an improper confirmation ought to be familiar to any person in business.

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

6. It is not necessary that the record be delivered to anybody, nor is this section intended to displace decisions that have given effect to lost records. It need not be signed by both parties, but except as stated in subsection (2) it is not sufficient against a party that has not signed it. Prior to a dispute, no one can determine which party's signature may be necessary, but from the time of contracting each party should be aware that it is the signature of the other which is important.

7. If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, or is admitted under oath but not in court, as by testimony in a deposition or an affidavit filed with a motion, no additional record is necessary. Subsection (3)(b) makes it impossible to admit the contract in these contexts and still use the Statute of Frauds as a defense. However, the contract is not thus conclusively established. The admission is evidential against the maker of the truth of the facts admitted and of nothing more; as against the other party, it is not evidential at all.

8. Subsection (4), which was not in prior versions of this Article, repeals the "one year" provision of the Statute of Frauds for contracts for the sale of goods. The phrase "any other applicable period" recognizes that some state statutes apply to periods longer than one year. The confused and contradictory interpretations under the so-called "one year" clause are illustrated in *C.R. Klewin, Inc. v. Flagship Properties, Inc.*, 600 A.2d 772 (Conn. 1991) (Peters, J.).

**SECTION 2–202. FINAL ~~WRITTEN~~ EXPRESSION IN A RECORD: PAROL OR EXTRINSIC EVIDENCE.**

(1) Terms with respect to which the confirmatory ~~memoranda~~ records of the parties agree or which are otherwise set forth in a ~~writing~~ record intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be

contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be ~~explained or supplemented~~ by evidence of:

(a) ~~by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208)~~ course of performance, course of dealing or usage of trade (Section 1-303); and

(b) ~~by evidence of consistent additional terms unless the court finds the writing record~~ to have been intended also as a complete and exclusive statement of the terms of the agreement.

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

### **Preliminary Official Comment**

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

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

3. Whether a writing is final, and whether a final writing is also complete, are issues for the court. This section rejects any assumption that because a record has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon. If the additional terms are those that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact. This section is not intended to suggest what should be the evidentiary strength of a merger clause as evidence of the mutual intent that the record be final and complete. That determination depends upon the particular circumstances of each case.

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

5. Issues of interpretation are generally left to the courts. In interpreting terms in a record, subsection (2) permits either party to introduce evidence drawn from a course of performance, a course of dealing, or a usage of trade without any preliminary determination by the court that the term at issue is ambiguous. This article takes no position on whether a preliminary determination of ambiguity is a condition to the admissibility of evidence drawn from any other source or on whether a contract clause can exclude an otherwise applicable implied-in-fact source.

*Legislative Note: The cross-references in subsection (1)(a) should not be changed if the jurisdiction has not adopted revised Article 1.*

**SECTION 2–203. SEALS INOPERATIVE.** The affixing of a seal to a ~~writing~~ record evidencing a contract for sale or an offer to buy or sell goods does not constitute the ~~writing~~ record a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

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

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the

existence of such a contract, the interaction of electronic agents, or the interaction of an electronic agent and an individual.

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

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

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

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

(b) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement that the individual has reason to know will:

(i) cause the electronic agent to complete the transaction or performance; or

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

### **Preliminary Official Comment**

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

is subject to the other provisions of this Article.

2. Under subsection (1), appropriate conduct by the parties may be sufficient to establish an agreement. Subsection (2) is directed primarily when the correspondence does not disclose the exact point at which the agreement was formed, but the conduct of the parties indicate that a binding obligation has been undertaken.

3. Subsection (3) states the principle for “open terms” which underlies later sections of this Article. If the parties intend to enter into a binding agreement, this subsection recognizes the agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy based on commercial standards of indefiniteness. Neither certainty for what the parties were to do nor a finding of the exact amount of damages is required. Neither is the fact that one or more terms are left to be agreed upon enough by itself to defeat an otherwise adequate agreement. This Act makes provision elsewhere for missing terms needed for performance, open price, remedies and the like.

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

4. Subsections (4)(a) and (b) are derived from Sections 14(a) and (b) of the Uniform Electronic Transactions Act. Subsection (4)(a) confirms that contracts may be formed by machines functioning as electronic agents for the parties to a transaction. This subsection is intended to negate any claim that lack of human intent, at the time of contract formation, prevents contract formation. When machines are involved, the requisite intention to contract flows from the programming and use of the machine. This provision, along with sections 2-211, 2-212, and 2-213, is intended to remove barriers to electronic contract formation.

5. Subsection (4)(b) validates contracts formed by an individual and an electronic agent. This subsection validates an anonymous click-through transaction. As with subsection (4)(a), the intent to contract by the electronic agent comes from the programming and use of the machine. The requisite intent to contract by the individual is found by the acts of the individual that the individual has reason to know will be interpreted by the machine as allowing the machine to complete the transaction or performance, or that will be interpreted by the machine as signifying acceptance on the part of the individual. This intent is only found, though, when the individual is free to refuse to take the actions that the machine will interpret as acceptance or allowance to complete the transaction. For example, if A goes to a website that provides for purchasing goods over the Internet, and after choosing items to be purchased is confronted by a screen which advises her that the transaction will be completed if A clicks “I agree” then A will be bound by the click if A knew or had reason to know that the click would be interpreted as signifying acceptance and A was free to refuse the click.

6. Nothing in this section is intended to restrict equitable defenses, such as fraud or mistake, in electronic contract formation. However, because the law of electronic mistake is not well

developed, and because factual issues may arise that are not easily resolved by legal standards developed for nonelectronic transactions, courts should not automatically apply standards developed in other contexts. Courts should also factor in the specific differences between electronic and nonelectronic transactions to resolve equitable claims in electronic contracts.

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

**SECTION 2–206. OFFER AND ACCEPTANCE IN FORMATION OF CONTRACT.**

(1) Unless otherwise unambiguously indicated by the language or circumstances

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

(b) 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 non-conforming goods, but ~~such a~~ the shipment of non-conforming 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.

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

(3) 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 Official Comment**

1. Subsection (1)(b) deals with a shipment that contains defective goods which is made following an order for the goods. The nonconforming shipment is normally understood as intended to close the bargain even though it constitutes a breach. However, the seller by stating that the shipment is nonconforming and is offered only as an accommodation to the buyer keeps the shipment of from operating as an acceptance.

2. The mirror image rule is rejected in subsection (3), but any responsive record must still be reasonably understood as an “acceptance” and not as a proposal for a different transaction.

### **SECTION 2-207. ~~ADDITIONAL TERMS IN ACCEPTANCE OR~~ TERMS OF CONTRACT; EFFECT OF CONFIRMATION.**

~~(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.~~

~~(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:~~

~~(a) the offer expressly limits acceptance to the terms of the offer;~~  
~~(b) they materially alter it; or~~  
~~(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.~~

~~(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the~~

~~writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.~~

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

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

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

(c) terms supplied or incorporated under any provision of this Act.

### **Preliminary Official Comment**

1. This section applies to all contracts for the sale of goods, and it is not limited only to those contracts where there has been a “battle of the forms.”

2. This section applies only when a contract has been created under another section of this Article. The purpose of this section is solely to determine the terms of the contract. When forms are exchanged before or during performance, the result from the application of this section differs from the prior Section 2-207 of this Article and the common law in that this section gives no preference to either 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 other terms as a condition of contract formation have no effect on the operation of this section. When one party insists in that party’s record that its own terms are a condition to contract formation, if that party does not subsequently perform or otherwise acknowledge the existence of a contract, if 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 this section is not applicable. As with original Section 2-207, the courts will have to distinguish between “confirmations” that are addressed in this section and “modifications” that are addressed in Section 2-209.

3. By inviting a court to determine whether a party “agrees” to the other party’s terms, the intent of this section is to recognize the enormous variety of circumstances that may be presented, and this section is intended to give the court greater discretion to include or exclude terms than was original section 2-207. In many cases, performance alone should not be construed to be an agreement to the terms in another party’s record by a party 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 party's additional or different terms by performance. In that case, the terms are determined under paragraph (a) (terms in both records) and paragraph (c) (supplied or incorporated by this Act). Concomitantly, 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 result 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 and there is no oral or other agreement, and the seller delivers in response to the purchase order but the seller does not send the seller's 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 response, such as "I accept," to an offer that contained many terms would show agreement to all of the offer's terms. In some cases an expression of acceptance accompanied by one or more additional terms also might demonstrate the offeree's agreement to the terms of the offer. For example, consider a buyer that sends a purchase order with technical specifications and a seller that responds with a record stating "Thank you for your order. We will fill it promptly. Note that we do not make deliveries after 3:00 p.m. on Fridays." Here a court could find that both parties agreed to the technical specifications.

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

In a rare case the terms in the records of both parties might not become part of the contract. This could be the case, for example, when the parties contemplated an agreement to a single negotiated record, and each party submitted to the other party similar proposals and then commenced performance but the parties never reached a negotiated agreement because of the differences over crucial terms. There is a variety of verbal and nonverbal behavior that may be suggest agreement to another's record. This section leaves the interpretation of that behavior to the discretion of the courts.

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

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

**~~SECTION 2-208. COURSE OF PERFORMANCE ON PRACTICAL  
CONSTRUCTION RESERVED.~~**

~~(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.~~

~~(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).~~

~~(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with~~

~~such course of performance.~~

*Legislative Note: This section should not be repealed if the jurisdiction has not adopted revised Article 1.*

### **Preliminary Official Comment**

This section has been moved to revised Article 1 (Section 1-303).

### **SECTION 2–209. MODIFICATION; RESCISSION AND WAIVER.**

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

(2) ~~A signed agreement~~ An agreement in a signed record which excludes modification or rescission except by a signed ~~writing~~ record cannot be otherwise modified or rescinded, but except as between merchants such a requirement ~~on a form~~ in a form record supplied by the merchant must be separately signed by the other party.

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

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party ~~who~~ 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.

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

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

~~(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.~~

~~(3) 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.~~

~~(4) 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 a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.~~

~~(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 2-609).~~

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

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

(b) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not an assignment that materially changes the duty of or materially increases the burden or risk imposed on the buyer or materially impairs the buyer's chance of obtaining return performance within paragraph (a) unless, and then only to the extent that, enforcement of the security interest results in a delegation of a material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective. However, the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and a court having jurisdiction may grant other appropriate relief, including cancellation of the contract or an injunction against enforcement of the security interest or consummation of the enforcement.

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

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

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

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

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

(3) 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.

(4) 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.

*Legislative Note: The cross-reference to Section 9-406 in subsection (1)(a) will have to be deleted if the jurisdiction has not adopted revised Article 9.*

### **Preliminary Official Comment**

1. This section is consistent with original Section 2-210 but follows a different organizational approach. Subsection (1) deals with the assignment of rights, subsection (2) deals with the delegation of duties, and subsections (3) and (4) are interpretive rules of general applicability. The section has also been changed to conform with revised Article 9.

2. 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.

3. Subsection (1)(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 unless the assignment materially increases the duty, burden or risk, or materially impairs expected performance to the other party, or, subject to subsection (1)(b) and Section 9-406 (discussed below), otherwise agreed. Even then a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of its entire obligation can be assigned despite contrary agreement.

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

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

4. Subsection (1)(a) is subject to subsection (1)(b), which conforms with revised Article 9. If an assignment of rights creates a security interest in the seller’s interest under the contract,

including a right to future payments, subsection (1)(b) states that there is no material impairment under subsection (1)(a) unless the creation, attachment, perfection and enforcement “results in a delegation of material performance of the seller.” This is not likely in most assignments, and the buyer’s basic protection is to demand adequate assurance of due performance from the seller if the assignment creates reasonable grounds for insecurity.

5. Occasionally a seller or buyer will delegate duties under the contract without also assigning rights. For example, a dealer might delegate its duty to procure and deliver a fixed quantity of goods to the buyer to a third party. In these cases, subsection (2) states the limitations on that power. A contract term prohibiting the delegation of duties renders an attempted delegation ineffective. Subsection (2)(d).

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

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

Finally, in any event, a delegation of duties is not effective if the person entitled under the contract has a “substantial interest in having the original promisor perform or control the performance required by the contract.” Subsection (2)(a).

6. In the case of ambiguity, subsection (3) provides a rule of interpretation to determine when an assignment of rights should also be considered a delegation of duties. When there is ambiguity, the preference is to construe the language as both a delegation of duties as well as an assignment of rights.

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

**SECTION 2-211. LEGAL RECOGNITION OF ELECTRONIC CONTRACTS,  
RECORDS AND SIGNATURES.**

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

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

(3) This article does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed by electronic means or in electronic form.

(4) A contract formed by the interaction of an individual and an electronic agent under Section 2-204(4)(b) 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 Official Comment**

1. This section is new. Subsections (1) and (2) are derived from Section 7(a) and (b) of the Uniform Electronic Transactions Act (UETA), and subsection (3) is derived from Section 5(b) of UETA. Subsection (4) 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 (15 U.S.C. § 7001 *et seq.*).

2. This section sets forth the premise that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance. Subsections (1) and (2) are designed to eliminate the single element of medium as a reason to deny effect or enforceability to a record, signature, or contract. The fact that the information is set forth in an electronic, as opposed to paper, medium is irrelevant.

3. 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 (2) validates its legality. Likewise, to the extent that a record or signature in electronic form may have legal effect but be unenforceable, subsection (1) validates the legality of the record or signature.

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 signature is valid under other law is not addressed by this Act.

4. While subsection (2) 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 signature is attributed to a person if the record was created by or the signature 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 Official Comment**

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

2. As long as the electronic record was created by a person or the electronic signature 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 signature is not ascribed to a machine, as opposed to the person operating or programming the machine.

3. In each of the following cases, both the electronic record and electronic signature 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 signature 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.

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

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

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

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

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

(1) If the receipt of an electronic communication has a legal effect, it has that effect even though no individual is aware of its receipt.

(2) 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 Official Comment**

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

2. 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.

3. Subsection (1) 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 that never reads a mail notice.

4. Subsection (2) 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."

5. 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**

##### **SECTION 2-302. UNCONSCIONABLE CONTRACT OR ~~CLAUSE~~ TERM.**

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

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

##### **Preliminary Official Comment**

1. This section is intended to make it possible for the courts to police explicitly against the contracts or terms which they find to be unconscionable instead of by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the term is contrary to public policy or to the dominant purpose of the contract. The section is intended to allow a court to pass directly on the unconscionability of the contract or a particular term of the contract and to make a conclusion of law as to its unconscionability. Courts have been particularly vigilant when the contract at issue is set forth in a standard form. The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power. The basic test is whether, in the light of the general 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.

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

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

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

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

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

**SECTION 2-305. OPEN PRICE TERM.**

(1) 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

(a) nothing is said as to price; or

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

(c) 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.

(2) A price to be fixed by the seller or by the buyer means a price ~~for him to fix~~ to be fixed in good faith.

(3) 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 ~~his~~ the party's option treat the contract as canceled or ~~himself~~ the party may fix a reasonable price.

(4) 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.

#### **SECTION 2-308. ABSENCE OF SPECIFIED PLACE FOR DELIVERY.**

Unless otherwise agreed

(a) the place for delivery of goods is the seller's place of business or if ~~he~~ it has none ~~his~~ the seller's residence; but

(b) in a contract for sale of identified goods which 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

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

#### **SECTION 2-309. ABSENCE OF SPECIFIC TIME PROVISIONS; NOTICE OF**

## **TERMINATION.**

(1) 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.

(2) 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.

(3) 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.

### **Preliminary Official Comment**

The last sentence of subsection (3) is new and is based on Section 1-102(3). It provides for greater party autonomy. In an appropriate circumstances the parties may agree that the standard for 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

(a) 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

(b) if the seller is required or authorized to send the goods ~~he~~ the seller may ship them

under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2–513); and

(c) if tender of delivery is ~~authorized and~~ agreed to be made by way of documents of title otherwise than by subsection (b) 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

(d) 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.

### **Preliminary Official Comment**

The word “required” has been added to paragraph (b) to make that provision consistent with other usages throughout Article 2 and with the common understanding of business practices. *See, e.g.*, Sections 2-504 and 2-509(1). Paragraph (c) has been amended for clarity.

## **SECTION 2–311. OPTIONS AND COOPERATION RESPECTING PERFORMANCE.**

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 2–204) 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.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and ~~except as otherwise provided in subsections (1)(c) and (3) of Section 2–319~~

specifications or arrangements relating to shipment are at the seller's option.

(3) 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

(a) is excused for any resulting delay in ~~his own~~ that party's performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of ~~his~~ that party's own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

### **Preliminary Official Comment**

The cross-reference in subsection (2) has been deleted because the referenced provisions no longer exist. The introductory phrase (“[u]nless otherwise agreed”) is sufficient to make the point.

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

(1) Subject to subsection (3) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be ~~good~~, 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; and

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

~~(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that it is purporting to sell only such right or title as it or a third person may have.~~

~~(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.~~

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

(3) A warranty under this section may be disclaimed or modified only by specific language or by circumstances that give the buyer reason to know that the seller does not claim title, that the seller is purporting to sell only the right or title as the seller or a third person may have, or that the seller is selling subject to any claims of infringement or the like.

### **Preliminary Official Comment**

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

In addition to sales in which there is an actual cloud on the title, a warranty that the “title conveyed is good and its transfer rightful” also covers cases where the title is good but the transfer is not rightful. For example, a wrongful transfer with good title occurs where a merchant bailee to which goods are entrusted for repair sells them without authority to a buyer in the ordinary course of business. *See* Section 2-403(2); *Sumner v. Fel-Air, Inc.*, 680 P.2d 1109 (Alaska 1984).

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

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

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

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

The “knowledge” referred to in subsection (1)(b) is actual knowledge as distinct from notice.

2. The provisions of this Article requiring notification to the seller within a reasonable time after the buyer's discovery of a breach (Section 2-607(3)(a)) apply to notice of a breach of the warranty of title when the seller's breach was innocent. However, if the seller's breach was in bad faith, the seller cannot claim prejudice by the delay in giving notice.

3. Subsection (2) provides the warranty against infringement. Unlike the warranty of title, for this warranty the seller must be a merchant that is “regularly dealing in goods of the kind” sold.

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

4. Subsection (3) deals with the disclaimer or modification of the warranties of title or against infringement. This is a self-contained provision governing the modification or disclaimer of warranties under this section; the warranties in this section are not designated as “implied” warranties, and hence are not subject to the modification and disclaimer provisions of Section 2-316(2) and (3). Unlike Section 2-316, subsection (3) of this section does not have any specific requirements that the disclaimer or modification be contained in a record or be conspicuous.

Subsection (3) recognizes that sales by sheriffs, executors, certain foreclosing lienors and persons similarly situated may be so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller that is purporting to sell only an unknown or limited right. This subsection does not touch upon and leaves open all questions of restitution arising in these cases, when a unique article so sold is reclaimed by a third party as the rightful owner.

Foreclosure sales under Article 9 are another matter. Section 9-610 of revised Article 9 provides that a disposition of collateral under that section includes warranties such as those imposed by this section on a voluntary disposition of property of the kind involved. Consequently, unless properly excluded under subsection (3) or under the special provisions for exclusion in Section 9-610, a disposition under that section of collateral consisting of goods includes the warranties imposed by subsection (1) and, if applicable, subsection (2).

6. The statute of limitations for a breach of warranty under this section is determined under the provisions set out in Section 2-725(1) and (3)(c).

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

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

~~(1)~~ (2) Express warranties by the seller to the immediate buyer are created as follows:

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

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

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

~~(2)~~ (3) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that ~~he~~ the seller have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

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

**Preliminary Official Comment**

1. Subsections (2) and (3) are identical to original Article 2 except that the term “immediate buyer” is used to make clear that the section is limited to express warranties and remedial promises made by a seller to a buyer with which the seller has a contractual relationship. Sections 2-313A and 2-313B address obligations that run directly from a seller to a remote purchaser.

2. Subsection (4) introduces the term “remedial promise,” which was not used in original Article 2. This section deals with remedial promises to immediate buyers; sections 2-313A and 2-313B deal with remedial promises running directly from a seller to a remote purchaser. Remedial promise is defined in Section 2-103(1)(m).

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

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

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

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

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

clear affirmative proof. The issue normally is one of fact.

6. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation for the description and therefore cannot be given literal effect under Section 2-316(1).

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

7. Subsection (2)(b) makes specific some of the principles set forth above when a description of the goods is given by the seller.

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

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

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model, just as any affirmation of fact, is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject-matter of the contract. The question is whether the seller has so acted with reference to the sample as to become responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be

regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

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

10. Concerning affirmations of value or a seller's opinion or commendation under subsection (3), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of subsection (3) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

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

11. The use of the word "promise" in subsection (2)(a) is unusual in that it refers to statements about the quality or performance characteristics of the goods. For example, a seller might make an affirmation of fact to the buyer that the goods are of a certain quality, or may promise that the goods when delivered will be of a certain quality, or may promise that the goods will perform in a certain manner after delivery. In normal usage, "promise" refers to a what a person, not goods, will do; that is, a promise is a commitment to act, or refrain from acting, in a certain manner in the future. A promise about the quality or performance characteristics of the goods creates an express warranty if the other elements of a warranty are present whereas a promise by which the seller commits itself to take remedial action upon the happening of a specified event is a remedial promise. The distinction has meaning in the context of the statute

of limitations. A right of action for breach of an express warranty accrues when the goods are tendered to the immediate buyer (Section 2-725(3)(a)) unless the warranty consists of a promise that explicitly extends to the future performance of the goods and discovery must await the time for performance, in which case accrual occurs when the immediate buyer discovers or should have discovered the breach (Section 2-725(3)(d)). Section 2-725(2)(c) separately addresses the accrual of a right of action for breach of a remedial promise.

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

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

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

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

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

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

(a) the goods will conform to the affirmation of fact, promise or description unless a

reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation; and

(b) the seller will perform the remedial promise.

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

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

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

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

(c) The remote purchaser may recover as damages for breach of a seller’s obligation arising under subsection (2) the loss resulting in the ordinary course of events as determined in any manner that is reasonable.

(5) An obligation that is not a remedial promise is breached if the goods did not conform

to the affirmation of fact, promise or description creating the obligation when the goods left the seller's control.

*Legislative Note: 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.*

### **Preliminary Official Comment**

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

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

4. This section applies only to obligations set forth in a record that is packaged with the goods or otherwise accompanies them (subsection (2)). Examples include a label affixed to the outside of a container, a card inside a container, or a booklet handed to the remote purchaser at the time of purchase. In addition, the seller must be able to anticipate that the remote purchaser will acquire the record, and therefore this section is limited to records that the seller reasonably expects to be furnished, and that are in fact furnished, to the remote purchaser.

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

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

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

7. Subsection (4)(a) makes clear that the seller may employ the provisions of Section 2-719 to modify or limit the remedies available to the remote purchaser for breach of the seller's obligation hereunder. The modification or limitation may appear on the same record as the one which creates the obligation, or it may be provided to the remote purchaser separately, but in no event may it be furnished to the remote purchaser any later than the time of purchase.

The requirements and limitations set forth in Section 2-719, such as the requirement of an express statement of exclusivity and the tests for failure of essential purpose (Section 2-719(2)) and unconscionability (Section 2-719(3)) are applicable to a modification or limitation of remedy under this section.

8. As with express warranties, no specific language or intention is necessary to create an obligation, and whether an obligation exists is normally an issue of fact. Subsection (3) is virtually identical to Section 2-313(3), and the tests developed under the common law and under that section to determine whether a statement creates an obligation or is mere puffing are directly applicable to this section.

Just as a seller can limit the extent to which its language creates an express warranty under Section 2-313 by placing that language in a broader context, so too can a seller under this section or Section 2-313B limit the extent of its liability to a remote purchaser (subsection(4)(a)). In other words, the seller, in undertaking an obligation under these sections, can spell out the scope and limits of that obligation.

9. As a rule, a remote purchaser may recover monetary damages measured in the same manner as in the case of an aggrieved buyer under Section 2-714, including incidental and consequential damages to the extent they would be available to an aggrieved buyer. Subsection (4)(c) parallels Section 2-714(1) in allowing the buyer to recover for loss resulting in the ordinary course of events as determined in any manner which is reasonable. In the case of an obligation that is not a remedial promise, the normal measure of damages would be the difference between the value of the goods if they had conformed to the seller's statements and their actual value, and the normal measure of damages for breach of a remedial promise would be the difference between the value of the promised remedial performance and the value of the actual performance received.

Subsection (4)(b) precludes a remote purchaser from recovering consequential damages that take the form of lost profits.

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

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

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

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

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

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

(b) the seller will perform the remedial promise.

(3) It is not necessary to the creation of an obligation under this section that the seller use formal words such as “warrant” or “guarantee” or that the seller have a specific intention to undertake an obligation, but an affirmation merely of the value of the goods or a statement

purporting to be merely the seller's opinion or commendation of the goods does not create an obligation.

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

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

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

(c) The remote purchaser may recover as damages for breach of a seller's obligation arising under subsection (2) the loss resulting in the ordinary course of events as determined in any manner that is reasonable.

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

*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.*

### **Preliminary Official Comment**

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 (2)(a) 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 this 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.

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 this 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.

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

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

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

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

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

and

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

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

(e) are adequately contained, packaged, and labeled as the agreement may require;  
and

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

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

### **Preliminary Official Comment**

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

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

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

4. A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to the goods. A contract for the sale of second-hand goods, however, involves only an obligation as is appropriate to the goods for that

is their contract description. A person making an isolated sale of goods is not a “merchant” within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. The seller’s knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

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

6. The second sentence of subsection (1) covers the warranty with respect to food and drink. The serving for value of food or drink for consumption on the premises or elsewhere is treated as a sale. Thus, both the patron in a restaurant and a buyer of “take out” food are protected by the implied warranty of merchantability.

7. Suppose that an unmerchantable lawn mower causes personal injury to the buyer, who is operating the mower. Without more, the buyer can sue the seller for breach of the implied warranty of merchantability and recover for injury to person “proximately resulting” from the breach. Section 2-715(2)(b).

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

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

To illustrate, suppose that the seller makes a representation about the safety of a lawn mower

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

8. Subsection (2) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is "must be at least such as ...," and the intention is to leave open other possible attributes of merchantability.

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

10. 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 (2)(c). 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.

11. Paragraph (2)(d) 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.

12. Paragraph (2)(e) applies only where the nature of the goods and of the transaction require a certain type of container, package or label. Paragraph (2)(f) 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.

13. 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 (6) 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.

14. Subsection (3) 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.

15. 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 2-316. EXCLUSION OR MODIFICATION OF WARRANTIES.**

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

(2) Subject to subsection (3), to exclude or modify the implied warranty of

merchantability or any part of it in a consumer contract the language must be in a record, be conspicuous and state “The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract,” and in any other contract the language must mention merchantability and in case of a writing record must be conspicuous, and to. Subject to subsection (3), to exclude or modify the implied warranty of fitness the exclusion must be by a writing in a record and be conspicuous. Language to exclude all implied warranties of fitness in a consumer contract must state “The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract,” and in any other contract the language is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.” Language that satisfies the requirements of this subsection for the exclusion and modification of a warranty in a consumer contract also satisfies the requirements for any other contract.

(3) Notwithstanding subsection (2):

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all faults” or other language which in common understanding calls the buyer's attention to the exclusion of warranties and, makes plain that there is no implied warranty, and in a consumer contract evidenced by a record is set forth conspicuously in the record; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods after a demand by the seller there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him the buyer; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

### **Preliminary Official Comment**

1. **Changes.** This section contains the following changes from original Section 2-718:

a) Subsection (2) sets forth new and more informative language for disclaimers of the implied warranty of merchantability and the implied warranty of fitness in consumer contracts. In both instances the language must be in a record and must be conspicuous. Use of this new language satisfies the requirements of this subsection for nonconsumer contracts.

b) If a consumer contract is set forth in a record, subsection (3) cannot be satisfied unless the language is in a record and is conspicuous.

c) Subsection (3)(b) now explicitly requires that there can be no refusal by a buyer unless there is a demand by the seller. Formerly, this requirement was found only in the comments.

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

The seller is protected against false allegations of oral warranties by this Article’s provisions on parol and extrinsic evidence and against unauthorized representations by the customary “lack of authority” clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4), the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. The organizational structure of this section has not been changed. The general test for disclaimers of implied warranties remains in subsection (3)(a), and the more specific tests remain in subsection (2). A disclaimer that satisfies the requirements of subsection (3)(a) need not also satisfy any of the requirements of subsection (2).

4. Subsection (2) now distinguishes between commercial and consumer contracts. In a commercial contract, language within the contemplation of the subsection disclaiming the implied warranty of merchantability need not be in a record, but if it is in a record it must be conspicuous. Under this subsection, both record and conspicuousness are required to disclaim the implied warranty of merchantability in a consumer contract and to disclaim the implied warranty of fitness in any contract. Use of the language required by this subsection for consumer contracts satisfies the subsections language requirements for other contracts.

5. Subsection (3)(a) deals with general terms such as “as is,” “as they stand,” “with all faults,” and the like. These terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by the subsection are in fact merely a particularization of subsection (3)(c), which provides for exclusion or modification of implied warranties by usage of trade. Nothing in subsection (3)(a) prevents a term such as “there are no implied warranties” from being effective in appropriate circumstances, as when the term is a negotiated term between commercial parties.

Satisfaction of subsection (3)(a) does not require that the language be set forth in a record, but if there is a record the language must be conspicuous if the contract is a consumer contract.

6. Subsection (2) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, the language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had “reason to know” under the section on implied warranty of fitness for a particular purpose.

7. The exceptions to the general rule set forth in subsections (3)(b) and (3)(c) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.

Under subsection (3)(b), warranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. “Examination” as used in this paragraph is not synonymous with inspection before

acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if the buyer unreasonably fails to examine the goods before using them, resulting injuries may be found to result from the buyer's own action rather than proximately from a breach of warranty. *See* Sections 2-314 and 2-715.

To bring the transaction within the scope of "refused to examine" in subsection (3)(a), it is not sufficient that the goods are available for inspection. There must in addition be an actual examination by the buyer or a demand by the seller that the buyer examine the goods fully. The seller's demand must place the buyer on notice that the buyer is assuming the risk of defects which the examination ought to reveal.

Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly a reliance on those words rather than on the buyer's examination, they give rise to an "express" warranty. In these cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the agreement.

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

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

**SECTION 2-318. THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS OR IMPLIED.**

(1) In this section:

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

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

**Alternative A to subsection (2)**

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

**Alternative B to subsection (2)**

~~(2) A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty.~~ A seller's warranty whether express or implied to an immediate

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

**Alternative C to subsection (2)**

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

**Preliminary Official Comment**

1. This section retains original Article 2's alternative approaches but expands each alternative to cover obligations arising under Sections 2-313A and 2-313B and remedial promises.

2. The last sentence of each alternative to subsection (2) is not meant to suggest that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided the exclusion or modification is permitted by Section 2-316. Nor is it intended to suggest that the seller is precluded from limiting the remedies of the immediate buyer or remote purchaser in any manner provided in Sections 2-718 or 2-719. *See*

*also* Section 2-313A(4) and Section 2-313B(4). To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, the provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties, obligations and remedial promises accruing to the immediate buyer or remote purchaser would extend under this section.

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

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

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

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

#### **SECTION 2-319. F.O.B. AND F.A.S. TERMS RESERVED.**

~~(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which~~

~~(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk~~

~~of putting them into the possession of the carrier; or~~

~~(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503);~~

~~(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323);~~

~~(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must~~

~~(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and~~

~~(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading;~~

~~(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.~~

~~(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.~~

### **Preliminary Official Comment**

Sections 2-319 through 2-324 have been eliminated because they are inconsistent with modern commercial practices.

### **SECTION 2-320. ~~C.I.F. AND C. & F. TERMS RESERVED.~~**

~~(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.~~

~~(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to~~

~~(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and~~

~~(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and~~

~~(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may~~

~~add to the price the amount of the premium for any such war risk insurance; and~~

~~(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and~~

~~(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.~~

~~(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.~~

~~(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.~~

#### **Preliminary Official Comment**

Sections 2-319 through 2-324 have been eliminated because they are inconsistent with modern commercial practices.

#### **~~SECTION 2-321. C.I.F. OR C. & F.: "NET LANDED WEIGHTS"; "PAYMENT ON ARRIVAL"; WARRANTY OF CONDITION ON ARRIVAL RESERVED.~~**

~~Under a contract containing a term C.I.F. or C. & F.~~

~~(1) Where the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must~~

be made with commercial promptness.

~~(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.~~

~~(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.~~

#### **Preliminary Official Comment**

Sections 2-319 through 2-324 have been eliminated because they are inconsistent with modern commercial practices.

#### **SECTION 2-322. ~~DELIVERY "EX-SHIP" RESERVED.~~**

~~(1) Unless otherwise agreed a term for delivery of goods "ex-ship" (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.~~

~~(2) Under such a term unless otherwise agreed~~

~~(a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and~~

~~(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or~~

are otherwise properly unloaded.

### **Preliminary Official Comment**

Sections 2-319 through 2-324 have been eliminated because they are inconsistent with modern commercial practices.

### **~~SECTION 2-323. FORM OF BILL OF LADING REQUIRED IN OVERSEAS SHIPMENT; "OVERSEAS" RESERVED.~~**

~~(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded in board or, in the case of a term C.I.F. or C. & F., received for shipment.~~

~~(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set~~

~~(a) due tender of a single part is acceptable within the provisions of this Article on cure of improper delivery (subsection (1) of Section 2-508); and~~

~~(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.~~

~~(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or~~

~~shipping practices characteristic of international deep water commerce.~~

### **Preliminary Official Comment**

Sections 2-319 through 2-324 have been eliminated because they are inconsistent with modern commercial practices.

### **SECTION 2-324. ~~"NO ARRIVAL, NO SALE" TERM~~ RESERVED.**

~~Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed,~~

~~(a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and~~

~~(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Section 2-613).~~

### **Preliminary Official Comment**

Sections 2-319 through 2-324 have been eliminated because they are inconsistent with modern commercial practices.

### **SECTION 2-325. ~~"LETTER OF CREDIT" TERM, "CONFIRMED CREDIT"~~**

#### **FAILURE TO PAY BY AGREED LETTER OF CREDIT.**

~~(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.~~

~~(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on reasonable notification to the buyer~~

require payment directly from him.

(3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

If the parties agree that the primary method of payment will be by letter of credit, the following rules apply:

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

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

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

### **Preliminary Official Comment**

This section has been amended to conform to revised Article 5.

**SECTION 2-326. SALE ON APPROVAL AND SALE OR RETURN;  
~~CONSIGNMENT SALES AND RIGHTS OF CREDITORS.~~**

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

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

(b) a "sale or return" if the goods are delivered primarily for resale.

(2) ~~Except as provided in subsection (3),~~ goods 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.

~~(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum". However, this subsection is not applicable if the person making delivery~~

~~(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or~~

~~(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or~~

~~(c) complies with the filing provisions of the Article on Secured Transactions (Article 9).~~

(4) ~~(3)~~ Any "or return" term of a contract for sale is to be treated as a separate contract

for sale within the statute of frauds section of this Article (Section 2–201) and as contradicting the sale aspect of the contract within the provisions of this Article on parol or extrinsic evidence (Section 2–202).

### **Preliminary Official Comment**

This section has been amended to conform to revised Article 9.

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

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

(2) 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 ~~while the hammer is falling in acceptance of~~ during the process of completing the sale but before a prior bid is accepted the auctioneer ~~may in his~~ has discretion to reopen the bidding or to declare the goods sold under the prior bid on which the hammer was falling.

(3) ~~Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid. 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.

(4) 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 buyer may at his the buyer's option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a ~~forced sale~~ an auction required by law.

### **Preliminary Official Comment**

This section has been amended to use language that is common among auctioneers. Specifically, “process of completing the sale” is used rather than “hammer falling” (subsection (2)); “right to withdraw the goods” is used rather than “with reserve” (subsection (3)).

## **PART 4**

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

**SECTION 2-401. PASSING OF TITLE; RESERVATION FOR SECURITY;  
LIMITED APPLICATION OF THIS SECTION.**

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2–501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller 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 his performance with reference to the ~~physical~~ 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 ~~him~~ 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 ~~he~~ 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 reverts title to the goods in the seller. Such reversioning occurs by operation of law and is not a "sale".

#### **Preliminary Official Comment**

The word "physical" been deleted in subsection (2) because the term "delivery" is now defined in Section 2-103(1)(f) as "the voluntary transfer of physical possession or control of goods."

#### **SECTION 2-402. RIGHTS OF SELLER'S CREDITORS AGAINST SOLD GOODS.**

(1) Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Sections 2-502 and 2-716).

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

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

- (a) under the provisions of the Article on Secured Transactions (Article 9); or
- (b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this Article constitute the transaction a fraudulent transfer or voidable preference.

### **Preliminary Official Comment**

The introductory phrase in subsection (3) has been added because a change in Section 2-403(2) (required for conformity with revised Article 9) can cause impairment of the rights of a secured party.

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

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

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through criminal fraud ~~punishable as larcenous under the criminal law.~~

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

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

*[Legislative Note: If a state adopts the repealer of Article 6—Bulk Transfers (Alternative A), subsection (4) should read as follows:]*

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9) and Documents of Title (Article 7).

*[Legislative Note: If a state adopts revised Article 6—Bulk Sales (Alternative B), subsection (4) should read as follows:]*

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Sales (Article 6) and Documents of Title (Article 7).

### **Preliminary Official Comment**

1. References to “larceny” have been replaced in subsections (1) and (3) by more general language referring to “criminal fraud” (subsection (1)) and conduct “punishable under the criminal law” (subsection (3)).

2. Subsection (2) has been amended to conform with revised Article 9. *See* Section 9-315(a).

## **PART 5**

### **PERFORMANCE**

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

(1) 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 non-conforming and ~~he~~ 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

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

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

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after

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

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

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

#### **SECTION 2-502. BUYER'S RIGHT TO GOODS ON SELLER'S INSOLVENCY.**

(1) Subject to ~~subsection (2)~~ subsections (2) and (3) and even though the goods have not been shipped a buyer ~~who~~ that has paid a part or all of the price of goods in which ~~he~~ the buyer has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller ~~if the seller becomes insolvent within ten days after receipt of the first installment on their price.~~ if:

(a) in the case of goods bought by a consumer, the seller repudiates or fails to deliver as required by the contract; or

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

(2) The buyer's right to recover the goods under subsection (1) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

~~(2)~~ (3) If the identification creating ~~his~~ the special property has been made by the buyer ~~he~~, the buyer acquires the right to recover the goods only if they conform to the contract for sale.

### **Preliminary Official Comment**

Subsection (1)(a) and subsection (2) are new. With one exception, the amendments are consistent with a conforming amendment approved as part of the revision of Article 9. The exception is that the conforming amendment limits the vesting rule in subsection (2) to cases governed by subsection (1)(a), whereas the vesting rule in this draft applies to all cases within subsection (1).

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

(1) 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 ~~him~~ the buyer to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(a) 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

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

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

(3) Where the seller is required to deliver at a particular destination tender requires that ~~he~~ the seller comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

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

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

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

(5) Where the contract requires the seller to deliver documents

(a) ~~he~~ the seller must tender all such documents in correct form, ~~except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323); and~~

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

### **Preliminary Official Comment**

1. Subsection (4)(a) 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(2)(b).

2. Under subsection (4)(b), receipt by the bailee of notification of a buyer's rights fixes those rights as against the bailee and third parties except as otherwise provided in Article 9. The exception for Article 9 conforms with revised Article 9.

3. The cross-reference in subsection (5)(a) has been deleted because Section 2-323 no longer exists. All documents, including bills in a set, must be in "correct form," meaning the form required by the contract.

#### **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 ~~him~~ the seller to deliver them at a particular destination, then unless otherwise agreed ~~he~~ the seller must

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

(b) 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

(c) promptly notify the buyer of the shipment.

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

#### **Preliminary Official Comment**

The addition of "conforming" in paragraph (a) clarifies the relationship between this section and Section 2-601.

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

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

(a) ~~his~~ the seller's procurement of a negotiable bill of lading to ~~his~~ the seller's own order or otherwise reserves in ~~him~~ the seller a security interest in the goods. ~~His~~ The seller's procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) a non-negotiable bill of lading to ~~himself~~ the seller or ~~his~~ the seller's nominee reserves possession of the goods as security but except in a case ~~of conditional delivery~~ when a seller has a right to reclaim the goods under (subsection (2) of Section 2-507) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

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

### **Preliminary Official Comment**

The change from “conditional delivery” to “right to reclaim the goods” in subsection (1)(b) conforms to amended Section 2-507, where the seller's right to recover the goods following dishonor of a check in a cash-sale transaction is now stated in terms of a right of reclamation.

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

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

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

### **Preliminary Official Comment**

Subsection (1) has been amended to provide that Article 5 governs in the event of a conflict.

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

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

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, ~~his right as against the seller to retain or dispose of them is conditional upon his making the payment due~~ the seller may reclaim the goods delivered upon a demand made

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

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good-faith purchaser for value under this Article (Section 2-403).

### **Preliminary Official Comment**

Subsection (2) has been amended to state directly that the seller's right to recover the goods from the buyer in a cash-sale transaction is a right of reclamation. The phrase "due and demanded" refers to the situation where the seller takes a check that is later dishonored. *See* Section 2-511. This change, and the addition of subsection (3), make the seller's rights parallel in credit-sale and cash-sale transactions. *See* Section 2-702.

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

~~(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.~~

~~(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.~~

(1) 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(1)(b) and the agreed time for performance has not expired, a seller that has performed in good faith, upon seasonable notice to the buyer and at the seller's own expense, may cure the breach of contract

by making a conforming tender of delivery within the agreed time. The seller shall compensate the buyer for all of the buyer's reasonable expenses caused by the seller's breach of contract and subsequent cure.

(2) 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(1)(b) 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 Official Comment**

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

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

2. Cure after a justifiable revocation of acceptance is not available as a matter of right in a consumer contract. Further, even in a nonconsumer contract no cure is available if the revocation is predicated on Section 2-608(1)(a). If the buyer is revoking because of a known

defect that the seller has not been willing or able to cure, there is no justification for giving the seller a second chance to cure.

3. Subsection (2) expands the seller's right to cure after the time for performance has expired. As under subsection (1), the buyer's rightful rejection or in a nonconsumer contract justifiable revocation of acceptance under Section 2-608(1)(b) trigger the seller's right to cure. Original Section 2-508(2) was directed toward preventing surprise rejections by requiring the seller to have "reasonable grounds to believe" the nonconforming tender was acceptable. Although this test has been abandoned, the requirement that the initial tender be made in good faith prevents a seller from deliberately tendering goods that it knows the buyer cannot use in order to save its contract and then, upon rejection, insisting on a second bite at the apple. The good faith standard applies under both subsection (1) and subsection (2).

4. The seller's cure under both subsection (1) and subsection (2) must be of conforming goods. Conforming goods includes not only conformity to the contracted-for quality but also as to quantity or assortment or other similar obligations under the contract. Since the time for performance has expired in a case governed by subsection (2), 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 (1) requires that cure be tendered "within the agreed time" while subsection (2) 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.**

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

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

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

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

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

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

(c) after ~~his~~ the buyer's receipt of a non-negotiable document of title or other ~~written~~ direction to deliver in a record, as provided in subsection (4)(b) of Section 2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on ~~his~~ the buyer's receipt of the goods ~~if the seller is a merchant; otherwise the risk passes to the buyer~~ on tender of delivery.

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

## Preliminary Official Comment

1. The word “duly” has been deleted in subsections (1)(a) and (1)(b) because it has caused confusion. In a shipment contract, the risk of loss shifts to the buyer when the goods are delivered to the carrier as required by Section 2-504; in a destination contract, the risk of loss shifts when the goods are tendered to the buyer as required by Section 2-503(3).

2. Subsection (3) has been simplified by eliminating the distinction between merchant and non-merchant sellers. In a case not governed by subsection (1) or subsection (2) and not subject to a contrary result under subsection (4), the risk of loss passes to the buyer upon the buyer’s receipt of the goods.

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

(1) 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.

(2) Where the buyer rightfully revokes acceptance ~~he~~ the buyer may to the extent of any deficiency in ~~his~~ the buyer’s effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

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

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

(1) Where the contract requires payment before inspection non-conformity of the goods

does not excuse the buyer from so making payment unless

(a) the non-conformity appears without inspection; or

(b) despite tender of the required documents the circumstances would justify injunction against honor under this Act (Section 5–109(b)).

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his the buyer's remedies.

### **SECTION 2–513. BUYER’S RIGHT TO INSPECTION OF GOODS.**

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

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

(3) Unless otherwise agreed ~~and subject to the provisions of this Article on C.I.F. contracts (subsection (3) of Section 2–321)~~, the buyer is not entitled to inspect the goods before payment of the price when the contract provides

(a) for delivery "C.O.D." ~~or on other like terms~~ on terms that under applicable course of performance, course of dealing, or usage of trade are interpreted to preclude inspection before payment; or

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

(4) A place ~~or method~~ , 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 ~~or method~~ , method or standard fixed was clearly intended as an indispensable condition failure of which avoids the contract.

### **Preliminary Official Comment**

1. The cross-reference in subsection (3) has been deleted because Section 2-321 no longer exists. The reference to “C.O.D.” in subsection (3)(a) has been deleted for the same reason that Sections 2-319 through 2-324 have been deleted – terms that amount to commercial shorthand will no longer be included in the text of Article 2.

2. Subsection (4) has been amended to provide that, in addition to the place and method of inspection, the parties may agree on the standard of inspection. The change responds to the large number of cases where there is a dispute about the appropriate standard of inspection. The word “compliance” in the second sentence of subsection (4) includes compliance with an agreed standard of inspection.

### **SECTION 2-514. WHEN DOCUMENTS DELIVERABLE ON ACCEPTANCE; WHEN ON PAYMENT.**

Unless otherwise agreed and except as otherwise provided in 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.

### **Preliminary Official Comment**

The exception for contrary provisions in Article 5 is new and makes this section consistent with Section 4-503, which also 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 does not necessarily indicate that the draft should be treated as a time draft.

## **PART 6**

### **BREACH, REPUDIATION AND EXCUSE**

#### **SECTION 2-601. BUYER'S RIGHTS ON IMPROPER DELIVERY.**

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and on shipment by seller (Section 2-504), and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

#### **Preliminary Official Comment**

The cross-reference to Section 2-504, pursuant to which a seller's failure properly to notify a buyer or to make a proper contract of carriage is a ground for rejection only if material delay or loss ensues, has been included for accuracy.

## **SECTION 2–602. MANNER AND EFFECT OF ~~RIGHTFUL~~ REJECTION.**

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (Sections 2–603 and 2–604) and to Section 2-608(4),

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

(b) if the buyer has before rejection taken physical possession of goods in which ~~he~~ the buyer does not have a security interest under the provisions of this Article (subsection (3) of Section 2–711), ~~he~~ the buyer is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on Seller's remedies in general (Section 2–703).

### **Preliminary Official Comment**

1. Elimination of the word “rightful” in the title makes it clear that a buyer can effectively reject goods even though the rejection is wrongful and constitutes a breach. *See* Section 2-703(1). The word “rightful” has also been deleted from the titles to Section 2-603 and 2-604. *See* Official Comments to those sections.

2. Subsection (2) has been amended to make it subject to Section 2-608(4), which deals with the problem of post-rejection or post-revocation use of the goods. *See* Official Comment to Section 2-608.

**SECTION 2-603. MERCHANT BUYER'S DUTIES AS TO RIGHTFULLY  
REJECTED GOODS.**

(1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in ~~his~~ the buyer's possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. ~~Instructions~~ In the case of a rightful rejection instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1) following a rightful rejection, ~~he~~ the buyer is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

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

**Preliminary Official Comment**

Consistent with the approach taken in Section 2-602, the title to this section has been amended to delete the word "rightful." Accordingly, except as otherwise stated in this section its provisions apply to all effective rejections, including rejections that are wrongful. Thus, any merchant buyer whose rejection is effective is subject to the duties set forth in the first sentence of subsection (1), and a merchant buyer that complies with those duties is entitled to the protection provided by subsection (3). However, the right to indemnity for expenses on demand under the second sentence of subsection (1) and the right to reimbursement for expenses and a commission under subsection (2) are limited to buyers whose rejections are rightful.

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

Subject to the provisions of the immediately preceding ~~section on perishables if the seller gives no instructions within a reasonable time after notification of rejection~~ section, the buyer may store the rejected goods for the seller's account or reship them to ~~him~~ the seller or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

**Preliminary Official Comment**

Consistent with the approach taken in Section 2-602, the title to this section has been amended to delete the word “rightful.” Accordingly, its provisions apply to any buyer whose rejection is effective. Note, however, that this section is subject to Section 2-603, and the provisions of that section differentiate between rightful and wrongful rejections.

The reference to “perishables” has been deleted as misleading – Section 2-603 applies to more than just goods that are perishable. The phrase “if the seller gives no instructions within a reasonable time after notification of rejection” has been deleted as superfluous.

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

(1) The buyer's failure to state in connection with rejection a particular defect or in connection with revocation of acceptance a defect that justifies revocation ~~which is ascertainable by reasonable inspection~~ precludes ~~him~~ the buyer from relying on the unstated defect to justify

rejection or ~~to establish breach~~ revocation of acceptance if the defect is ascertainable by reasonable inspection

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

(b) between merchants when the seller has after rejection made a request in ~~writing a record~~ and for a full and final written statement in record form of all defects on which the buyer proposes to rely.

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

### **Preliminary Official Comment**

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

Subsection (1) as revised makes three substantive changes. First, failure to particularize affects only the buyer's right to reject or revoke acceptance, not the buyer's right to establish breach. Waiver of a right to damages for breach because of a failure properly to notify the seller is governed by Section 2-607(3).

Second, subsection (1) now requires the seller to have had a right to cure under Section 2-508 in addition to having the ability to cure. This point was perhaps implicit in the prior provision, but it is now expressly stated to avoid any question of whether this section creates a seller's right to cure independent of the right enumerated in section 2-508. Thus if the defect is

one that could be cured under Section 2-508, the buyer will have waived that defect as a basis for rejecting the goods, or possibly revoking acceptance, if the buyer fails to state the defect with sufficient particularity to facilitate the seller's exercise of its right to cure as provided in Section 2-508.

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

2. When the time for cure is past, subsection (1)(b) makes plain that a merchant seller is entitled upon request to a final statement of objections by a merchant buyer upon which the seller can rely. What is needed is a clear statement to the buyer of exactly what is being sought. A formal demand will be sufficient in the case of a merchant-buyer.

3. Subsection (2) has been revised to make clear that the buyer that makes payment upon presentation of the documents to the buyer may waive defects, but that a person that is not the buyer, such as the issuer of a letter of credit, that pays as against documents is not waiving the buyer's right to assert defects in the documents as against the seller.

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

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

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that ~~he~~ the buyer will take or retain them in spite of their non-conformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) except as otherwise provided in Section 2-608(4), does any act inconsistent with the seller's ownership; ~~but if such the act is wrongful as against the seller it is an acceptance only if ratified by him~~ ratified by the seller.

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

### **Preliminary Official Comment**

The only substantive change is the cross-reference in subsection (1)(c) to Section 2-608(4), which deals with the problem of post-rejection or post-revocation use of the goods. *See* Official Comment to Section 2-608.

## **SECTION 2-607. EFFECT OF ACCEPTANCE; NOTICE OF BREACH; BURDEN OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM OR LITIGATION TO PERSON ANSWERABLE OVER.**

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

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if

made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after ~~he~~ the buyer discovers or should have discovered any breach notify the seller ~~of breach or be barred from any remedy; ; however, failure to give timely notice bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure and~~

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach ~~he~~ the buyer must so notify the seller within a reasonable time after ~~he~~ the buyer receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

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

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

(a) ~~he~~ the buyer may give ~~his seller~~ the other party ~~written~~ notice of the litigation in a record. If the notice states that the ~~seller~~ other party may come in and defend and that if the ~~seller~~ other party does not do so ~~he~~ the other party will be bound in any action against ~~him~~ the other party by ~~his~~ the buyer by any determination of fact common to the two litigations, then unless the ~~seller~~ other party after seasonable receipt of the notice does come in and defend ~~he~~ the

other party is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2–312) the original seller may demand in ~~writing~~ a record that ~~his~~ its buyer turn over to ~~him~~ it control of the litigation including settlement or else be barred from any remedy over and if ~~he~~ it also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after reasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2–312).

### **Preliminary Official Comment**

1. Subsection (3)(a) provides that a failure to give notice to the seller bars the buyer from a remedy for breach of contract only if the seller suffers prejudice due to the failure to notify. *See* Restatement (Second) of Contracts § 229, excusing a condition where the failure is not material and implementation would result in disproportionate forfeiture.

2. The vouching-in procedure in subsection (5) has been expanded to include indemnity actions, and it has been broadened to include any other party that is answerable over, not just the immediate seller. As under former Article 2, all the provisions of this section are subject to any explicit reservation of rights. Section 1-207.

Vouching in does not confer on the notified seller a right to intervene, does not confer jurisdiction of any kind on the court over the seller, and does not create a duty to defend on the part of the seller. Those matters continue to be governed by the applicable rules of civil procedure and substantive law outside this section. Vouching in is based upon the principle that the seller is liable for its contractual obligations regarding the quality or title to the goods which the buyer is being forced to defend.

## **SECTION 2–608. REVOCATION OF ACCEPTANCE IN WHOLE OR IN PART.**

(1) The buyer may revoke ~~his~~ acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to ~~him~~ the buyer if ~~he~~ the buyer has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if ~~his~~ the buyer's acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

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

(3) A buyer ~~who~~ that so revokes has the same rights and duties with regard to the goods involved as if ~~he~~ the buyer had rejected them.

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

(a) 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.

(b) 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 Official Comment**

Subsection (4), which is new, deals with the problem of post-rejection or revocation use of the goods. The courts have developed several alternative approaches. Under original Article 2, a buyer's post-rejection or revocation use of the goods could be treated as an acceptance, thus undoing the rejection or revocation, could be a violation of the buyer's obligation of reasonable care, or could be a reasonable use for which the buyer must compensate the seller. Subsection (4) adopts the third approach. If the buyer's use after an effective rejection or a justified revocation of acceptance is unreasonable under the circumstances, it is inconsistent with the rejection or revocation of acceptance and is wrongful as against the seller. This gives the seller the option of ratifying the use, thereby treating it as an acceptance, or pursuing a non-Code remedy for conversion.

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

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

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

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

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

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

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

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

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

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

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

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

other party impossible.

### **Preliminary Official Comment**

Subsection (2), which is new, provides guidance on when a party can be considered to have repudiated a performance obligation based upon the Restatement (Second) of Contracts § 250 and does not purport to be an exclusive statement of when a repudiation has occurred. As under prior law, repudiation centers upon an overt communication of intention, actions which render performance impossible, or a demonstration of a clear determination not to perform. Repudiation does not require that performance be made utterly impossible, rather, actions which reasonably indicate rejection of the performance obligation suffice. Failure to provide adequate assurance of due performance under Section 2-609 also operates as a repudiation.

### **SECTION 2-611. RETRACTION OF ANTICIPATORY REPUDIATION.**

(1) Until the repudiating party's next performance is due ~~he~~ that party can retract ~~his~~ the repudiation unless the aggrieved party has since the repudiation canceled or materially changed ~~his~~ position or otherwise indicated that ~~he considers~~ the repudiation is final.

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

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

### **SECTION 2-612. "INSTALLMENT CONTRACT"; BREACH.**

(1) An "installment contract" is one which requires or authorizes the delivery of goods in

separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment ~~and cannot be cured~~ to the buyer or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if ~~he~~ the party accepts a non-conforming installment without seasonably notifying of cancellation or if ~~he~~ the party brings an action with respect only to past installments or demands performance as to future installments.

### **Preliminary Official Comment**

Subsection (2) has been amended to make it clear that the buyer's right in the first instance to reject an installment depends upon whether there has been a substantial impairment of the value of the installment to the buyer and not on the seller's ability to cure the nonconformity. The seller can prevent a rightful rejection by giving adequate assurances of cure. Amending subsection (2) by adding the words "to the buyer" makes the standard for rejecting an installment consistent with the standard for revoking acceptance under Section 2-608.

### **SECTION 2-613. CASUALTY TO IDENTIFIED GOODS.**

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, ~~or in a proper case under a "no arrival, no sale" term (Section 2-324)~~ then

(a) if the loss is total the contract is ~~avoided~~ terminated; and

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

### **Preliminary Official Comment**

1. The cross-reference to Section 2-324 has been deleted because the referenced section no longer exists.

2. The change in paragraph (a) from “avoided” to “terminated” preserves pre-termination breaches. *See* Section 2-106(3).

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

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in ~~delivery or non-delivery~~ performance or non-performance in whole or in part by a seller ~~who~~ that complies with paragraphs (b) and (c) is not a breach of ~~his~~ the seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity

to perform, ~~he~~ the seller must allocate production and deliveries among ~~his~~ its customers but may at ~~his~~ its option include regular customers not then under contract as well as ~~his~~ its own requirements for further manufacture. ~~He~~ The seller may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

### **Preliminary Official Comment**

“[D]elivery or non-delivery” in Paragraph (a) has been changed to “performance or non-performance” to take into consideration the broad range of obligations that a seller may have in addition to the obligation to deliver the goods.

### **SECTION 2-616. PROCEDURE ON NOTICE CLAIMING EXCUSE.**

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section ~~he~~ it may by ~~written~~ notification in a record to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2-612), then also as to the whole,

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

(b) modify the contract by agreeing to take ~~his~~ its available quota in substitution.

(2) If after receipt of ~~such~~ notification from the seller the buyer fails ~~so~~ to modify the contract within a reasonable time not exceeding thirty days the contract ~~lapses~~ is terminated with

respect to any ~~deliveries~~ performance affected.

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

### **Preliminary Official Comment**

In subsection (2), the change from “lapses” to “is terminated” conforms with the amendment of Section 2-613(a) and the change from “deliveries” to “performance” conforms with the amendment to Section 2-615(a).

## **PART 7**

### **REMEDIES**

#### **SECTION 2-702. SELLER’S REMEDIES ON DISCOVERY OF BUYER’S INSOLVENCY.**

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

(2) Where the seller discovers that the buyer has received goods on credit while insolvent ~~he~~ the seller may reclaim the goods upon demand made within ~~ten days~~ a reasonable time after the buyer’s receipt of the goods, ~~but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply.~~ Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good-faith purchaser for value under this Article (Section 2-403).

Successful reclamation of goods excludes all other remedies with respect to them.

### **Preliminary Official Comment**

1. The seller's right to withhold the goods or to stop delivery except for cash when the seller discovers the buyer's insolvency is made explicit in subsection (1) regardless of the passage of title, and the concept of stoppage has been extended to include goods in the possession of any bailee that has not yet attorned to the buyer.

2. Subsection (2) takes as its base line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller. The amendments omit the 10-day limitation and the 3-month exception to the 10-day limitation. If the buyer is in bankruptcy at the time of reclamation, the seller will have to comply with Section 546(c) of the Bankruptcy Code of 1978, which includes a 10-day limitation.

3. Because the right of the seller to reclaim goods under this section constitutes preferential treatment as against the buyer's other creditors, subsection (3) provides that such reclamation bars all of the seller's other remedies as to the goods involved.

4. The rights of a seller to reclamation under section 2-702 from its buyer are subordinate to the rights of good faith purchasers from that buyer under Section 2-403. The amendments take no position on the seller's claims to proceeds of the goods. Courts have disagreed on the seller's rights to proceeds of goods that would have been subject to reclamation had they not been resold.

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

~~Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612);~~

~~then also with respect to the whole undelivered balance, the aggrieved seller may~~

- ~~(a) withhold delivery of such goods;~~
- ~~(b) stop delivery by any bailee as hereafter provided (Section 2-705);~~
- ~~(c) proceed under the next section respecting goods still unidentified to the contract;~~
- ~~(d) resell and recover damages as hereafter provided (Section 2-706);~~
- ~~(e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709);~~
- ~~(f) cancel.~~

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

(2) If the buyer is in breach of contract the seller may to the extent provided for by this Act or other law:

- (a) withhold delivery of the goods;
- (b) stop delivery of the goods under Section 2-705;
- (c) proceed under Section 2-704 with respect to goods unidentified to the contract or unfinished;
- (d) reclaim the goods under Section 2-507(2) or 2-702(2);
- (e) require payment directly from the buyer under Section 2-325(c);
- (f) cancel;

- (g) resell and recover damages under Section 2-706;
- (h) recover damages for nonacceptance or repudiation under Section 2-708(1);
- (i) recover lost profits under Section 2-708(2);
- (j) recover the price under Section 2-709;
- (k) obtain specific performance under Section 2-716;
- (l) recover liquidated damages under Section 2-718;
- (m) in other cases, recover damages in any manner that is reasonable under the circumstances.

(3) If a buyer becomes insolvent, the seller may:

- (a) withhold delivery under Section 2-702(1);
- (b) stop delivery of the goods under Section 2-705;
- (c) reclaim the goods under Section 2-702(2).

### **Preliminary Official Comment**

1. This section is a list of the remedies of the seller available under this Article to remedy any breach by the buyer. It also lists the seller's statutory remedies in the event of buyer insolvency. The subsection does not address the extent to which other law provides additional remedies or supplements the statutory remedies in Article 2 ( *see* Section 1-103).

In addition to the statutory remedies, it contemplates agreed upon remedies, *see* subsection (2)(l). It does not address remedies that become available upon demand for adequate assurance under Section 2-609.

This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the

individual case.

2. The buyer's breach which occasions the use of the remedies under this section may involve only one lot or delivery of goods, or may involve all of the goods which are the subject matter of the particular contract. The right of the seller to pursue a remedy as to all the goods when the breach is as to only one or more lots is covered by the section on breach in installment contracts. The present section deals only with remedies available after the goods involved in the breach have been determined by that section.

3. In addition to the typical case of refusal to pay or default in payment, the language in subsection (1), "fails to make a payment due," is intended to cover the dishonor of a check on due presentment, or the non-acceptance of a draft, and the failure to furnish an agreed letter of credit.

4. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1-106).

**SECTION 2-704. SELLER'S RIGHT TO IDENTIFY GOODS TO THE CONTRACT  
NOTWITHSTANDING BREACH OR TO SALVAGE UNFINISHED GOODS.**

(1) An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time ~~he~~ the seller learned of the breach ~~they~~ the goods are in ~~his~~ the seller's possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture

and resell for scrap or salvage value or proceed in any other reasonable manner.

**SECTION 2-705. SELLER'S STOPPAGE OF DELIVERY IN TRANSIT OR OTHERWISE.**

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when ~~he~~ the seller discovers the buyer to be insolvent (Section 2-702) ~~and may stop delivery of carload, truckload, plane load or larger shipments of express or freight~~ or when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods, except a carrier, that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods, the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) A carrier ~~who~~ that has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

### **Preliminary Official Comment**

Subsection (1) has been amended to omit the restriction that prohibited stoppage of less than “carload, truckload, planeload or larger shipments” in certain circumstances. The capacity of carriers to identify shipments as small as a single package makes it feasible to stop small shipments.

### **SECTION 2-706. SELLER’S RESALE INCLUDING CONTRACT FOR RESALE.**

(1) ~~Under the conditions stated in Section 2-703 on seller's remedies~~ In an appropriate case involving breach by the buyer, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the contract price and the resale price ~~and the contract price~~ together with any incidental or consequential damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as

referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of ~~his~~ an intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which 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; and

(c) 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

(d) the seller may buy.

(5) A purchaser ~~who~~ 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.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or a buyer ~~who~~ that has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of ~~his~~ the buyer's security interest, as hereinafter defined (subsection (3) of Section 2-711).

(7) Failure of a seller to resell under this section does not bar the seller from any other remedy.

### **Preliminary Official Comment**

1. **Changes.** Consistent with the revision of Section 2-710, this section now provides for consequential as well as incidental damages. Subsection (7) is new, and parallels the provision for buyer cover in 2-713. Original Section 2-706(1) measures damages by the difference between the resale price and the contract price; amended subsection (1) reverses these terms ("difference between the contract price and the resale price") because the contract price must be the larger number for there to be direct damages.

2. The right of resale under this section arises when a seller reclaims goods under Section 2-507 or a buyer repudiates or makes a wrongful but effective rejection. In addition, there is a right of resale if the buyer unjustifiably attempts to revoke acceptance and the seller takes back the goods. However, the seller may choose to ignore the buyer's unjustifiable attempt to revoke acceptance, in which case the appropriate remedy is an action for the price under Section 2-709. Application of the right of resale to cases of buyer repudiation is supplemented by subsection (2), which authorizes a resale of goods which are not in existence or were not identified to the contract before the breach.

Subsection (1) allows the seller to resell the goods after a buyer's breach of contract if the seller has possession or control of the goods. The seller may have possession or control of the goods at the time of the breach or may have regained possession of the goods upon the buyer's wrongful rejection. If the seller has regained possession of the goods from the buyer pursuant to Article 9, that Article controls the seller's rights of resale.

3. Under this Article the seller resells by authority of law, on the seller's own behalf, for the seller's own benefit and for the purpose of setting the seller's damages. The theory of a seller's agency is thus rejected. The question of whether the title to the goods has or has not passed to the buyer is not relevant for the operation of this section.

4. To recover the damages prescribed in subsection (1) the seller must act "in good faith and in a commercially reasonable manner" in making the resale. If the seller complies with the prescribed standards in making the resale, the seller may recover from the buyer the damages provided for in subsection (1). Evidence of market or current prices at any particular time or place is relevant only for the question of whether the seller acted in a commercially reasonable manner in making the resale.

5. Subsection (2) enables the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances. A seller may sell at a public sale or a private sale as long as the choice is commercially reasonable. A "public" sale is one to which members of the public are admitted. A public sale is usually a sale by auction, but all auctions are not public auctions. A private sale may be effected by an auction or by solicitation and negotiation conducted either directly or through a broker. In choosing between a public and private sale, the character of the goods must be considered and relevant trade practices and usages must be observed. A public sale has further requirements stated in subsection (4).

The purpose of subsection (2) is to enable the seller to dispose of the goods to the best advantage, and therefore the seller is permitted in making the resale to depart from the terms and conditions of the original contract for sale to any extent "commercially reasonable" in the circumstances.

As for the place for resale, the focus is on the commercial reasonableness of the seller's choice as to the place for an advantageous resale. This section rejects the theory that the seller should normally resell at the agreed place for delivery and that a resale elsewhere can be permitted only in exceptional cases.

The time for resale is a reasonable time after the buyer's breach. What is a reasonable time depends on the nature of the goods, the condition of the market and the other circumstances of the case; its length cannot be measured by any legal yardstick or divided into degrees. When a seller contemplating resale receives a demand from the buyer for inspection under Section 2-515, the time for resale may be appropriately lengthened.

6. The provision of subsection (2) that the goods need not be in existence to be resold applies when the buyer is guilty of anticipatory repudiation of a contract for future goods before the goods or some of the goods have come into existence. In this case, the seller may exercise the right of resale and fix the damages by "one or more contracts to sell" the quantity of conforming future goods affected by the repudiation.

The companion provision of subsection (2), that resale may be made although the goods were not identified to the contract prior to the buyer's breach, likewise contemplates an anticipatory repudiation by the buyer, but one occurring after the goods are in existence. The seller may identify goods to the contract after the breach, but must identify the goods being sold as pertaining to the breached contract. If the identified goods conform to the contract, their resale will fix the seller's damages as satisfactorily as if the goods had been identified before the breach.

7. If the resale is to be by private sale, subsection (3) requires that reasonable notification of the seller's intention to resell must be given to the buyer. Notification of the time and place of a private resale is not required.

8. Subsection (4) states requirements for a public resale. The requirements of this subsection are in addition to the requirements of subsection (2), which pertain to all resales under this section.

Paragraph (a) of subsection (4) qualifies the last sentence of subsection (2) with respect to resales of unidentified and future goods at public sale. If conforming goods are in existence the seller may identify them to the contract after the buyer's breach and then resell them at public sale. If the goods have not been identified, however, the seller may resell them at public sale only as "future" goods and only if there is a recognized market for public sale of futures in goods of the kind.

Subsection (4)(b) requires that the seller give the buyer reasonable notice of the time and place of a public resale so that the buyer may have an opportunity to bid or to secure the attendance of other bidders. An exception is made in the case of goods "which are perishable or threaten to decline speedily in value."

Since there would be no reasonable prospect of competitive bidding elsewhere, subsection (4)(b) requires that a public resale "must be made at a usual place or market for public sale if one is reasonably available"; *i.e.*, a place or market which prospective bidders may reasonably be expected to attend. The market may still be "reasonably available" under this subsection, although at a considerable distance from the place where the goods are located. In this case, the expense of transporting the goods for resale is recoverable from the buyer as part of the seller's incidental damages under subsection (1). However, the question of availability is one of commercial reasonableness in the circumstances and if such "usual" place or market is not reasonably available, a duly advertised public resale may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for goods of the kind.

Subsection (4)(c) is designed to permit intelligent bidding. Subsection (4)(d), which permits the seller to bid and, of course, to become the purchaser, benefits the original buyer by tending to increase the resale price and thus decreasing the damages the buyer will have to pay.

9. Subsection (5) allows a purchaser to take the goods free of the rights of the buyer even if the seller has not complied with this section. The policy of resolving any doubts in favor of the resale purchaser operates to the benefit of the buyer by increasing the price the purchaser should be willing to pay.

10. Subsection (6) recognizes that when the seller is entitled to resell under this Article, the goods are the seller's goods and the purpose of resale under this section is to set the seller's damages as against the buyer. However, a person in the position of the seller under Section 2-707 or a buyer asserting a security interest in the goods under Section 2-711(3) has only a limited right in the goods and so must account to the seller for any excess over the limited amount necessary to satisfy that right.

11. Subsection (7) expresses the policy that resale is not a mandatory remedy for the seller. Except as otherwise provided in Section 2-710, the seller is always free to choose between resale and damages for repudiation or nonacceptance under Section 2-708.

Subsection (7) parallels the provision in the cover section, Section 2-712. A seller that fails to comply with the requirements of this section may recover damages under Section 2-708(1). In addition, a seller may recover both incidental and consequential damages under Section 2-710 assuming the seller's damages have not been liquidated under Section 2-718 or limited under Section 2-719.

#### **SECTION 2-707. "PERSON IN THE POSITION OF A SELLER".**

(1) A "person in the position of a seller" includes as against a principal an agent ~~who~~ that has paid or become responsible for the price of goods on behalf of ~~his~~ the principal or anyone ~~who~~ that otherwise holds a security interest or other right in goods similar to that of a seller.

(2) 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)~~ has the same remedies as a seller under this Article.

#### **Preliminary Official Comment**

Subsection (2) has been amended to permit a "person in the position of a seller" to have the full range of remedies available to a seller.

#### **SECTION 2-708. SELLER'S DAMAGES FOR NON-ACCEPTANCE OR**

## REPUDIATION.

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723)

(a) the measure of damages for non-acceptance or repudiation by the buyer is the difference between the contract price and the market price at the time and place for tender and the unpaid contract price together with any incidental or consequential damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach: breach; and

(b) 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 (a), together with any incidental or consequential damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) 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 or consequential damages provided in this Article (Section 2-710), ~~due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.~~

### Preliminary Official Comment

1. **Changes.** This section contains the following changes from original Section 2-708:

a) Consistent with the revision of Section 2-710, this section now provides for consequential as well as incidental damages. Subsection (1) has been divided into two paragraphs. The new paragraph, clarifies the measure of damages in anticipatory repudiation. The same approach has been taken in Section 2-713 on buyer's market-based damage claims.

b) Original Section 2-708(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. An aggrieved buyer that has already paid a portion of the price is entitled to recover it in restitution under Section 2-718.

c) Original Section 2-708(1) measures damages by the difference between the resale price and the contract price. Subsection (1) 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.

d) Subsection (2) now has the following emphasized language added: "provided in subsection (1) *or Section 2-706* is inadequate . . ." Most courts 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 the question. *See, e.g., R.E. Davis Chemical Corp. v. Diasonics, Inc.*, 826 F.2d 678 (7th Cir. 1987). The change makes this result explicit.

e) In subsection (2), the phrases that appeared in original 2-708(2), "due allowance for costs reasonably incurred" and "due credit for payments or proceeds of resale" have been deleted. As has been noted repeatedly (*see, e.g., Harris, A General Theory for Measuring Seller's Damages for Total Breach of Contract*, 60 Mich. L. Rev. 577 (1962)); the "due credit" language makes no sense for a seller that has lost a sale not because it ceased manufacture on a buyer's breach but because it has resold a finished product (that was made for its breaching buyer) to one its existing buyers. When a seller ceases manufacture and resells component parts for scrap or salvage value under Section 2-704(2), a credit for the proceeds is due the buyer to offset the damages under this section. And when a seller incurs costs that are not recovered by scrap or salvage, it must be given an "allowance" for those costs to measure its loss accurately. *See E. Farnsworth Contracts Section 12.9* (3rd ed. 1999)(general measure of damages = loss in value + other loss – cost avoided – loss avoided).

2. The right to damages under this section arises when a seller reclaims goods under Section 2-507 or a buyer repudiates or makes a wrongful but effective rejection. In addition, there is a right to damages under this Section if the buyer unjustifiably attempts to revoke acceptance and the seller takes back the goods. However, if the seller refuses to take the goods back in the face of the buyer's unjustifiable attempt to revoke acceptance, the appropriate remedy is an action for

the price under Section 2-709.

3. The current market price at the time and place for tender is the standard by which damages for nonacceptance are to be determined. The time and place of tender is determined by Section 2-503 on tender of delivery and by the use of common shipping terms. The provisions of Section 2-723 are relevant in determining the market price.

In the event that there is no evidence available of the current market price at the time and place of tender, proof of a substitute market may be made as provided in Section 2-723. Furthermore, the section on the admissibility of market quotations is intended to ease materially the problem of providing competent evidence.

4. Subsection (1)(b) addresses the question of when the market price should be measured in the case of an anticipatory repudiation by the buyer. This section provides that the market price should be measured in a repudiation case at the place of tender under the agreement at a commercially reasonable time after the seller learned of the repudiation, but no later than the time of tender under the agreement. This time approximates the market price at the time the seller would have resold the goods, even though the seller has not done so under Section 2-706. In determining whether the seller has learned of the repudiation, the court should be sensitive to the rights of the aggrieved party when tactical behavior by the buyer has made the determination difficult. *See Louisiana Power and Light v. Allegheny Ludlow*, 517 F. Supp. 1319 (D.C.La. 1981).

In a long term contract the calculation of damages for repudiation will be complex. The court must first determine not only the market but also the contract price at the time of breach. Since contract prices in long term contracts are commonly escalated, the court will have to determine the escalated price at the time the aggrieved party learned of the repudiation. Next the court must determine the quantities contracted for in each of the succeeding years of the contract, apply the single difference between the market price and the escalated contract price (both prices determined at the time the aggrieved party learned of the repudiation) to the contracted quantity for each of those years, and discount those damages for each of the future years to a present value. *See generally* 1 J. White & R. Summers, *Uniform Commercial Code, Practitioner Ed.* 4th 347 (1995).

5. Subsection (2) is used in the cases of uncompleted goods, jobbers or middlemen, and other lost-volume sellers. This remedy is an alternative to the remedy under subsection (1) or Section 2-706 and is available when the damages based upon resale of the goods or market price of the goods does not 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. Since this section deals with the plaintiff's lost profit on a particular sale, and not with cases where a plaintiff is suing for the "lost profits" from an enterprise as consequential damages, it is not necessary to show a history of earnings; all that is necessary is that the plaintiff shows a loss of the marginal benefit to be gained from performance of the broken contract.

To qualify as a "lost volume" seller, the seller needs to show only that it could have supplied both the breaching purchaser and the resale purchaser with the goods. *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985). Where an aggrieved seller has sold goods made for the breaching party to another, courts should consider whether the seller could and would have made a profit on an additional sale in addition to the breached sale. If the Seller could not or would not have profitably made another sale in the absence of breach, there is no lost volume and the buyer would normally be made whole by a recovery of the incidental costs associated with the substitute transaction.

6. Consequential damages are not recoverable under this section unless seller has made reasonable attempts to minimize its damages in good faith, either by resale under Section 2-706 or by other reasonable means.

7. Where an agreement contains provisions for payment of a liquidated sum of money as an alternative to performance, (such take-or-pay contracts), a court must determine whether the agreement is truly for alternative performances or whether the alternatives are performance or liquidated damages. Recovery under this section is available when a buyer breaches an alternative performance contract. When the "alternative" is truly liquidated damages and when that damage provision complies with Section 2-718 recovery, is under the liquidated damage clause. *See Roye Realty & Developing, Inc. v. Arkla, Inc.*, 863 P.2d 1150, 1154, 22 UCC2d 183 (Okla.1993); 5A Corbin, *Corbin on Contracts* § 1082, at 463-64 (1964).

8. In some cases an aggrieved party's resale should prevent that party from recovering the contract market difference under this section. If for example a seller does not lose a sale because of the buyer's breach and resells at a price equal to or in excess of the contract price, the seller should recover no more than incidental and consequential damages. To award an additional amount because the seller could show the market price was higher than the contract price would overcompensate the seller. Of course, a defendant, that wished so to limit a plaintiff seller, would have to prove the resale and show that it had the economic effect of limiting the aggrieved party's actual loss to an amount less than the contract market difference.

Whether a breaching party should be able to deprive an aggrieved party from the use of the contract market formulas on a showing that the aggrieved party's actual damages were less than

the difference between the contract and the market prices has been much disputed in the academic literature and has not received a consistent answer from the courts. *Compare* Nobs Chemical USA Inc., v. Koppers Co. Inc., 616 F.2d 212 (5th. Cir. 1980), reh'g denied 618 F.2d 1389 (5th Cir. 1980)(yes) *and* Allied Cannery & Packers, Inc. v. Victor Packing Co., 162 Cal. App.3d 905, 209 Cal. Rptr. 60 (1984)(yes) *with* Tongish v. Thomas, 840 P.2d 471 (Kan. 1992)(no). Even under the rule of Nobs Chemical, an aggrieved party should not be foreclosed from recovery of the contract market difference simply because that party chooses not to proceed with its transaction after the other party breaches. *Trans World Metals, Inc. v. Southwire Co.*, 769 F.2d 902 ( 2d Cir. 1985). In most cases it will be difficult for a defendant buyer to show that an aggrieved seller's resale should foreclose recovery of the contract market difference under 2-708(1) or lost profit under 2-708(2). Since most commercial sellers would have made at least one additional sale had there had been no breach (the sale to the breaching buyer and the sale to the third party), the resale does not make the seller whole. Sometimes it may even be appropriate for a court to allow an aggrieved party to use a contract market formula in lieu of proof of its actual loss to preserve its business secrets. *See* Ben-Shahar and Bernstein, *The Secrecy Interest in Contract Law*, 109 Yale L. J. 1885 (2000).

#### **SECTION 2-709. ACTION FOR THE PRICE.**

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental or consequential damages under the next section, the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of 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.

(2) Where the seller sues for the price ~~he~~ the seller must hold for the buyer any goods which have been identified to the contract and are still in ~~his~~ the seller's control except that if resale becomes possible ~~he~~ the seller may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the

judgment entitles ~~him~~ the buyer to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610), a seller ~~who~~ that is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

### **Preliminary Official Comment**

Subsection (1) has been amended to permit recovery of consequential damages as provided in amended Section 2-710.

### **SECTION 2-710. SELLER'S INCIDENTAL AND CONSEQUENTIAL DAMAGES.**

(1) Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

(2) Consequential damages resulting from the buyer's breach include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting had reason to know and which could not reasonably be prevented by resale or otherwise.

(3) In a consumer contract, a seller may not recover consequential damages from a consumer.

### **Preliminary Official Comment**

1. Subsection (2), which permits an aggrieved seller to recover consequential damages, is based on Section 2-715(2)(a); that is, the loss must result from general or particular requirements of the seller of which the buyer had reason to know at the time of contracting. As with Section 2-715, the “tacit agreement” test is rejected and the buyer is not liable for losses that could have been mitigated.

Sellers rarely suffer compensable consequential damages. A buyer’s usual default is failure to pay. In normal circumstances the disappointed seller will be able to sell to another, borrow to replace the breaching buyer’s promised payment, or otherwise adjust its affairs to avoid consequential loss. *cf.* *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1368 (7<sup>th</sup> Cir. 1985).

2. Subsection (3) precludes seller’s from recovering consequential damages from consumers. This provision is nonwaivable.

## **SECTION 2-711. BUYER’S REMEDIES IN GENERAL; BUYER’S SECURITY**

### **INTEREST IN REJECTED GOODS.**

~~(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid~~

~~(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or~~

~~(b) recover damages for non-delivery as provided in this Article (Section 2-713).~~

~~(2) Where the seller fails to deliver or repudiates the buyer may also~~

~~(a) if the goods have been identified recover them as provided in this Article (Section~~

~~2-502); or~~

~~(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716):~~

(1) A breach of contract by the seller includes the seller's wrongful failure to deliver or to perform a contractual obligation, making of a nonconforming tender of delivery or performance, or repudiation.

(2) If the seller is in breach of contract under subsection (1) the buyer may to the extent provided for by this Act or other law:

(a) in the case of rightful cancellation, rightful rejection or justifiable revocation of acceptance recover so much of the price as has been paid;

(b) deduct damages from any part of the price still due under Section 2-717;

(c) cancel;

(d) cover and have damages under Section 2-712 as to all goods affected whether or not they have been identified to the contract;

(e) recover damages for non-delivery or repudiation under Section 2-713;

(f) recover damages for breach with regard to accepted goods or breach with regard to a remedial promise under Section 2-714;

(g) recover identified goods under Section 2-502;

(h) obtain specific performance or obtain the goods by replevin or the like under Section 2-716;

(i) recover liquidated damages under Section 2-718;

(j) in other cases, recover damages in any manner that is reasonable under the circumstances.

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in ~~his~~ the buyer's possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

### **Preliminary Official Comment**

1. Despite the seller's breach, proper tender of delivery under the section on cure of improper tender or replacement can effectively preclude the buyer's remedies under this section, except for any delay involved.

2. To make it clear in subsection (3) that the buyer may hold and resell rejected goods if the buyer has paid a part of the price or incurred expenses of the type specified. "Paid" as used here includes acceptance of a draft or other time negotiable instrument or the signing of a negotiable note. The buyer's freedom of resale is coextensive with that of a seller under this Article except that the buyer may not keep any profit resulting from the resale and is limited to retaining only the amount of the price paid and the costs involved in the inspection and handing of the goods. The buyer's security interest in the goods is intended to be limited to the items listed in subsection (c), and the buyer is not permitted to retain such funds as the buyer might believe adequate for his damages. The buyer's right to cover, or to have damages for non-delivery, is not impaired by the buyer's exercise of the right of resale.

3. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1-106).

**SECTION 2-712. "COVER"; BUYER'S PROCUREMENT OF SUBSTITUTE GOODS.**

(1) ~~After a breach within the preceding section~~ If the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar ~~him~~ the buyer from any other remedy.

**Preliminary Official Comment**

1. **Changes.** Original Section 2-712(1) refers to a seller's "breach" as the basis for the remedy in this section. The language has been changed to make it clear that there is a right to cover "[i]f the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or justifiably revokes acceptance."

2. The purpose of this section is to provide the buyer with a remedy to enable the buyer to obtain the goods the buyer is entitled to under the contract with the seller. This remedy is the buyer's equivalent of the seller's right to resell.

The buyer is entitled to this remedy if the seller wrongfully fails to deliver the goods or repudiates the contract or if the buyer rightfully rejects or justifiably revokes acceptance. Cover is not available under this section if the buyer accepts the goods and does not rightfully revoke the acceptance.

3. Subsection (2) allows a buyer that has appropriately covered to measure damages by the difference between the cover price and the contract price. In addition, the buyer is entitled to

incidental damages, and when appropriate, consequential damages under Section 2-715.

4. The definition of "cover" is necessarily flexible, and therefore cover includes a series of contracts or sales as well as a single contract or sale, goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances, and contracts on credit or delivery terms differing from the contract in breach but reasonable under the circumstances. The test of proper cover is whether at the time and place of cover the buyer acted in good faith and in a reasonable manner. It is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.

5. The requirement in subsection (1) that the buyer must cover "without unreasonable delay" is not intended to limit the time necessary for the buyer to examine reasonable options and decide how best to effect cover.

6. Subsection (3) expresses the policy that cover is not a mandatory remedy for the buyer. The buyer is always free to choose between cover and damages for nondelivery under Section 2-713. However, this subsection must be read in conjunction with the section 2-715(2)(a), which limits the recovery of consequential damages to those damages that could not reasonably be prevented by cover. Moreover, the operation of Section 2-716(3) on replevin and the like must be considered because the inability to cover is made an express condition to the right of the buyer to replevy the goods.

#### **SECTION 2-713. BUYER'S DAMAGES FOR NON-DELIVERY OR REPUDIATION.**

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), if the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or justifiably revokes acceptance

(a) the measure of damages for non-delivery or repudiation in the case of wrongful failure to deliver by the seller or rightful rejection or justifiable revocation of acceptance by the buyer is the difference between the market price at the time when the buyer learned of the breach for tender under the contract and the contract price together with any incidental and or

consequential damages provided in this Article (Section 2–715), but less expenses saved in consequence of the seller's ~~breach~~ breach; and

(b) the measure of damages for repudiation by the seller is the difference between the market price at the expiration of a commercially reasonable time after the buyer learned of the repudiation, but no later than the time stated in paragraph (a), and the contract price together with any incidental or consequential damages provided in this Article (Section 2–715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

### **Preliminary Official Comment**

1. **Changes.** This section now provides a rule for anticipatory repudiation cases. This is consistent with the new rule for sellers in Section 2-708(1)(b). In a case not involving repudiation, the buyer's damages will be based on the market price at the time for tender under the agreement. This changes the former rule where the time for measuring damages was at the time the buyer learned of the breach.

2. This section provides for a buyer's expectancy damages when the seller wrongfully fails to deliver the goods or repudiates the contract or the buyer rightfully rejects or justifiably revokes acceptance. This section provides an alternative measure of damages to the cover remedy provided for in Section 2-712.

3. Under subsection (1)(a), the measure of damages for a wrongful failure to deliver the goods by the seller or a rightful rejection or justifiable revocation of acceptance by the buyer is the difference between the market price at the time for tender under the agreement and the contract price.

4. Subsection (2)(b) addresses the question when the market price should be measured in the case of an anticipatory repudiation by the seller. The market price should be measured in a repudiation case at the place where the buyer would have covered at a commercially reasonable time after the buyer learned of the repudiation, but no later than the time of tender under the

agreement. This time approximates the market price at the time the buyer would have covered even though the buyer has not done so under Section 2-712. This subsection is designed to put the buyer in the position the buyer would have been in if the seller had performed by approximating the harm the buyer has suffered without allowing the buyer an unreasonable time to speculate on the market at the seller's expense.

5. The market or current price to be used in comparison with the contract price under this section is the price for goods of the same kind and in the same branch of trade.

When the current market price under this section is difficult to prove, Section 2-723 on determination and proof of market price is available to permit a showing of a comparable market price. When no market price is available, evidence of spot sale prices may be used to determine damages under this section. When the unavailability of a market price is caused by a scarcity of goods of the type involved, a good case may be made for specific performance under Section 2-716. *See* the Official Comment to that Section. For a discussion of the issues associated with long term contracts see the comments to 2-708.

6. In addition to the damages provided in this section, the buyer is entitled to incidental and consequential damages under Section 2-715.

7. A buyer that has covered may not recover the contract market difference under this section. If for example a construction company that intended to buy only one bulldozer covered by buying a bulldozer from a third party at or below the contract price after a seller's breach, the buyer should recover no more than incidental and consequential damages. To award an additional amount because the buyer could show the market price was higher than the contract price would put the buyer in a better position than performance would have. Of course, the seller would bear the burden of proving that cover had the economic effect of limiting the buyer's actual loss to an amount less than the contract market difference.

An apparent cover, which does not in fact replace the goods contracted for, should not foreclose the use of the contract market measure of damages. If, for example, the buyer intended to buy an undetermined number of bulldozers, the purchase of a bulldozer from a third party after breach would not necessarily reduce the buyer's damages. If the breaching seller cannot prove that the new purchase is in fact a replacement for the one not delivered under the contract, the "cover" purchase should not foreclose the buyer's recovery under 2-713 of the market contract difference.

For a discussion of the question when an aggrieved party should be foreclosed from a contract market recover because of its cover or resale, *see* the Official Comments to 2-708.

**SECTION 2-714. BUYER'S DAMAGES FOR BREACH IN REGARD TO  
ACCEPTED GOODS.**

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) ~~he~~ the buyer may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

**SECTION 2-716. ~~BUYER'S RIGHT TO SPECIFIC PERFORMANCE OR;~~ BUYER'S  
RIGHT REPLEVIN.**

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances. In a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy. However, even if the parties agree to specific performance, specific performance may not be decreed if the breaching party's sole remaining contractual obligation is the payment of money.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin or the like for goods identified to the contract if after reasonable effort ~~he~~ the buyer is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

(4) The buyer's right under subsection (3) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

### **Preliminary Official Comment**

1. **Changes:** This section contains the following changes from original Section 2-716:

a) The caption has been amended to make it clear that either party may entitled to specific performance.

b) The second sentence of subsection (1) explicitly permits parties to bind themselves to specific performance even where it would not otherwise be available.

c) In subsection (3), the phrase “or the like” has been added after “replevin” to reflect the fact that under the governing state law the right may be called “detinue,” “sequestration,” “claim and delivery,” or something else.

d) Subsection (4) is new and corresponds with Section 2-502(b), which in turn is derived from (but broader than) the conforming amendments to Article 9. It provides a vesting rule for cases in which there is a right of replevin.

2. Uniqueness should be determined in light of the total circumstances surrounding the contract and is not limited to goods identified when the contract is formed. The typical specific performance situation today involves an output or requirements contract rather than a contract for the sale of an heirloom or priceless work of art. A buyer's inability to cover is evidence of “other proper circumstances.”

3. Subsection (1) provides that a court may decree specific performance if the parties have agreed to that remedy; the parties' agreement to specific performance can be enforced even if legal remedies are entirely adequate. Even in a commercial contract, the third sentence of subsection (1) prevents the aggrieved party from obtaining specific performance if the only obligation of the party in breach is the payment of money. Whether a buyer is obligated to pay the price is determined by Section 2-709, not by this section.

Nothing in this section constrains the court's exercise of its equitable discretion in deciding whether to enter a decree for specific performance or in determining the conditions or terms of such a decree. This section assumes that the decree for specific performance will be conditioned on a tender of full performance by the party that is seeking the remedy.

4. The legal remedy of replevin or the like is also available for cases in which cover is unavailable and the goods have been identified to the contract. This is in addition to the prepaying buyer's right to recover identified goods upon the seller's insolvency or, when the goods have been bought for a personal, family, or household purpose, upon the seller's repudiation or failure to deliver (Section 2-502). If a negotiable document of title is outstanding, the buyer's right of replevin relates to the document and does not directly relate to the goods. See Article 7, especially Section 7-602.

5. Subsection (4) provides that a buyer's right to replevin or the like vests upon the buyer's acquisition of a special property in the goods (Section 2-501) even if the seller has not at that time repudiated or failed to make a required delivery. This vesting 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.

#### **SECTION 2-717. DEDUCTION OF DAMAGES FROM THE PRICE.**

The buyer on notifying the seller of his an intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

## SECTION 2-718. LIQUIDATION OR LIMITATION OF DAMAGES; DEPOSITS.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach and, in a consumer contract, the difficulties of proof of loss, loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. ~~A term fixing unreasonably large liquidated damages is void as a penalty.~~ Section 2-719 determines the enforceability of a term that limits but does not liquidate damages.

(2) Where the seller justifiably withholds delivery of goods or stops performance because of the buyer's breach or insolvency, the buyer is entitled to restitution of any amount by which the sum of ~~his~~ the buyer's payments exceeds (a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), ~~or (b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.~~

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller

has notice of the buyer's breach before reselling goods received in part performance, ~~his~~ the resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

### **Preliminary Official Comment**

1. **Changes:** This section contains the following changes from original Section 2-718:

a) In subsection (a), the requirements that the party seeking to enforce a term liquidating damages demonstrate “difficulties of proof of loss” and “inconvenience or nonfeasibility of otherwise obtaining an adequate remedy” have been eliminated in commercial contracts.

b) In subsection (a), the sentence “[a] term fixing unreasonably large liquidated damages is void as a penalty” has been eliminated as unnecessary and capable of causing confusion.

c) The last sentence of subsection (a) has been added to clarify the relationship between this section and Section 2-719.

d) In subsection (b), the circumstances in which restitution is available have been expanded to cover any situation where the seller stops performance on account of the buyer’s breach or insolvency.

e) In subsection (b), the buyer’s right to restitution is not limited by a statutory liquidated damages provision.

2. A valid liquidated damages term may liquidate the amount of all damages, including consequential and incidental damages. As under former law, liquidated damages clauses should be enforced if the amount is reasonable in light of the factors provided in subsection (a). This section thus respects the parties’ ability to contract for damages while providing some control by requiring reasonableness based upon the circumstances of the particular case.

Under original Section 2-718, a party seeking to enforce a liquidated damages term had to demonstrate the difficulty of proving the loss and the inconvenience or nonfeasibility of obtaining an adequate remedy. These tests have been eliminated in commercial contracts but retained in consumer contracts.

3. The sentence from original Section 2-718(1) stating that an unreasonably large liquidated damages term is void as a penalty has been eliminated as unnecessary and misleading. If the liquidated damages are reasonable in light of the test of subsection (a), the term should be enforced, rendering the penalty language of the former law redundant. The sentence is also misleading because of its emphasis on unreasonably large damages. A liquidated damages term providing for damages that are unreasonably small under the test of subsection (a) is likewise unenforceable.

4. If a liquidated damages term is unenforceable, the remedies of this Article become available to the aggrieved party.

5. Under subsection (b), only the buyer's payments that are more than the amount of an enforceable liquidated damages term need be returned to the buyer. If the buyer has made payment by virtue of a trade-in or other goods deposited with the seller, subsection (d) provides that the reasonable value of such goods or their resale price should be used to determine what the buyer has paid, not the value the seller allowed the buyer in the trade-in. To assure that the seller obtains a reasonable price for such goods, the seller must comply with the resale provisions of Section 2-706 if the seller knows of the buyer's breach before it has otherwise resold them.

Subsection (b) expands the situations in which restitution is available. Original Section 2-718(2) was limited to circumstances in which the seller justifiably withheld delivery because of the buyer's breach. Subsection (b) extends the right to situations where the seller stops performance because of the buyer's breach or insolvency.

6. Subsection (c) continues the rule from former law without change. If there is no enforceable liquidated damages term, the buyer is entitled to restitution under subsection (b) subject to a set off of the seller for any damages to which it is otherwise entitled to under this Article.

#### **SECTION 2-722. WHO CAN SUE THIRD PARTIES FOR INJURY TO GOODS.**

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

(a) a right of action against the third party is in either party to the contract for sale ~~who~~ that has title to or a security interest or a special property or an insurable interest in the goods;

and if the goods have been destroyed or converted a right of action is also in the party ~~who~~ that either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, ~~his~~ the party plaintiff's suit or settlement is, subject to ~~his~~ its own interest, as a fiduciary for the other party to the contract;

(c) either party may with the consent of the other sue for the benefit of ~~whom~~ which it may concern.

#### **SECTION 2-723. PROOF OF MARKET: TIME AND PLACE.**

~~(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 or Section 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.~~

(2) (1) If evidence of a price prevailing at the times or places 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 which 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.

~~(3)~~ (2) 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 he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

### **Preliminary Official Comment**

Subsection (1) has been deleted because Sections 2-708(1)(b) and 2-713(1)(b) now provide the rule for the proper measure of damages in cases of repudiation.

**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 ~~or periodicals~~ periodicals or other means of communication in of 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.

### **Preliminary Official Comment**

The addition of “other means of communication” reflects the common use of non-paper media.

### **SECTION 2-725. STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE.**

~~(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.~~

~~(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made,~~

~~except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.~~

(1) Except as otherwise provided in this section, an action for breach of any contract for sale must be commenced within the later of four years after the right of action has accrued under subsection (2) or (3) or one year after the breach was or should have been discovered, but no longer than five years after the right of action accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it; however, in a consumer contract, the period of limitation may not be reduced.

(2) Except as otherwise provided in subsection (3), the following rules apply:

(a) Except as otherwise provided in this subsection, a right of action for breach of a contract accrues when the breach occurs, even if the aggrieved party did not have knowledge of the breach.

(b) For breach of a contract by repudiation, a right of action accrues at the earlier of when the aggrieved party elects to treat the repudiation as a breach or when a commercially reasonable time for awaiting performance has expired.

(c) For breach of a remedial promise, a right of action accrues when the remedial promise is not performed when due.

(d) In an action by a buyer against a person that is answerable over to the buyer for a claim asserted against the buyer, the buyer's right of action against the person answerable over accrues at the time the claim was originally asserted against the buyer.

(3) If a breach of a warranty arising under Section 2-312, 2-313(2), 2-314, or 2-315, or a breach of an obligation other than a remedial promise arising under Section 2-313A or 2-313B, is claimed the following rules apply:

(a) Except as otherwise provided in paragraph (c), a right of action for breach of a warranty arising under Section 2-313(2), 2-314 or 2-315 accrues when the seller has tendered delivery to the immediate buyer, as defined in Section 2-313, and has completed performance of any agreed installation or assembly of the goods.

(b) Except as otherwise provided in paragraph (c), a right of action for breach of an obligation other than a remedial promise arising under Section 2-313A or 2-313B accrues when the remote purchaser, as defined in sections 2-313A and 2-313B, receives the goods.

(c) Where a warranty arising under Section 2-313(2) or an obligation other than a remedial promise arising under 2-313A or 2-313B explicitly extends to future performance of the goods and discovery of the breach must await the time for performance the right of action accrues when the immediate buyer as defined in Section 2-313 or the remote purchaser as defined in Sections 2-313A and 2-313B discovers or should have discovered the breach.

(d) A right of action for breach of warranty arising under Section 2-312 accrues when the aggrieved party discovers or should have discovered the breach. However, an action for breach of the warranty of non-infringement may not be commenced more than six years after tender of delivery of the goods to the aggrieved party.

(3) (4) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action

may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

~~(4)~~ (5) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

### **Preliminary Official Comment**

1. Original Section 2-725 has been changed as follows: 1) The basic four-year limitation period in subsection (1) has been supplemented by a discovery rule that permits a cause of action to be brought within one year after the breach was or should have been discovered, although no later than five years after the time the cause would otherwise have accrued; 2) The applicable limitation period cannot be reduced in a consumer contract (subsection (1)); 3) Subsection (2) contains specific rules for cases of repudiation, breach of a remedial promise, and actions where another person is answerable over; 4) Subsection (3)(a) provides that the limitation period for breach of warranty accrues when tender of delivery has occurred and the seller has completed any agreed installation or assembly of the goods; 5) Subsection (3) contains specific rules for breach of an obligation arising under Section 2-313A or 2-313B, for breach of a warranty arising under Section 2-312, and for breach of a warranty against infringement.

2. Subsection (1) continues the four-year limitation period of original Article 2 but provides for a possible one-year extension to accommodate a discovery of the breach late in the four year period after accrual. The four year period under this Article is shorter than many other statutes of limitation for breach of contract and provides a period which is appropriate given the nature of the contracts under this Article and modern business practices. As under original Article 2, the period of limitation can be reduced to one year by an agreement in a commercial contract, but no reduction is permitted in consumer contracts.

3. Subsections (2) and (3) provide rules for accrual of the various types of action that this Article allows. Certainty of commercial relationships is advanced when the rules are clearly set forth. Subsection (2) deals with accrual rules for actions other than for breach of a warranty, including actions based on repudiation or breach of a remedial promise and actions where another person is answerable over. Subsection (3) deals with the accrual rules for the various claims based on a warranty, including a warranty of title and a warranty against infringement, or on an obligation other than a remedial promise arising under Section 2-313A or 2-313B.

Subsection (2)(a) states the general rule from prior law that a right of action for breach of contract accrues when the breach occurs without regard to the aggrieved party's knowledge of the breach. This general rule is then subject to the three more explicit rules in subsection (2) and to the rules for breach of warranty stated in subsection (3).

Subsection (2)(b) provides an explicit rule about repudiation cases. In a repudiation, the aggrieved party may await performance for a commercially reasonable time or resort to any remedy for breach. Section 2-610. The accrual rule for breach of contract in a repudiation case is keyed to the earlier of those two time periods.

Subsection (2)(c) provides that a cause of action for breach of a remedial promise accrues when the promise is not performed at the time performance is due.

Subsection (2)(d) addresses the problem that has arisen in the cases when an intermediary party is sued for a breach of obligation for which its seller or another person is answerable over, but the limitations period in the upstream lawsuit has already expired. This subsection allows a party four years, or if reduced in the agreement, not less than one year, from when the claim is originally asserted against the buyer for the buyer to sue the person that is answerable over. Whether a party is in fact answerable over to the buyer is not addressed in this section.

4. Subsection (3) addresses the accrual rules for breach of a warranty arising under Section 2-312, 2-313(2), 2-314 or 2-315, or of an obligation other than a remedial promise arising under Section 2-313A or 2-313B. The subsection does not apply to remedial promises arising under Section 2-313(4); all remedial promises are governed by subsection 2(c). The accrual rules explicitly incorporate the definitions of "immediate buyer" and "remote purchaser" in Sections 2-313, 2-313A and 2-313B. Any cause of action brought by another person to which the warranty or obligation extends is derivative in nature. Thus, the time period applicable to the immediate buyer or remote purchaser governs even if the action is brought by a person to which the warranty or obligation extends under Section 2-318.

Subsection (3)(a) continues the general rule that an action for breach of warranty accrues in the case of an express or implied warranty to an immediate buyer upon completion of tender of delivery of nonconforming goods to the immediate buyer but makes explicit that accrual is deferred until the completion of any installation or assembly that the seller has agreed to undertake. This extension of the time of accrual in the case of installation or assembly applies only in the case of the seller promising to install or assemble and not in the case of a third party, independent of the seller, undertaking that action.

Subsection (3)(b) addresses the accrual of a cause of action for breach of an obligation other than a remedial promise arising under Section 2-313A or 2-313B. In these cases, the cause of

action accrues when the remote purchaser (as defined in those sections) receives the goods. This accrual rule balances the rights of the remote buyer or remote lessee to be able to have a cause of action based upon the warranty obligation the seller has created against the rights of the seller to have some limit on the length of time the seller is liable.

Both of these accrual rules are subject to the exception in subsection (3)(c) for a warranty or obligation that explicitly extends to the future performance of the goods and discovery of the breach must await the time for performance. In this case, the cause of action does not accrue until the buyer or remote purchaser discovers or should have discovered the breach.

With regard to a warranty of title or a warranty of non-infringement under Section 2-312, subsection (3)(d) provides that a cause of action accrues when the aggrieved party discovers or should have discovered the breach. In a typical case, the aggrieved party will not discover the breach until it is sued by a party asserting title to the goods or an infringement, an event which could be many years after the buyer acquired the goods. The accrual rule allows the aggrieved party appropriate leeway to then bring a claim against the person that made the warranty. In recognition of a need to have a time of repose in an infringement case, a party may not bring an action based upon a warranty of non-infringement more than six years after tender of delivery.

5. Subsection (4) states the saving provision included in many state statutes and permits an additional short period for bringing new actions where suits begun within the four year period have been terminated so as to leave a remedy still available for the same breach.

6. Subsection (5) makes it clear that this Article does not purport to alter or modify in any respect the law on tolling of the Statute of Limitations as it now prevails in the various jurisdictions.

## **PART 8**

### **TRANSITION PROVISIONS**

#### **SECTION 2-801. EFFECTIVE DATE.**

This [Act] shall become effective on \_\_\_\_\_, 20 .

**SECTION 2-802. AMENDMENT OF EXISTING ARTICLE 2.**

This [Act] amends [insert citation to existing Article 2].

**SECTION 2-803. APPLICABILITY.**

This [Act] applies to a transaction within its scope that is entered into on or after the effective date of this [Act]. This [Act] does not apply to a transaction that is entered into before the effective date of this [Act] even if the transaction would be subject to this [Act] if it had been entered into after the effective date of this [Act]. This [Act] does not apply to a cause of action that has accrued before the effective date of this [Act]. Section 2-313B of this [Act] does not apply to an advertisement of similar communication made before the effective date of this [Act].

**SECTION 2-804. SAVINGS CLAUSE.**

A transaction entered into before the effective date of this [Act] and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this [Act] as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.