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A HISTORY AND PERSPECTIVE OF REVISED ARTICLE 2: THE NEVER ENDING SAGA OF A SEARCH FOR BALANCE

*Linda J. Rusch**

I. INTRODUCTION

THE road to revision of Article 2 of the Uniform Commercial Code (UCC) continues to be long and arduous. In 1988, a study group appointed by the Permanent Editorial Board (PEB) of the UCC started to consider whether Article 2 should be revised. That study group issued both a preliminary and a final report in 1991 recommending revision.¹ The PEB authorized the appointment of a drafting committee and a reporter² in 1991, and from that time until May 1999, the Drafting Committee met several times a year.

The drafting committee is composed of members of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI), partners in the revision of the UCC. Drafting committee meetings were open to the public. At the Article 2 meetings, advisors from the American Bar Association³ (ABA) and various observers representing consumer interests and affected industries were present and able to speak freely about revisions proposed or make their own proposals for revisions in the drafts.⁴ Unlike a legislative com-

* Professor of Law, Hamline University School of Law; J.D. 1983 University of Iowa College of Law. From December 1996 until my resignation on July 26, 1999, I served as the Associate Reporter to the Article 2 Drafting Committee. Prior to that time, I attended Article 2 Drafting Committee meetings as an observer and worked with the ABA Subcommittee on Sales providing comments on drafts and suggestions. This article reflects my own views and not the views of the ALI, NCCUSL, the ABA, the drafting committee, or the reporter, Professor Richard E. Speidel. My thanks to D. Benjamin Beard, William H. Henning, Christina L. Kunz, and Roy Ryden Anderson for their helpful comments.

1. See Task Force, A.B.A. Comm. on the Unif. Commercial Code, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981 (1991); Study Group, Permanent Editorial Bd. of the Unif. Commercial Code, *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (1991).

2. Professor Richard E. Speidel served as the chair for the PEB Study group and was reporter for the drafting committee from its inception until July 26, 1999, when he resigned.

3. The ABA eventually appointed three advisors to the project.

4. The recent drafts of Revised Article 2 are on the website maintained by the University of Pennsylvania at <http://www.law.upenn.edu/library/ulc/ulc.htm>.

mittee where testimony is taken in a formal process, the drafting committee meetings consisted of a free-flow discussion of issues raised. Drafting committee meetings throughout the process have been well attended.⁵ In addition, people who were interested in the revision wrote letters expressing viewpoints and making suggestions for the draft. Along the way, the observers and advisors have made many comments that have improved the quality of Revised Article 2. The receptiveness of the drafting committee to suggestions by people not on the drafting committee was remarkable. Over the course of the process, the committee made many changes to the drafts in specific response to suggestions from the observers and advisors.

Throughout the years, the drafts were also presented to ALI consultative groups, the ALI council, the ALI membership, and the NCCUSL membership. In December 1998, the ALI council recommended that the draft be submitted to its membership for approval and appointed an ad hoc committee to monitor developments. The Revised Article 2 received final approval from the ALI membership in May 1999 and was submitted to NCCUSL at its annual meeting in July 1999 for final approval.⁶ At that meeting, after two sessions of reading revised Article 2, the NCCUSL president, Gene LeBrun, announced that no further reading of revised Article 2 and Article 2A to the Committee of the Whole would occur and that those acts would be read the following year due to a very full agenda. This announcement came as a surprise to the Committee of the Whole, which had read approximately half of the draft at that point. The drafting committee was not informed of the decision to defer the remainder of the reading prior to the announcement to the Conference. In discussions between the Conference leadership and the members of the drafting committee after the announcement, the committee was informed that the deferment occurred, in large part, because of fear of continued industry opposition to the draft and the perceived threat of nonuniform enactment of the revised article.

In spite of the give and take of the drafting process and constant attempts to achieve a balanced consensus, some observers were not satisfied with what was in the Revised Article 2 July 1999 draft. Certain segments of the observers felt that Revised Article 2 was not an improvement over the current statute and should not be enacted. Others maintain that it improved the current statute by resolving litigated issues or adapting sales law to current times. Resistance to revision of the statute is perhaps best exemplified by what happened at the NCCUSL annual meeting in 1997 and again in 1999. In 1997, certain revisions in the draft,

5. Drafting committee meetings ran from Friday morning through Sunday noon. Typically, the committee met three times a year. Attendance ranged from approximately 40 people to over 100 people at each drafting committee meeting.

6. For a general description of the process for revising articles of the UCC, see Fred H. Miller, *Realism not Idealism in Uniform Laws - Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 712-16 (1998).

particularly those aimed at consumer protection principles,⁷ drew tremendous fire as being unwarranted, creating such heat that the project was put on hold to provide a cooling-off period. The drafting committee did not meet again until March 1998, when it proceeded to deal directly with those issues that raised such vehement concern. During 1998 and 1999, industry and consumer representatives continued to attend meetings, and the drafting committee began to crystallize its approaches to various difficult issues. By far the bulk of time in the last year was spent on issues in the warranty area and the issue of consumer protection, particularly in standard-form contracting. The consumer protection provisions in the July 1999 draft continued to be attacked by industry representatives, again resulting in the Conference leadership's decision to defer final approval at the NCCUSL annual meeting, despite representations to the ALI membership that further delay would not help. To quote Fred Miller, Executive Director of NCCUSL at the 1999 ALI Annual Meeting:

I would make two observations. One, I have been a commissioner for over 25 years. I have taught commercial law for that same period of time. If you take an objective look at the Revised Article 2 you will find there are many benefits in there that will reduce litigation costs, prevent litigation, answer questions. It is a quality product from the standpoint of substance. It is also true that I think we have reached the best balance we can. If you are going to delay this for a year, yes, you can upset the balance one way or the other and that's going to have an impact on enactment. I think it's time to let it go. If you want to kill it, kill it, I agree with Mr. Langrock, but do not delay it, it isn't going to get better.⁸

Gene LeBrun, President of NCCUSL also stated at the 1999 ALI Annual Meeting:

As I pointed out earlier, this project has been around between NCCUSL and the ALI for 12 years, the Study Committee and then, four years of Study Committee, eight years in the drafting process. It's had innumerable Drafting Committee sessions, it's been before the ALI Council, it's been before this membership before, it has been before the body of NCCUSL, we have had four Drafting Committee meetings in the last year. All of the issues which have been

7. For example, in the July 1997 draft, section 2-206 provided:

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

(b) Before deciding whether to exclude a term under subsection (a), the court, on motion of a party or its own motion, after affording the parties a reasonable and expeditious opportunity to present evidence on whether the term should be included or excluded from the contract, shall decide whether the contract should be interpreted to exclude the term.

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

U.C.C. § 2-206 (Proposed Draft July 1997).

8. ALI Annual Meeting 1999, unedited transcript, pp. 904-05.

discussed here have been discussed many, many times on the floor of the conference and particularly with the Drafting Committee. I don't think that further delay is going to change the matter. We have to bite the bullet at some point in time.

It's been discussed about the need for a more ongoing process and keeping the code up to date. The Permanent Editorial Board has discussed that. We in NCCUSL have discussed that. I think that's important. Whether you adopt this draft or some other draft, not all 50 states are going to enact it at the same time, so if you're going to move forward you are going to have some nonuniformity for some period of time, but I think, as Geoff Hazard put in the Foreword to the Comment, he says "Further consideration of the controversial issues by the Drafting Committee is unlikely to produce closer concord as to what the text should say. Certainly the work has been pursued thoroughly, conscientiously, and perhaps near exhaustively." And I submit that is the case and I submit it's time to enact, approve this act, it's got a ways to go, it's got to go through the conference yet, but I think further delay will not do us any further good.⁹

As of this writing, a new reconstituted drafting committee to revise both Article 2 and 2A has been appointed, consisting of a few former members of both the Articles 2 and 2A drafting committees. William Henning has been appointed chair, and Henry Gabriel has been appointed the reporter.

A summary of the history of the Article 2 revision process would not be complete without a discussion of the failed "hub and spoke" concept and the coordination issue that resulted, as separate committees tackled drafting law about contracting principles. When the Article 2 revision project started, one of the hot issues was whether and how Article 2 should cover software in addition to transactions in goods. The discussions resulted in the eventual development of a "hub and spoke" concept whereby general contracting principles would be placed in a hub and provisions particular to each type of transaction would be placed in a separate spoke. The drafting committee contemplated a spoke for sales of goods, a spoke for leases, and a spoke for software licenses with the possibility of additional spokes being added later on. In 1995, the NCCUSL leadership decided that the concept was unworkable and the effort was abandoned. A separate drafting committee to address software transactions was appointed. Thus, proposed Article 2B was born (later denominated Uniform Computer Information Transactions Act).¹⁰ In addition, in 1997 another drafting committee (Uniform Electronic Transactions Act) was appointed to address electronic transactions, a subject that both

9. ALI Annual Meeting 1999, unedited transcript pp. 892-93.

10. In 1999, NCCUSL and ALI decided that Article 2B should not be part of the UCC. Therefore, Article 2B was reborn as the Uniform Computer Information Transactions Act (UCITA). NCCUSL approved UCITA at the July 1999 Annual Meeting. UCITA was the subject of a considerable lobbying effort from both supporters and opponents prior to its approval.

the Article 2 and Article 2B committees were supposed to address.¹¹ Finally, an Article 2A drafting committee was appointed to consider whether any changes made in Article 2 would be appropriate for leasing transactions. Thus, on many issues, three drafting committees, and on electronic issues, four drafting committees, were considering the problems and, of course, coming to different approaches. Needless to say, over the course of the process, issues of harmony among the provisions of the various drafts were always present. Instead of the "hub and spoke" method, a more difficult coordination effort ensued whereby the chairs and reporters for the different drafts endured coordination meetings to discuss whether and how the drafts should be similar. This back door "hub and spoke" resulted in competition between the committees when disagreements arose about the related provisions in each draft.

This article will address the process of uniform law revision as it has played out in the Article 2 process. I have a unique perspective in that for the first several years I was on the side of the observers working with the ABA Subcommittee on Sales and during the last three years, until my recent resignation, I was on the side of the drafting committee serving as the Associate Reporter. I have seen the effort from both sides in trying to come up with a workable product. After a discussion of the uniform law process, this article will address the provisions in the July 1999 draft of Revised Article 2 that balance buyer's and seller's interests in contracts for the sale of goods. Following that discussion, this article will address the lessons learned in the revision process.

II. UNIFORM LAW REVISION: COMPLAINTS AND COMPLIMENTS

Over the past decade, the UCC has been substantially revised.¹² The process of revision has spawned substantial literature evaluating that process.¹³ Inevitably the revision process has both critics and supporters.

11. That drafting committee produced the Uniform Electronic Transactions Act, which was approved by NCCUSL at its July 1999 Annual Meeting.

12. The following schedule of revised articles demonstrates the efforts of NCCUSL and ALI over the last ten years: Revised Article 6 (Bulk Sales) (1989); new Article 4A (Funds Transfer) (1989); Revised Articles 3 and 4 (Negotiable Instruments) (1990); Revised Article 8 (Investment Securities) (1994); Revised Article 5 (Letters of Credit) (1995); Revised Article 9 (Secured Transactions) (1998). Article 1 (General Provisions) is still in the revision process and will be finished in 2000 or 2001. Article 7 (Warehouse Receipts, Bills of Lading and Other Documents of Title) is under study to determine the need for revision. The future of Revised Articles 2 and 2A is still in flux as of this writing.

13. Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419 (1997) (critiquing the process of preparing commentary to revised code); Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217 (1996) (replying to a critique of a private legislation process and concluding that it is no worse and may be better than a public legislative process); Amelia H. Boss, *The History of Article 2A: A Lesson for Practitioner and Scholar Alike*, 39 ALA. L. REV. 575 (1988) (describing the Article 2A process and the need for broader input early on in the process in order to get more perspectives on draft shaping decisions); Mark E. Budnitz, *The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action*, 43 MERCER L.

REV. 827 (1992) (arguing that a federal payments code should be adopted to deal with consumer concerns that were ignored in the revisions of Articles 3 and 4); Neil B. Cohen & Barry L. Zaretsky, *Drafting Commercial Law for the New Millennium: Will the Current Process Suffice?*, 26 LOY. L.A. L. REV. 551 (1993) (analyzing the pros and cons of uniform laws process in comparison to hypothetical federal process); Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who Is Saving the UCC?*, 26 LOY. L.A. L. REV. 563 (1993) (discussing the roles of interest groups and reformers in the UCC process); Marianne B. Culhane, *The UCC Revision Process: Legislation You Should See in the Making*, 26 CREIGHTON L. REV. 29 (1992) (noting the need for early involvement in order to build a consensus and have uniform enactment); Richard A. Elbrecht, *The NCCUSL Should Abandon Its Search for Consensus and Address More Difficult and Controversial Issues Applying "Process" Concepts*, 28 LOY. L.A. L. REV. 147 (1994) (arguing that a consensus approach and focus on uniform enactability results in drafting laws used to resolve disputes, rather than laws to be used in conducting business transactions, and eliminates the ability to deal with controversial issues); Clayton P. Gillette, *Politics and Revision: A Comment on Scott*, 80 VA. L. REV. 1853 (1994) (arguing that a revision, as opposed to reconceptualization is more likely to result in capture by interest groups, as not enough is at stake to energize real pluralism); Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998) (discussing the difficulty of getting uniform enactment and how that encourages capture of the process and a race to the bottom); Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations From the Revision of the UCC*, 39 S. TEX. L. REV. 707 (1998) (identifying issues of politicalization, push for uniformity, consumer protection, and harmonization of revisions); Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 MINN. L. REV. 861 (1995) (responding to critiques of the process as too concerned about enactability, the influence of interest groups, and participation in the process); Fred H. Miller, *The Uniform Commercial Code: Will the Experiment Continue?*, 43 MERCER L. REV. 799 (1992) (discussing the need for broad participation in order to obtain consensus); A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645 (1996) (evaluating policy, public choice, and contextual approaches to the revision process, and arguing the process should seek to revise law within the constraints of political accountability, inclusion of interest groups, and uniformity of laws and that the contextual model of revision best fulfils those goals); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993) (analyzing the revision process for Article 4 in light of concerns about enactable legislation, role of interest groups, the balance of power between state and federal governments, and the effect on consumer interests); Donald J. Rapson, *Who is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L. A. L. REV. 249 (1994) (evaluating revision process in light of serving the public interest defined as fair rules, arguing for executive sessions of drafting committees in order to discuss issues outside presence of interest groups); Carlyle C. Ring, Jr., *The UCC Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287 (1994) (describing the participation and process of development of Article 4A and arguing for an open and participatory process involving affected constituencies); Albert J. Rosenthal, Moderator, *Uniform State Laws: A Discussion Focused on Revision of the Uniform Commercial Code*, 22 OKLA. CITY U. L. REV. 257 (1997) (debating the pros and cons of the NCCUSL process of developing uniform state laws in light of the alternatives); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991) (arguing that the process must have interest groups in balance in order to come up with fair compromise solutions); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993) (noting that lawyers involved in the process identify with their clients' interests, the absence of consumer interest participation early in the process of revising Articles 3 and 4, the effect of the adversarial nature of lawyers on the process, the resistance to new ways of thinking about subjects, the lack of empirical evidence and the difficulty of effecting change at the legislative stage); Steven L. Schwarcz, *A Fundamental Inquiry Into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909 (1995) (arguing that the revision process should take place within the constraints of clarity, simplicity, flexibility, fairness, consistency and completeness); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PENN. L. REV. 595 (1995) (applying a model that predicts the specificity of rules emerging from

This section will discuss the complaints and compliments about the UCC revision process in the context of the experience in the Article 2 drafting process.

The most often repeated objections in the literature about the revision process pose two concerns: (i) the influence of interest groups that may capture the process in the absence of countervailing, equally powerful interest groups; and (ii) non-uniform enactment or failure to enact a revision product.¹⁴ These two fears together lead to doubts about the policy choices made in the drafts as not serving the public interest.¹⁵ This issue of whether the drafts serve the public interest has frequently been at the core of concerns about how the revision process deals with consumer issues that tend to be controversial and difficult for drafting committees to address.¹⁶ The difficulty in addressing controversial issues in light of interest group influence and the quest for uniform enactability has in some cases led to a politicization of positions with the accompanying threat to stop enactment unless the drafting committee chooses the position taken by the entity making the threat.¹⁷

While interest groups have been very active in the Article 2 revision process, they did not capture the drafting committee. This failure of capture is perhaps best reflected in the letters that continued to pour in protesting various items in the revision as the draft proceeded to final approval at the ALI and NCCUSL in 1999. Whether the industry has captured the leadership of NCCUSL remains to be seen in light of the leadership's decision at the 1999 NCCUSL annual meeting to defer the project for yet another year and to reconstitute the drafting committee, which will presumably be more receptive to industry complaints. Con-

various types of participants in the reform process, including a preference for the status quo and the risk of capture by interest groups); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994) (analyzing the revision of Article 9 in light of interest group influence on the project); Harry C. Sigman, *Improving the UCC Revision Process: Two Specific Proposals*, 28 LOY. L.A. L. REV. 325 (1994) (advocating a public comment period for the final approved draft prior to enactment in states and a delayed common effective date to improve participation in process); William D. Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811 (1993) (detailing the difficult task of obtaining a consensus and dealing with consumer issues); William J. Woodward, Jr., *The Realist and Secured Credit: Grant Gilmore, Common-Law Courts, and the Article 9 Reform Process*, 82 CORNELL L. REV. 1511 (1997) (noting that enactability concerns and interest group threat to enactment limits policy choices). For a critique of NCCUSL's promulgation of uniform law as an enterprise, see Larry E. Ribstein and Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996). See generally James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RESOL. 795 (1998) (giving an overview and suggestions on developing uniform mediation law).

14. See Gillette, *supra* note 13, at 1867-69; Janger, *supra* note 13, at 578-80; Patchel, *supra* note 13, at 123-25; Scott, *Politics*, *supra* note 13, at 1818-21; Woodward, *supra* note 13, at 1521-25.

15. See Cooper, *supra* note 13; Patchel, *supra* note 13; Rapson, *supra* note 13.

16. Elbrecht, *supra* note 13; Miller, *Realism*, *supra* note 6, at 726-30; Rubin, *Efficiency*, *supra* note 13; Warren, *supra* note 13, at 821.

17. Miller, *Realism*, *supra* note 6, at 717-21.

cerns about enactability¹⁸ had already influenced the July 1999 draft and resulted in compromises in positions the drafting committee originally maintained. For example, the drafting committee eventually backed down from the decision to repeal the statute of frauds based on continued industry support for a statute of frauds. It is fair to say that a majority of the drafting committee decided that the fight over whether to have a statute of frauds was not worth continuing, even though modern practice internationally has done away with statutes of frauds, and maintaining a statute of frauds in Article 2 keeps the domestic law of this country out of step with the rest of the world.¹⁹ The drafting committee's ability to deal with the controversial issues, such as standard-form contracting in consumer contracts, was minimal due to interest group pressure, in spite of effective representation of consumer interests.²⁰ The standard-form contracting issue generated the most comments from participants in the process. The observers opposing the consumer provisions have repeatedly threatened to stop enactment in the states if the draft contained the proposed provisions for consumer contracts in standard-form situations.

The literature about the revision process discusses the significant toll on human and fiscal capital that the process involves. The time and resource commitment to participation in the process makes it difficult to bring all affected constituencies to the table to consider a product in a timely manner and to achieve consensus. Even if consensus is achieved in the drafting process, that consensus is often illusory when the product reaches the states and other groups get involved.²¹ In addition, another criticism directed at the process is that the natural tendency to resist change to the status quo makes meaningful reform difficult, necessarily resulting in a law that, in some participant's view, does not go far enough in addressing various issues.²² The Article 2 process has been very long, involving not only two dozen drafting committee meetings but many more hours in producing and reading drafts and providing commentary on the proposals over the course of seven years. The length of the process resulted in a test of the staying power of various groups. In addition, many groups who knew about the process chose not to get involved until later in the process, given the time and expense of participation. Resistance to changing current Article 2 was persistent. The July 1999 draft is drafted in the same style as current Article 2, but with a conscious at-

18. According to NCCUSL's Constitution, the Conference's purpose is "to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable." NCCUSL CONST., art. 1, § 1.2. Obviously, with that mission, concerns about enactability are proper concerns for that body.

19. See United Nations Convention on Contracts for the International Sale of Goods, opened for signature Apr. 11, 1980, art. 11, S. TREATY DOC. NO. 9 (1983), 19 I.L.M. 671, reprinted in 15 U.S.C. app. 52 (1997).

20. The history of the fight over consumer standard form contract principles is detailed in Michael M. Greenfield & Linda J. Rusch, *Limits on Standard-Form Contracts in Revised Article 2*, 32 UCC L.J. 115 (1999).

21. See Sigman, *supra* note 13, at 327-30.

22. See Woodward, *supra* note 13, at 1522-23.

tempt to fix language anomalies according to modern NCCUSL style rules while retaining the same substance in a majority of its provisions. The proponents of the status quo resisted any changes, even changes such as gender neutral language, noun and verb agreement, parallel sentence structure, and consistent use of defined terms as perhaps causing unintended substantive change.

On the compliment side, there are several benefits from the uniform laws process. First, uniform law in and of itself facilitates commercial activity, providing relatively well-drafted statutes that allow interstate commerce to play by the same sets of rules across the country.²³ While federal legislation would result in uniformity, some express concern about whether federal action would be able to accomplish that goal with the same degree of quality as a NCCUSL product.²⁴ Whether the July, 1999 draft of Article 2 would have been enacted in a uniform manner is unknown, given the decision to defer further consideration of the draft. A federal Article 2 would undoubtedly result in a different calculus of the balance of the rights between sellers and buyer, particularly consumer buyers.

Another benefit of the uniform law process is the ability to gather expertise that may result in more informed decision makers and ultimately better law.²⁵ In the Article 2 revision process, several academics served as drafting committee members, but relatively few academics participated as observers. Some academics served as paid experts for various lobbying groups. The expertise of practitioners has been well represented. Given the pervasiveness of Article 2 in law school curriculums, it is surprising that relatively few academics participated in the process in any meaningful way, through attendance at meetings or written comments on drafts. Many of the participants in attendance at the meetings represented major manufacturers of goods, and a few participants represented consumer interests.

The openness of the process is also a significant benefit. NCCUSL has worked hard to open up the process so that those who have the time and the money to attend meetings may participate in the process. The drafts are widely circulated and available electronically. This wider net facilitates bringing more people to the table with a variety of experiences that informs the drafting committee regarding the merits and demerits of particular proposals for the drafts. The Article 2 drafting committee meetings were open. The chair allowed everyone present to voice views, sometimes resulting in meetings that bogged down, but all viewpoints had an opportunity to speak. However, the ability to keep up with developments and the latest drafts was not as good as one would hope in this electronic age. Drafts were produced at a rate that was faster than the ability to produce commentary in a timely manner for the drafting com-

23. Miller, *Future*, *supra* note 13, at 861-62.

24. Miller, *Future*, *supra* note 13, at 863-64; Cohen & Zaretsky, *supra* note 13.

25. See Miller, *Future*, *supra* note 13; Overby, *supra* note 13.

mittee to consider, resulting in commentary received at a time when it was no longer addressed to the latest draft.

Having participated in the process for the last five years from both sides of the table, I have several personal observations about the process that are not reflected in the literature summarized above. The process itself is extraordinarily educational about the difficulty of writing policy-based legislation in a democratic system of competing interests. Attempting to find middle ground positions which were acceptable to persons at the drafting committee meetings was grueling. There are several reasons why that consensus middle ground was so difficult to find. First, the wrong people are at the table. The business people and consumers, not their lawyers, should provide the baseline for commercial mores and discussions about reasonable standards of behavior. As we all know, a lawyer's job is to keep a client's risks to a minimum. Thus, even if a business person might agree that a particular rule is reasonable and reflects a good accommodation of risk, a lawyer negotiating on behalf of the client may attempt to reduce that risk even further. This risk-avoidance orientation of the lawyers involved in the process was reflected in positions taken during the drafting process that supported changes that reduced current risk to sellers but opposed changes that may have increased current risk to sellers. In addition, advocates who might agree that a provision was a solid compromise provision were unable to bind their clients to that compromise. Thus, the various debates were repeated over and over again as the drafting committee attempted to figure out what position would result in a "deal" on a particular provision. The process of seeking compromise and consensus was also hampered by the presence of lobbyists who had little knowledge of commercial principles or the current state of the law but who knew the position that their constituents wanted in the law, making policy choices based on compromise to a middle position difficult.

Another difficulty encountered in the Article 2 process was that the goal of uniform enactability undermined the goal of policy legislation based upon a consensus. The ability to threaten to block enactment from various parties influenced the drafting committee to attempt to reach compromise on various issues. However, the more compromise was sought on the major issues, the less likely it was to be achieved, as various groups threatened to stop passage of the revision if they did not get their way. The incentive for opposing groups to compromise and arrive at consensus policy statements is gone as long as the sponsoring organization yields to threats from groups who insist that the statute be written their way or they will stop enactment in the states. This lesson, unfortunately, has come through loud and clear as demonstrated by the latest decision to defer final reading of Revised Article 2.

Finally, devising a different process for drafting commercial law in a democratic society would be extremely difficult.²⁶ The emphasis on dem-

26. See Alces & Frisch, *Commenting*, *supra* note 13; Alces & Frich, *On the UCC*, *supra* note 13.

ocratic process is vital to understanding the dynamics of the revision process. Rules produced in a democracy reflect the interests of those who write and enact them. The rules will not be theoretically pure and will reflect tradeoffs between various positions. As long as NCCUSL is committed to a type of democratic participatory process and is afraid of non-uniform enactment of an article of the UCC, what has happened in the UCC revision is inevitable. Moving the revisions to another forum, such as federal enactment, would not necessarily change the dynamics of the process or result in less influence by interest groups so as to lead to a better law.

An undemocratic and less participatory process has drawbacks as well. While the possibility exists that the law might be "better" from some viewpoints, it is equally possible that it could be "worse" from other viewpoints. A less participatory process involves a risk that the proposed statute could not be enacted in any states as constituents excluded from the process attack the proposed statute. While it is necessary for the process to be a participatory process in order to have a law that has the best chance of providing the best possible rule given the participants, participation should not equal veto power over the project. Unfortunately, NCCUSL leadership's fear of non-uniform enactment of an article of the UCC gives recalcitrant participants little incentive to seek a middle ground that accommodates all participants and leads to strong interest groups having virtual veto power over UCC projects.

III. PRODUCING A BALANCED REVISION

Current Article 2 contains provisions that favor both the buyer and the seller. The July 1999 draft of Revised Article 2 continues that balanced approach while making changes to deal with modern business practices, including international practice, and addressing various issues that have been litigated over the four decades the current code has been in place. Maintaining that balance has been difficult in the face of pressure from both industry representatives and consumer representatives about various proposals for changing the statute. The following discussion is based upon the July 1999 draft.

Revised Article 2 continues the freedom of contract philosophy of current Article 2. Parties should be free to agree to terms and vary the default rules of Article 2 subject to the usual limitations of contract law such as fraud, duress and unconscionability.²⁷ Revised Article 2 also continues the reliance on business practices to help define the parties' agreements through its use of course of dealing, course of performance and usage of

27. Revised Section 2-108 provides:

- (a) Unless a section in this article otherwise provides, the effect of any provision of this article may be varied by agreement.
- (b) The presence of mandatory language, such as "must" or "shall," or the absence of enabling language, such as "unless otherwise agreed," does not by itself preclude the parties from varying by agreement a provision of this article.

trade.²⁸ Beyond that general orientation, however, the revision addresses several key issues in a manner designed to achieve a balance in Article 2 between buyers and sellers and between fairness and certainty in contract law. This article will briefly explore the issues of balance in the following areas: standard-form contracts, warranties, breach, and remedies.

The basic contract formation principle in both current and Revised Article 2 is that the parties may contract in any manner sufficient to show agreement.²⁹ With one notable exception, once a contract is formed, the

(c) Whenever this article allocates a risk or imposes a burden between the parties, they may agree to shift the allocation and to apportion the risk or burden.

(d) Whether a term is conspicuous or unconscionable under Section 2-105 is a question to be determined by the court.

U.C.C. § 2-108 (Proposed Draft July 1999).

28. For example, revised Section 2-202, as amended at the NCCUSL annual meeting in 1999 provides:

(a) Terms on which the confirmatory records of the parties agree, or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to the included terms, may not be contradicted by evidence of any previous agreement or a contemporaneous oral agreement. However, terms in the record may be supplemented by evidence of:

(1) consistent additional terms, unless the court finds that the record was intended as a complete and exclusive statement of the terms of the agreement; and

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

(b) 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.

U.C.C. § 2-202 (Proposed Draft July 1999).

29. Current Section 2-204 provides:

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

(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.

U.C.C. § 2-204 (1995).

Revised Section 2-203 provides:

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

(b) If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more terms are left open or to be agreed upon, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.

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

(d) Language that expressly conditions the intention to make a contract upon agreement by the other party to terms proposed prevents contract formation unless the other party agrees or conduct by both parties recognizes the existence of a contract. However, an express condition contained as a standard term in a record must be conspicuous.

U.C.C. § 2-203 (Proposed Draft July 1999).

determination of the terms of that contract are left to general contract principles outside of Article 2, supplanted by the provisions of Article 2 on gap-fillers and warranties.³⁰ That notable exception is found in Section 2-207 dealing with the so-called "battle of the forms."³¹

Although not denominated as such, the thrust of current Section 2-207 was directed at the exchange of preprinted forms, a type of standard-form contracting. The commentary criticizing current Section 2-207 is legion.³² At stake in the "battle of the forms" scenario is the question of what to do with terms in forms that no one reads or expects to read and that the business people do not expect to govern the terms of the transaction.³³ When something goes wrong so that a party is looking to the terms in the forms to determine rights and responsibilities, should a court give effect to terms in either the buyer's or seller's form? If so, various subsidiary questions come into play. Should it matter in what order the forms are sent? Should it matter whether one form is silent on a particular issue? Should it matter whether a form contains language purporting to prevent contract formation, except upon the other party's acceptance of the form terms? Should it matter that one side is sophisticated enough to know how to play the game in order to get their terms and the other side is not as sophisticated? The above questions are relevant, not only to the two or more form transaction, but to the one form transaction as well.

Attempting to confront the reality of standard-form transactions in the revision of Article 2 has been somewhat difficult in the battle of the forms scenario and exceedingly difficult in the typical one-form transaction, the

30. See the parol evidence rule (Section 2-202) and the provisions in parts 3 and 4 of the July 1999 draft.

31. Current Section 2-207 provides:

(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.

U.C.C. § 2-207 (1995).

32. Linda J. Rusch, *The Relevance of Evolving Domestic and International Law on Contracts in the Classroom: Assumptions About Assent*, 72 TUL. L. REV. 2043, 2047-2050 (1998) (Sources cited in footnote 9).

33. "Business persons do not consider the boilerplate printed on the reverse side of their forms to be part of the deal unless it coincidentally reflects some aspect of custom, usage, course of dealing, or practice that they understand as implicit in the resulting transactional relationship." Thomas J. McCarthy, *An Introduction: The Commercial Irrelevancy of the "Battle of the Forms,"* 49 BUS. LAW. 1019, 1026 (1994).

consumer contract. In Revised Article 2, the "battle of the forms" scenario has used as its baseline approach a modified knockout rule that is based upon current section 2-207(3). This modified knockout rule provides that the terms of the contract include the standard terms in the forms, non-standard terms that the parties have agreed to, standard terms to which the other party expressly agreed, and the code provisions. This rule applies in two situations: (1) when the parties form a contract based, not upon the exchange of forms, but upon conduct that demonstrates agreement; and (2) when the acceptance is in a record that contains terms that vary from the terms in the offer.³⁴ In the one-form transaction, the revision provides a modest control on obnoxious terms in consumer contracts through the unconscionability mechanism.³⁵ This unconscionability

34. Revised Section 2-207 provides:

(a) This section is subject to Section 2-105.

(b) If a contract is formed by offer and acceptance and the acceptance is by a record containing terms additional to or different from the offer, or if the conduct of the parties recognizes the existence of a contract but the records of the parties do not otherwise establish a contract, the terms of the contract include:

(1) terms in the records of the parties to the extent that they agree;

(2) nonstandard terms, whether or not in a record, to which the parties have otherwise agreed;

(3) standard terms in a record supplied by a party to which the other party has expressly agreed; and

(4) terms supplied or incorporated under any provision of [the Uniform Commercial Code].

(c) If a party confirms a contract by a record received by the other party which contains terms that add to or differ from those in the confirmed contract, the terms of the contract include:

(1) terms in the confirmation and the confirmed contract, to the extent that they agree;

(2) terms in the confirmed contract to which the parties have previously agreed;

(3) standard terms in a confirming record that add to or differ from the confirmed contract to which the other party expressly agrees; and

(4) terms supplied or incorporated under any provision of this article.

(d) In this section, a party does not expressly agree to a term by the mere retention or use of goods.

U.C.C. § 2-207 (Proposed Draft July 1999).

35. Revised Section 2-105 provides:

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

(b) In a consumer contract, a nonnegotiated term in a standard form record is unconscionable and is not enforceable if it:

(1) eliminates the essential purpose of the contract;

(2) subject to Section 2-202, conflicts with other material terms to which the parties have expressly agreed; or

(3) imposes manifestly unreasonable risk or cost on the consumer in the circumstances.

(c) If a court as a matter of law finds that a consumer contract or any term thereof has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a consumer contract, the court may grant appropriate relief.

provision received a key vote of support by the Committee of the Whole at the 1999 NCCUSL annual meeting by a two to one margin. Both approaches are a modest attempt to balance fairness with certainty to facilitate a method of contracting that bears little resemblance to the paradigm case of dickered terms between parties of equal bargaining power. Both provisions apply equally to buyers and sellers and, on their face, favor neither side.

Some writers contend, however, that the gap-filler provisions, which take the place of terms determined to be unenforceable, favor the buyer, particularly as to the implied warranty and consequential damages terms.³⁶ That favoritism is true if one starts with the normative assumption that the baseline expectation in a sale of goods transaction should be that the buyer receives no warranty regarding the goods and, in the event of breach, a buyer should not recover consequential damages. The baseline expectation in current and Revised Article 2 has been and continues to be that a buyer has a right, absent a contrary bargain, to expect a certain level of quality in goods when the goods are sold by a merchant with respect to goods of the kind (*i.e.*, a merchantability warranty) and that if the contract is breached, a buyer is entitled to recover its expectancy interest, including foreseeable and provable consequential damages. The fact that sellers may not want to have these risks does not make it unfair that the baseline expectation of a seller's responsibility entails those risks. Sales law long ago progressed beyond the harsh environs of caveat emptor.³⁷ The provisions in Revised Article 2 directed to standard-form contracting should benefit both buyers and sellers as the provisions should function to guide parties to reasonable terms in the forms and to force the parties to get agreement to terms that alter the basic assumptions regarding the seller's and buyer's responsibilities in a sales transaction.

A second area where a balance between buyers and sellers was attempted was in the warranty provisions. The warranty provisions in current Article 2 are not well adapted to the modern method of marketing and distribution of goods. The revision recognizes this phenomenon and provides a clear demarcation between warranties made to buyers in privity with the seller and warranties made to parties not in privity. Courts have long recognized in many contexts that parties not in privity should have an Article 2 warranty claim even though the statutory language of

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

U.C.C. § 2-105 (Proposed Draft July 1999).

36. See Mark E. Roszkowski & John D. Wladis, *Revised U.C.C. Section 2-207: Analysis and Recommendations*, 49 BUS. LAW. 1065, 1069-70 (1994).

37. See Sheldon Gardner & Robert Kuehl, *Acquiring an Historical Understanding of Duties to Disclose, Fraud and Warranties*, 104 COM. L.J. 168 (1999).

current Article 2 did not precisely allow for that possibility.³⁸

Under the revision, warranties to parties in privity follow the familiar code provisions of express warranty and the implied warranties of merchantability and fitness for a particular purpose.³⁹ A new provision,

38. For a recent case, see *Yates v. Pitman Manufacturing, Inc.*, 514 S.E.2d 605 (Va. 1999). See also, William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternative A)*, 20 PEPP. L. REV. 1215 (1993); William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternatives B and C)*, 27 AKRON L. REV. 197 (1993).

39. Revised Section 2-403 provides:

- (a) Any representation made by the seller to the immediate buyer, including a representation made in any medium of communication to the public, such as advertising, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the representation or, with respect to a sample or model, that the whole of the goods will conform to the sample or model.
- (b) To create an express warranty, it is not necessary that the seller use formal words such as "warranty" or "guaranty" or have a specific intention to make a warranty. However, a representation merely of the value of the goods or an affirmation purporting to be merely the seller's opinion or commendation of the goods does not create an express warranty under subsection (a).
- (c) A representation under subsection (a) becomes part of the basis of the bargain unless:
 - (1) the immediate buyer knew that the representation was not true;
 - (2) a reasonable person in the position of the immediate buyer would not believe that the representation was part of the agreement; or
 - (3) in the case of a representation made in any medium of communication to the public, including advertising, the immediate buyer did not know of the representation at the time of the sale.
- (d) A right of action for breach of warranty under this section accrues as provided in Section 2-814(c).

U.C.C. § 2-403 (Proposed Draft July 1999).

Revised Section 2-404 provides:

- (a) Subject to Sections 2-406 and 2-407, a warranty that goods are merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section, the serving for value of food or drink to be consumed on the premises or elsewhere is a sale.
- (b) Goods, to be merchantable, at a minimum must:
 - (1) pass without objection in the trade under the contract description;
 - (2) in the case of fungible goods, be of fair, average quality within the description;
 - (3) be fit for the ordinary purposes for which goods of that description are used;
 - (4) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;
 - (5) be adequately contained, packaged, and labeled as the agreement or circumstances may require; and
 - (6) conform to any representations made on the container or label.
- (c) Subject to Section 2-406, other implied warranties may arise from course of dealing or usage of trade.

U.C.C. § 2-404 (Proposed Draft July 1999).

Revised Section 2-405 (July 1999 draft) provides:

Subject to Section 2-406, if a seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods are fit for that purpose.

Section 2-408, allows for warranties by seller to a remote buyer, a buyer not in privity with the seller, based upon package inserts and upon advertising.⁴⁰ Recognition of remote warranty obligation is an acknowledg-

40. U.C.C. § 2-405 (Proposed Draft July 1999).

Revised Section 2-408 provides:

(a) In this section:

(1) "Goods" means new goods and goods sold or leased as new goods in the sale to the remote buyer or in the lease to the remote lessee;

(2) "Remote lessee" means a lessee that leased good from an immediate buyer or a person in the ordinary chain of distribution.

(b) If a seller makes a representation or a remedial promise in a record packaged with or accompanying the goods and the seller reasonably expects the record to be, and the record is, furnished to the remote buyer or a remote lessee, the following rules apply:

(1) The seller has an obligation to the remote buyer or remote lessee that the goods will conform to the representation or that it will perform any remedial promise unless:

(A) a reasonable person in the position of the remote buyer or remote lessee would not believe that the representation created an obligation; or

(B) the representation is merely the value of the goods or is an affirmation purporting to be merely the seller's opinion or commendation of the goods.

(2) The seller's obligation to the remote buyer or remote lessee created under paragraph (1) also extends to:

(A) any member of the family or household unit or any invitee of the remote consumer buyer or remote consumer lessee; and

(B) a transferee from the remote consumer buyer or remote consumer lessee and any subsequent transferee, but, for purposes of this paragraph, the seller may limit its obligation to the remote consumer buyer or remote consumer lessee or may limit extension to a particular person or transferee or a class of transferees, if the limitation is furnished to the remote consumer buyer or remote consumer lessee at the time of the sale or with the record that makes the representation, whichever is later.

(c) If a seller makes a representation in a medium for communication to the public, such as advertising, the seller has an obligation to the remote buyer or remote lessee that the goods will conform to the representation and that the seller will perform any accompanying remedial promise if:

(1) the remote buyer purchased or the remote lessee leased the goods from a person in the normal chain of distribution with knowledge of the representation and with the expectation that the goods will conform to the representation;

(2) a reasonable person in the position of the remote buyer or the remote lessee with knowledge of the representation would expect the goods to conform to the representation; and

(3) the representation is not merely the value of the goods or is not an affirmation purporting to be merely the seller's opinion or commendation of the goods.

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

(e) An express warranty obligation under this section is breached if the goods did not conform to the representation creating the express warranty obligation when the goods left the seller's control. A right of action for breach of an express warranty obligation under this section accrues as provided in Section 2-814.

(f) The following rules apply to the remedies for breach of an obligation created under this section and, unless otherwise stated, an obligation extended under Section 2-409, or for breach of any remedial promise that is part the obligation:

(1) A seller under this section may modify or limit the remedies available to persons to which an obligation is created, if the modification or limitation is

ment of the modern marketing and distribution system in which the manufacturers give warranties to persons not in privity.⁴¹ The recognition of these remote warranties also comes with a recognition of the remote seller's ability to limit remedies⁴² and to curtail the extension of the warranty to nonbuyers,⁴³ as well as providing a clear accrual rule for bringing actions based upon the remote warranty.⁴⁴

furnished to the remote buyer or remote lessee no later than the time of sale or lease or with the record that makes the representation.

(2) Damages may be proved in any manner that is reasonable. Unless special circumstances show proximate damages of a different amount, the measure of damages if the goods do not conform to a representation is the value of the goods as represented less the value of the goods as delivered, and the measure of damages for breach of a remedial promise is the value of the promised remedial performance less the value of any remedial performance completed.

(3) Subject to any enforceable modification or limitation of remedy, a seller in breach under this section is liable for incidental or consequential damages under Sections 2-805 and 2-806 but is not liable for lost profits.

U.C.C. § 2-408 (Proposed Draft July 1999).

41. See Donald F. Clifford, *Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 WASH. U. L.Q. 413 (1997); Curtis R. Reitz, *Manufacturers' Warranties of Consumer Goods*, 75 WASH. U. L.Q. 357 (1997).

42. See U.C.C. § 2-408(f)(1) (Proposed Draft July 1999), *supra* note 40.

43. See U.C.C. § 2-408(b)(2) (Proposed Draft July 1999), *supra* note 40.

44. Revised Section 2-814 provides in relevant part:

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

* * * * *

(c) If a breach of warranty is claimed, the definitions in Section 2-401 and the following rules apply:

(1) Except as otherwise provided in paragraph (4), a right of action accrues for breach of a warranty that arises under Section 2-403, 2-404, 2-405, or 2-409 when a seller has tendered delivery of nonconforming goods to the immediate buyer and has completed performance of any agreed installation or assembly of the goods.

(2) Except as otherwise provided in paragraph (4), a right of action accrues for a breach of an express warranty obligation arising under Section 2-408 when the remote buyer or remote lessee receives the new goods or goods sold or leased as new goods.

(3) For a breach of the warranty arising under Section 2-402, a right of action accrues when the aggrieved party discovers or should have discovered the breach. However, an action for breach of the warranty of noninfringement may not be commenced more than eight years after tender of delivery of the goods to the aggrieved party.

(4) If the seller has made a representation about the performance or quality of the goods which extends to the performance or quality of the goods after delivery and that representation creates a warranty under Section 2-403 or a warranty obligation under Section 2-408, a right of action accrues when the immediate buyer under Section 2-403 or remote buyer or remote lessee under Section 2-408(b) discovers or should have discovered that the goods did not conform to that representation.

* * * * *

U.C.C. § 2-814 (Proposed Draft July 1999).

In making this demarcation between privity and non-privity warranties, the revision also had to address who besides the buyer could take advantage of a warranty the seller made and the applicable remedies available to those non-buyers. These issues of warranty extension are addressed in current Section 2-318⁴⁵ and are contained in new Sections 2-408 and Section 2-409. Section 2-408 allows a limited extension beyond a remote consumer buyer to the buyer's household or transferees in the situation where a seller not in privity with that consumer buyer gives a warranty packaged with the goods,⁴⁶ but allows no extension when a remote seller makes a warranty by advertising.⁴⁷ For personal injury damages, Section 2-409⁴⁸ allows a warranty made to an immediate buyer to be extended to either the buyer's household or alternatively to any person reasonably

45. Current Section 2-318 provides:

Alternative A

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 may not exclude or limit the operation of this section.

Alternative B

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 may not exclude or limit the operation of this section.

Alternative C

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 may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

U.C.C. § 2-318 (1995).

46. See U.C.C. § 2-408(b)(2) (Proposed Draft July 1999), *supra* note 40.

47. See U.C.C. § 2-408(c) (Proposed Draft July 1999), *supra* note 40.

48. Revised Section 2-409 provides:

(a) In a consumer contract, a seller's express or implied warranty or a remedial promise made to an immediate consumer buyer extends to any member of the family or household or an invitee to the household of the immediate consumer buyer or a transferee from the immediate consumer buyer who may reasonably be expected to use, consume, or be affected by the goods and who suffers damage other than injury to the person resulting from a breach of warranty or a remedial promise. The seller may not disclaim, modify, or limit damages arising under this section unless the seller has a substantial interest in having a warranty or a remedial promise extend only to the immediate consumer buyer.

Alternative A

(b) A seller's warranty, whether express or implied extends to any individual who is injured in person by breach of the warranty in the family or household of the immediate buyer or who is a guest in the immediate buyer's home if it is reasonable for the seller to expect that the individual may use, consume, or be affected by the goods. A seller may not disclaim or limit the operation of this subsection.

Alternative B

(b) A seller's warranty whether express or implied extends to any individual 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 may not disclaim or limit the operation of this subsection.

End of Alternatives

expected to be affected by the breach of warranty.⁴⁹ In the case of non-personal injury damages, a warranty to an immediate consumer buyer is extended to the transferees from or the household of the consumer buyer.⁵⁰ In all cases of extension, the persons to whom the warranty is extended cannot recover consequential damages for lost profits.⁵¹ This recognition of modern warranty practice balances the imposition of liability on sellers against a minimal extension of that liability beyond a consumer buyer coupled with restrictions on the remedies available to the persons to whom the warranty is extended. While these revisions codify part of the current case law and restrict part of the warranty liability of sellers under current law, the provisions are an intricate balance negotiated among the observers and the drafting committee over the course of 1998 and 1999.

In the performance of a contract for sale of goods, both a buyer and seller have certain responsibilities. The seller has an obligation to tender conforming goods in a conforming manner, and the buyer has an obligation to accept conforming goods and pay for the goods in a conforming manner.⁵² Conduct conforming to the contract requirements is the linchpin of Article 2's provisions on performance and breach. The July 1999 draft of Revised Article 2 continues that focus and has made several changes to balance fairness and certainty in the performance and breach provisions. Three notable examples are the provisions on waiver and notice of breach, care of goods after a rejection or revocation, and cure of a breach of contract.

The provisions on waiver and notice of breach provide that an aggrieved party who accepts a nonconforming performance should give notice of a breach in order to preserve the ability to exercise all of the

(c) This article does not diminish the rights and remedies of any third-party beneficiary or assignee under the law of contracts or of persons to which goods are transferred by operation of law and does not displace any other law that extends a warranty or remedial promise to or for the benefit of any other person.

(d) The scope of any warranty extended under this section to other than the immediate buyer and the remedies for breach may be limited by the enforceable terms of the contract between the seller and the immediate buyer. To the extent not limited:

(1) the scope of the warranty is determined by Sections 2-402, 2-403, 2-404, and 2-405; and

(2) the remedies for breach of warranty or a remedial promise for other than the immediate buyer are determined by Section 2-408(f)(2) and (3).

(e) A right of action for breach of warranty or breach of a remedial promise under this section accrues as provided in Section 2-814(b)(3) and (c).

U.C.C. § 2-409 (Proposed Draft July 1999).

49. See *id.* § 2-409(b) (Alternatives A and B).

50. See U.C.C. § 2-409(a) (Proposed Draft July 1999), *supra* note 48.

51. See U.C.C. § 2-408(f)(3) (Proposed Draft July 1999), *supra* note 40; U.C.C. § 2-409(d) (Proposed Draft July 1999), *supra* note 48.

52. Current Section 2-301 provides: "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." U.C.C. § 2-301 (1995).

Revised Section 2-601 (July 1999 draft) provides: "The parties shall perform in accordance with the contract." U.C.C. § 2-601 (Proposed Draft July 1999).

remedies available to the aggrieved party. While the buyer has always been required to give such a notice in the case of accepted goods in order to pursue remedies for breach under current Article 2,⁵³ the July 1999 draft of Revised Article 2 provides that failure to give notice does not bar the ability to pursue remedies unless the seller is prejudiced and requires that persons other than buyers to whom warranties have been extended must give notice of the breach of warranty to the persons against whom the breach is claimed.⁵⁴ The July 1999 draft also changes the requirement from current Article 2 that a buyer rejecting the goods give notice to the seller of reasonably ascertainable nonconformities justifying the rejection in order to obtain any remedies for breach.⁵⁵ Instead, the failure to particularize the defects under the revision precludes only the ability to assert a proper rejection.⁵⁶ The July 1999 draft also adds a new provision that prevents an aggrieved party (either buyer or seller) from canceling a

53. Current Section 2-607 provides in relevant part: "(3) Where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy" U.C.C. § 2-607 (1995).

54. Revised Section 2-707 provides in relevant part:

(c) If a tender of delivery has been accepted, the following rules apply:

(1) The buyer or a person entitled to enforce a warranty or warranty obligation shall notify the party claimed against of the breach of contract, warranty, or warranty obligation within a reasonable time after the breach was discovered or should have been discovered. However, a failure to give timely notice bars the person required to notify the party claimed against from a remedy only to the extent that the party entitled to notice establishes that it was prejudiced by the failure.

U.C.C. § 2-707 (Proposed Draft July 1999).

55. Current Section 2-605 provides:

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

(a) where the seller could have cured it if stated seasonably; or

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

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

U.C.C. § 2-605 (1995).

56. Revised Section 2-702 provides in relevant part:

(c) A party is precluded from relying on a nonconforming performance as follows:

(1) Buyer's payment upon tender of a document of title to the buyer made without reservation of rights waives the right to assert defects apparent on the face of the document of title.

(2) The buyer's failure to state, in connection with a rejection under Section 2-703, a particular nonconformity that is ascertainable by reasonable inspection precludes reliance on the unstated nonconformity to justify rejection if:

(A) the seller, upon a seasonable particularization, had a right to cure under Section 2-709 and could have cured the nonconformity; or

(B) between merchants, the seller after rejection made a request in a record for a full and final statement of all nonconformities on which the buyer proposes to rely.

(3) The buyer's failure to state, in connection with a revocation of acceptance under Section 2-708, a known nonconformity that justifies the revocation precludes the buyer from relying on that nonconformity to justify the

contract if it fails to object when accepting a nonconforming performance. The aggrieved party's other remedies are preserved without the need to object unless the breaching party is prejudiced by the failure to object.⁵⁷ These notice and waiver provisions balance the breaching party's right to know what has gone wrong in the transaction against the fairness of not punishing the aggrieved party for failure to give notice unless the breaching party is harmed by that failure.

Another example of a balance between fairness and certainty is in the provision on the buyer's care of goods after a rejection or a revocation of acceptance. Assume a buyer rejects the goods or revokes acceptance of the goods but uses the goods after notifying the seller of the rejection or revocation. Courts have struggled with whether to treat that use as an acceptance of the goods that moots the rejection or revocation or as a use that violates the buyer's obligation to take reasonable care of rejected goods.⁵⁸ Often the buyer has no choice but to use the goods even if rejected, such as in the case of a defective mobile home where the buyer cannot afford replacement housing and the seller refuses or is unable to take the goods back and refund the price.⁵⁹ If the court finds that the use is not an acceptance, the court may require the buyer to pay to the seller the reasonable value of the use.⁶⁰ The July 1999 draft adopts that approach in an attempt to balance the rights of the seller to the rejected goods and the rights of the buyer to reject goods and get a refund of the price.⁶¹ This revision also balances the certainty of the acceptance and

revocation if the seller had a right to cure under Section 2-709 and could have cured that nonconformity.

U.C.C. § 2-702 (Proposed Draft July 1999).

57. Revised Section 2-702 provides in relevant part:

(a) Except as otherwise provided in subsection (c) and Section 2-707(c)(1), if a party knows the other party's performance constitutes a breach of contract but accepts that performance, the following rules apply:

(1) The nonbreaching party that accepted performance is precluded from relying on the breach to cancel the contract if it fails within a reasonable time to object to the breach.

(2) The nonbreaching party's acceptance of the performance and failure to object does not preclude a claim for damages unless the party in breach has reasonably and in good faith changed its position in reliance on the nonbreaching party's inaction.

(b) A party's failure to object under subsection (a) to a nonconforming performance does not preclude its objection to the same or similar breach of the contract in future performances of like kind unless the nonbreaching party expressly so states. A statement waiving future performance may be retracted by seasonable notice received by the other party stating that strict performance will be required unless retraction would be unjust in view of a material change of position in reliance on the waiver.

U.C.C. § 2-702 (Proposed Draft July 1999).

58. See e.g., *Wilk Paving, Inc. v. Southworth-Milton, Inc.*, 649 A.2d 778, 27 U.C.C. Rep. Serv. 2d 130 (Vt. 1994); *Liarikes v. Melloy*, 639 N.E.2d 716, 27 U.C.C. Rep. Serv. 2d 136 (Mass. 1994).

59. See Carolyn F. Lazaris, Note, *Article 2: Revocation of Acceptance - Should a Seller be Granted a Setoff for the Buyer's Use of the Goods?*, 30 NEW ENG. L. REV. 1073, 1081-82 (1996).

60. See *id.*

61. Revised Section 2-704 provides:

rejection line with fairness to the buyer who is justified in the rejection or revocation of acceptance and faced with the seller's recalcitrance.

A third example of balance in the performance and breach area is the revised provision on the seller's cure of the breach.⁶² This section has been substantially rewritten to allow the seller to cure after revocation of acceptance on the grounds of a latent defect, in addition to cure after rejection of the goods. The new cure provision also provides a more flex-

(a) Subject to Sections 2-705 and 2-829(b), after an effective rejection or justifiable revocation of acceptance, a buyer in physical possession of the goods shall hold the goods with reasonable care at the seller's disposition for a sufficient time to permit the seller to remove them. The buyer has no further obligation with regard to goods rightfully rejected or to which an acceptance has been justifiably revoked.

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

(1) Any use by the buyer which is unreasonable under the circumstances and which is either inconsistent with the seller's ownership or inconsistent with the buyer's claim of rejection or justifiable revocation of acceptance is an acceptance only if ratified by the seller.

(2) If the buyer wrongfully rejected the goods, any use of the goods by the buyer which is inconsistent with the seller's ownership or inconsistent with the buyer's claim of rejection is unreasonable.

(3) If use of the goods is reasonable under the circumstances, the use is not an acceptance, but the buyer, upon returning or disposing of the goods, shall pay the seller the value of the reasonable use to the buyer, unless requiring the buyer to do so would be unjust under the circumstances. The use value must be deducted from the amount paid to be refunded to the buyer, if any, and from any damages to which the buyer is otherwise entitled under this article.

U.C.C. § 2-704 (Proposed Draft July 1999).

62. Revised Section 2-709 provides:

(a) If the buyer rightfully and effectively rejects goods or a tender of delivery under Section 2-703 or justifiably revokes an acceptance under Section 2-708(a)(2) and the agreed time for performance has not expired, the seller, upon reasonable notice to the buyer and at its 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 and necessary expenses caused by the nonconforming tender and subsequent cure.

(b) If the buyer rightfully and effectively rejects goods or a tender of delivery under Section 2-703 or justifiably revokes an acceptance under Section 2-708(a)(2) and the agreed time for performance has expired, the seller, upon reasonable notice to the buyer and at its 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 and necessary expenses caused by the nonconforming tender and subsequent cure.

U.C.C. § 2-709 (Proposed Draft July 1999).

Current Section 2-508 provides:

(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.

U.C.C. § 2-508 (1995).

ible test for cure after the time for performance has expired. In exchange for giving the seller more flexibility, the cure has to be of a conforming tender or conforming goods and the seller has a statutory obligation to pay the expenses the buyer has incurred due to the seller's nonconforming performance and cure. The expanded right to cure for sellers is balanced against explicit provisions to protect the buyer from the consequences of the seller's breach and subsequent cure.

The remedies provisions of the July 1999 draft of Revised Article 2 are also the result of an attempt to balance the buyer's and seller's remedies in order to allow each, as an aggrieved party, to achieve its expectancy interest in the event of a breach. To that end, the remedies part of the revision starts out with several principles, such as a statement of the expectation interest, a provision on mitigation of harm, a prohibition on double recovery, and a recognition of restitution- or reliance-based recovery in an appropriate case.⁶³ The buyer's and seller's provisions on using market price as a measurement for recovery of damages are comparable to each other. Each provision also addresses the measurement of market price in the anticipatory repudiation context, a subject that has often been litigated, and provides that market price will be measured at the end of a commercially reasonable time after the aggrieved party learns of the repudiation.⁶⁴ The innovative remedies from current Article

63. Revised Section 2-803 provides:

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

(b) Unless the contract provides for liquidated damages enforceable under Section 2-809 or a limited remedy enforceable under Section 2-810, an aggrieved party may not recover that part of a loss resulting from a breach of contract that could have been avoided by reasonable measures under the circumstances. The burden of establishing that reasonable measures under the circumstances were not taken is on the party in breach.

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

(d) This article does not impair a remedy for breach of an obligation or promise collateral or ancillary to a contract for sale.

U.C.C. § 2-803 (Proposed Draft July 1999).

Revised Section 2-804 provides:

Subject to Section 2-803, if a breach of contract occurs, the aggrieved party may recover compensation for the loss resulting in the ordinary course from the breach as determined under Sections 2-815 through 2-829 or as determined in any other reasonable manner, together with incidental damages and consequential damages, less expenses saved as a result of the breach.

U.C.C. § 2-804 (Proposed Draft July 1999). Comment 2 to Section 2-804 explains that "[a]lthough compensation of the expectancy interest of the aggrieved party is the general rule, a party may also use this measurement to compensate the aggrieved party's reliance or restitution interests." U.C.C. § 2-804 cmt. 2 (Proposed Draft July 1999).

64. Revised Section 2-821 provides:

(a) If the buyer is in breach of contract, the seller may recover damages based upon the contract price less the market price of comparable goods, together with any incidental and consequential damages, less expenses saved as a result of the breach, as follows:

(1) Except as otherwise provided in paragraph (2), the market price of comparable goods is determined at the time and place for tender of delivery.

2 based on the cover price and resale price remain intact.⁶⁵ In addition, the buyer and seller each have provisions allowing recovery of the goods

(2) In the case of a repudiation governed by Section 2-712, the market price of comparable goods is determined at the place for tender of delivery and at the expiration of a commercially reasonable period after the seller learned of the repudiation, but no later than the time stated in paragraph (1). The period includes a commercially reasonable period for awaiting performance under Section 2-712 and any further commercially reasonable period for obtaining any substitute performance.

(b) If the measure of damages under subsection (a) or Section 2-819 is inadequate to put the seller in as good a position as if the other party had fully performed, the seller may recover, together with incidental and consequential damages:

(1) lost profits, including reasonable overhead, resulting from the breach of contract determined in any reasonable manner; and

(2) reasonable expenditures made in preparing for or performing the contract.

U.C.C. § 2-821 (Proposed Draft July 1999).

Revised Section 2-826 provides:

(a) If the seller is in breach of contract, the buyer may recover damages based upon the market price of comparable goods, less the contract price, together with any incidental and consequential damages, less expenses saved as a result of the breach, as follows:

(1) Except as otherwise provided in paragraph (2), the market price for comparable goods is determined at the time for tender of delivery or when the buyer learned that the tender of delivery did not occur, whichever is later.

(2) In the case of a repudiation governed by Section 2-712, the market price of comparable goods is determined at the expiration of a commercially reasonable period after the buyer learned of the repudiation, but no later than the time stated in paragraph (1). The period includes the commercially reasonable time for awaiting performance under Section 2-712 and any further commercially reasonable period for obtaining substitute performance.

(b) Market price is determined at the place for tender of delivery. However, in a case of rejection after arrival or revocation of acceptance, market price is determined at the place of arrival.

U.C.C. § 2-826 (Proposed Draft July 1999).

65. Revised Section 2-819 provides:

(a) If the buyer is in breach of contract, the seller may resell the goods concerned that are in the seller's possession or control. If the resale is made in good faith, within a commercially reasonable time, and in a commercially reasonable manner, the seller may recover the contract price less the resale price together with any consequential and incidental damages, less expenses saved as a result of the breach.

(b) A resale:

(1) may be at a public auction or at a private sale, including a private auction, a sale by one or more contracts to sell, or an identification to an existing contract of the seller;

(2) 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; and

(3) must be reasonably identified as referring to the breached contract, but the goods need not be in existence or have been identified to the contract before the breach.

(c) If a resale is at a public auction, the following rules apply:

(1) Only identified goods may be sold unless there is a recognized market for the public sale of futures in goods of the kind.

(2) The resale must be made at a usual place or market for public sale if one is reasonably available. Except in the case of goods that are perishable or threaten to decline in value speedily, the seller shall give the buyer reasonable notice of the time and place of the resale.

from the other party and dealing with the respective rights of other claimants to the goods.⁶⁶ The prepaying buyer's right to obtain the goods from the seller was broadened to eliminate the requirement that the seller be

(3) If the goods are not to be within the view of persons attending the sale, the notice of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders.

(4) The seller may buy the goods.

(d) A good-faith purchaser at a resale takes the goods free of any rights of the original buyer, even if the seller fails to comply with this section.

(e) The seller is not accountable to the buyer for any profit made on a resale. However, a person in the position of a seller or a buyer which has rightfully rejected or justifiably revoked acceptance shall account for any excess over the amount of the claim secured by the security interest provided in Section 2-829(b).

(f) A seller that does not resell in the manner required under this section is not barred from any other remedy.

U.C.C. § 2-819 (Proposed Draft July 1999).

Revised Section 2-825 provides:

(a) If the seller is in breach of contract, the buyer may cover by making in good faith and without unreasonable delay any reasonable purchase of, contract to purchase, or arrangement to procure comparable goods to substitute for those due from the seller.

(b) A buyer that covers in the manner required by subsection (a) may recover damages measured by the cost of covering less the contract price, together with any incidental or consequential damages, less expenses saved as a result of the seller's breach of contract.

(c) A buyer that does not cover in a manner required under subsection (a) is not barred from any other remedy.

U.C.C. § 2-825 (Proposed Draft July 1999).

66. Revised Section 2-816 provides:

(a) If the buyer is in breach of contract under Section 2-701, the seller may withhold delivery of the goods that are the subject of the breached contract. In an installment contract, if the breach is of the whole contract under Section 2-710(c), the seller may withhold delivery of any undelivered balance.

(b) The seller may reclaim goods delivered to the buyer under a contract for sale only in the following circumstances:

(1) A seller that discovers that the buyer has received goods on credit while insolvent may reclaim the goods upon a demand made within a reasonable time after the buyer's receipt of the goods.

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

(c) Reclamation under subsection (b) is subject to the rights under this article of a buyer in ordinary course of business or other good-faith purchaser for value that vest before the seller takes possession under a timely demand for reclamation. Successful reclamation of the goods under subsection (b)(1) precludes all other remedies with respect to them.

U.C.C. § 2-816 (Proposed Draft July 1999).

Revised Section 2-824 provides:

(a) A buyer that pays all or a part of the price of goods identified to the contract, whether or not they have been shipped, and makes and keeps open a tender of full performance has a right to recover the goods from the seller if the seller repudiates or does not deliver as required by the contract.

(b) The buyer may recover from the seller by [replevin, detinue, seizure, claims and delivery, or the like] goods identified to a contract if:

(1) after reasonable efforts, the buyer is unable to effect cover for the goods or the circumstances reasonably indicate that an effort to obtain cover would be unavailing and the buyer tenders full performance of its obligation under the contract; or

insolvent within ten days of the buyer's payment. The seller's right to reclaim in a cash sale was codified, and the right to reclaim on account of the buyer's insolvency was broadened. The revision also strengthens the role of agreements about remedies, such as liquidated damages and limited remedies.⁶⁷ In commercial sales, a liquidated damages clause would be enforceable without regard to the inconvenience or nonfeasibility of

(2) the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

(c) A buyer's right vests under subsection (a) or (b) upon identification of the goods to the contract for sale even if the seller has not then repudiated the contract or failed to deliver as required by the contract.

Legislative Note: States should insert the appropriate name for their civil action for replevin, claim and delivery, detinue, sequestration or the like in subsection (b).

U.C.C. § 2-824 (Proposed Draft July 1999).

Revised Section 2-505 provides:

(a) Except as otherwise provided in subsection (b), the rights of creditors of the seller with respect to goods identified to a contract for sale and in the seller's possession are subject to the buyer's rights under Sections 2-807, 2-822, and 2-824, if the buyer's rights vest before a creditor's claim in rem attaches to the goods.

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

(c) Except as otherwise provided in subsection (a) and Section 2-504(c), this article does not impair rights of creditors of the seller:

(1) under Article 9; or

(2) if identification to the contract or delivery is not made in current course of trade but is made in satisfaction of or as security for a preexisting claim for money, security, or the like under circumstances that under any law of the State in which the goods are situated, apart from this article, would constitute a fraudulent transfer or voidable preference.

U.C.C. § 2-505 (Proposed Draft July 1999).

67. Revised Section 2-809 provides:

(a) Damages for breach of contract by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the difficulties of proof of loss in the event of breach, either the actual loss caused by the breach or the loss anticipated at the time of the agreement that would be caused by the breach, and in a consumer contract, the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. If a term liquidating damages is unenforceable under this subsection, the aggrieved party may pursue the remedies provided in this article. Section 2-810 determines the enforceability of a term that limits but does not liquidate damages.

(b) If a seller justifiably withholds delivery of goods or stops performance because of the buyer's breach of contract or insolvency, the buyer is entitled to restitution for any amount by which the sum of payments exceeds the amount to which the seller is entitled under a term liquidating damages in accordance with subsection (a).

(c) The buyer's right to restitution under subsection (b) is subject to setoff to the extent that the seller establishes a right to recover damages under the provisions of this article other than subsection (a) and to the extent of the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(d) If the seller has received payment in goods, their reasonable value or the proceeds of their resale are payments for the purposes of subsection (b). However, if the seller has notice of the buyer's breach before reselling goods

obtaining an adequate remedy. In a commercial sale, if a limited remedy failed of its essential purposes, the companion clause excluding liability for consequential damages would still be enforceable. Finally, the changes to the statute of limitations are designed to increase certainty about when a cause of action accrues in various situations under Article 2, while allowing an aggrieved party adequate time for bringing a cause of action.⁶⁸ To that end, the July 1999 draft sets forth several different accrual rules for the particular types of causes of action.

received in part performance, the resale is subject to the requirements of Section 2-819.

U.C.C. § 2-809 (Proposed Draft July 1999).

Revised Section 2-810 provides:

(a) Subject to subsections (b) and (c) and Section 2-809, the following rules apply:

(1) An agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, such as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts.

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

(3) An agreed remedy under this section may create a remedial promise.

(b) If circumstances cause an exclusive or limited remedy to fail of its essential purpose, the following rules apply:

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

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

(c) Subject to subsection (b), consequential damages may be limited or excluded by agreement unless the operation of the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of a consumer contract is prima facie unconscionable, but limitation of damages for a commercial loss is not.

U.C.C. § 2-810 (Proposed Draft July 1999).

68. Revised Section 2-814 provides:

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

(b) Except as otherwise provided in subsection (c), the following rules apply:

(1) Except as otherwise provided in this subsection, a right of action accrues for breach of contract when the breach occurs, even if the aggrieved party did not have knowledge of the breach.

(2) For breach of a contract by repudiation under Section 2-712, 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.

(3) For breach of a remedial promise, a right of action accrues when the remedial promise is not performed when due.

Although this brief sketch of the changes to Article 2 is not exhaustive, the examples cited above demonstrate that this revision has not tried to change Article 2 from its current orientation and has not favored any one side in the process. Rather, the changes are targeted and incremental, rather than dramatic and sweeping. Fans of current Article 2 would have had no trouble adjusting to the revised article.

IV. LESSONS LEARNED FROM THE REVISION OF ARTICLE 2

A. LAW REVISION IS MORE DIFFICULT THAN IT LOOKS FROM THE OUTSIDE, OR ALTERNATIVELY, DEMOCRACY IS MESSY

Participants in the revision process had drastically different ideas about the legal rules that should guide the transaction based upon their own anecdotal sense of whether the rule created problems in transactions. Some participants' quest for rules that provided certainty necessarily undermined the flexibility provided by statements of standards used to

(4) 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.

(c) If a breach of warranty is claimed, the definitions in Section 2-401 and the following rules apply:

(1) Except as otherwise provided in paragraph (4), a right of action accrues for breach of a warranty that arises under Section 2-403, 2-404, 2-405, or 2-409 when a seller has tendered delivery of nonconforming goods to the immediate buyer and has completed performance of any agreed installation or assembly of the goods.

(2) Except as otherwise provided in paragraph (4), a right of action accrues for a breach of an express warranty obligation arising under Section 2-408 when the remote buyer or remote lessee receives the new goods or goods sold or leased as new goods.

(3) For a breach of the warranty arising under Section 2-402, a right of action accrues when the aggrieved party discovers or should have discovered the breach. However, an action for breach of the warranty of noninfringement may not be commenced more than eight years after tender of delivery of the goods to the aggrieved party.

(4) If the seller has made a representation about the performance or quality of the goods which extends to the performance or quality of the goods after delivery and that representation creates a warranty under Section 2-403 or a warranty obligation under Section 2-408, a right of action accrues when the immediate buyer under Section 2-403 or remote buyer or remote lessee under Section 2-408(b) discovers or should have discovered that the goods did not conform to that representation.

(d) If an action for breach of contract or other obligation commenced within the applicable period of limitation is terminated but a remedy by another action for the same breach is available, the other action may be commenced after the expiration of the period of limitation 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.

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

U.C.C. § 2-814 (Proposed Draft July 1999).

guide behavior as favored by other participants.⁶⁹ The push to resolve litigated questions was resisted by those who desired to leave the statute untouched with its resulting ambiguity. The search for common ground lead to decisions about what to codify and what to leave to comments. The result of those countervailing forces is a revision draft that reflects an incremental change in a few areas from current Article 2, while leaving in place the basic structure and philosophy. Critics may say that the revision did not accomplish very much, as there are no sweeping changes. There are at least two responses to that critique. First, the current Article 2 works fairly well and sweeping changes are not needed. The revision draft's incremental changes help to resolve identified trouble spots but no more is necessary. Second, if sweeping changes were needed,⁷⁰ they were not possible given the competing forces in the revision process and the drafting committee's desire to maintain the current balance between buyers and sellers in the draft. Perhaps the real lesson learned in this process is to not start a revision project until a large constituency agrees reform is needed and to have a tighter blueprint for the types of changes that should be considered. While the Article 2 revision process had a partial blueprint in the guise of the PEB Study report, the venture into the "hub and spoke" process early on allowed for forays into a less structured process for change.

B. BEAUTY (OR PROGRESS) IS IN THE EYE OF THE BEHOLDER

One of the interesting phenomena of a revision process is to witness agreement that an issue should be resolved and then watch the discussion unfold as to how that issue should be resolved. Invariably, participants differed on how the issue should be resolved depending on whether the advocates identified more with the buyer's perspective or the seller's perspective, or with an industry perspective, as opposed to a consumer perspective. For example, an issue often litigated is the effect of the exclusion of consequential changes when an agreed, exclusive, limited remedy fails to be provided. The typical transaction is that the seller promises to repair or replace a defective good and excludes liability for any consequential damages in the event the good is defective. The seller is unable to repair or replace the defective good and the buyer suffers consequential damages due to the failure of the good. At the heart of the issue is the intent of the parties as to the relationship between the consequential damage excluder and the agreement to provide the limited remedy. Did the parties intend to allocate the risk of consequential harm to the buyer even if the seller was unable to remedy the defective good in a

69. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

70. In fact, some sweeping changes were suggested but defeated after considerable discussion and disagreement. Two examples are a proposal to eliminate the statute of frauds and a proposal to eliminate consequential damages as a default rule.

timely manner? Here the courts split, some saying yes, some saying no.⁷¹ The revision follows the courts' general approach in the majority of cases. In the commercial case, the presumed intent is that the two clauses operate independently so that if the limited remedy is not provided, the consequential damage excluder is effective. In the consumer case, the presumption is just the opposite, if the limited remedy fails, the consequential damage excluder fails as well.⁷² Industry advocates argued for the commercial presumption in all cases, including consumer cases, clearly wearing only their seller hats, in spite of the numerous commercial cases where commercial buyers had argued for the result as provided in the consumer cases and succeeded. Industry representatives have continuously opposed the relief accorded consumer buyers under this provision. This is a clear example where advocates identified only with the seller's side of the equation, ignoring the buyer's considerations. If one looks at the revision from a seller's perspective, the rule for commercial cases is a victory and the rule in consumer cases is a defeat. If one looks at it from

71. See e.g., *Middletown Concrete Prods., Inc. v. Black Clawson Co.*, 802 F. Supp. 1135, 20 UCC Rep. Serv. 2d 815 (D. Del. 1992); *International Fin. Servs., Inc. v. Franz*, 534 N.W.2d 261, 26 UCC Rep. Serv. 2d 1137 (Minn. 1995); *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 455 S.E.2d 183, 28 UCC Rep. Serv. 2d 190 (S.C. App. 1995); Howard Foss, *When to Apply the Doctrine of Failure of Essential Purpose to an Exclusion of Consequential Damages: An Objective Approach*, 25 DUQ. L. REV. 551 (1987); Henry Mather, *Consequential Damages When Exclusive Repair Remedies Fail: Uniform Commercial Code Section 2-719*, 38 S. C. L. REV. 673 (1987); Daniel C. Hagen, Note, *Sections 2-719(2) & 2-719(3) of the Uniform Commercial Code: The Limited Warranty Package & Consequential Damages*, 31 VAL. U. L. REV. 111 (1996).

72. Revised Section 2-810 provides:

(a) Subject to subsections (b) and (c) and Section 2-809, the following rules apply:

(1) An agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, such as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts.

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

(3) An agreed remedy under this section may create a remedial promise.

(b) If circumstances cause an exclusive or limited remedy to fail of its essential purpose, the following rules apply:

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

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

(c) Subject to subsection (b), consequential damages may be limited or excluded by agreement unless the operation of the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of a consumer contract is prima facie unconscionable, but limitation of damages for a commercial loss is not.

U.C.C. § 2-810 (Proposed Draft July 1999).

a buyer's perspective, the commercial rule is a defeat and the consumer rule is a victory. Whether the revision rule is a positive or negative result depends upon the observer's perspective as either a buyer or a seller. From a law reform perspective, however, the certainty provided by a clear rule that resolves a much litigated issue in a manner consistent with the courts' approach and the typical expectations of the parties in a transaction would be the real victory.

C. HARMONY IS DIFFICULT TO ACHIEVE WHEN DIFFERENT SINGERS
ARE ALL IN DIFFERENT ROOMS AT DIFFERENT TIMES

One of the difficulties with the revision process was the need to coordinate four different committees with (2, 2A, UCITA, and UETA) at least four different perspectives on various issues. Once the "hub and spoke" idea was scuttled as unworkable, an equally unworkable process of harmonization was put into place. The first question was always whether there was any reason for the rule to be different in the different drafts. Each drafting committee had its own reporter and was comprised of between 10-20 people, all of whom had ideas about the proper rule and the way to state the rule, even if all agreed as to what the rule should be. In numerous coordination meetings of the chairs and reporters for the various committees, the identification of rules to be harmonized, the content of those rules, and the drafting of those rules was debated. Needless to say, those meetings were excruciating.

In my opinion, the harmonization process was a back door attempt at a "hub and spoke" product but in a way that made it impossible to truly harmonize. Without involving the drafting committees in the harmonization process, the reporters and chairs had to make a judgment about whether the differences in the various drafts were stylistic or substantive. On matters of substance, the reporters could only take suggestions back to their respective committees for deliberation. Even if agreed to by the reporter or the committees, the continuing problem of harmonizing drafts that were constantly in flux due to the hectic pace of drafting committee meetings, where items were discussed and voted on, meant that all of the projects were continually out of step with each other. In reading the drafts as they existed in July 1999, it is amazing that the drafts were anywhere close to each other on provisions that should be harmonized.

D. COMPROMISE IS NOT A DIRTY WORD, BUT NO GOOD DEED
GOES UNPUNISHED

In the NCCUSL process, one often hears about the need for compromise in order to achieve an enactable product. In fact, compromise is essential in a democratic system of government. The difficulty of the NCCUSL process, however, is that it does not necessarily create an atmosphere where parties have an incentive to compromise. The concern about uniform enactability of the revision of Article 2 has created just the opposite incentive. Groups that have compromised and agreed to less

than what they wanted, and to changes in the law that are unfavorable to them, such as the consumer groups, do not appear to have enough power to get the act approved by NCCUSL. Groups that have not compromised and can afford to whip up a frenzy of form letters from various organizations opposing the revision have succeeded in getting the project deferred from two final readings, one in 1997 and one in 1999, because of the Conference leadership's concerns about uniform enactability of the product.

The big question for NCCUSL in this project or any other project is the relative importance of enactability in a uniform manner as balanced against the substantive content of a draft. One of the ways that NCCUSL has built respect for its products when taking those products to the states for uniform enactment is the ability to argue that knowledgeable people have considered the issues and arrived at a decision on the policy issues in the draft in a balanced manner that considered all sides of an issue in an open process. Is NCCUSL maintaining an independent judgment about good policy so that an act approved by NCCUSL deserves uniform enactment in the states? Alternatively, is NCCUSL relatively unconcerned about the merits of the arguments on policy grounds and swayed by the rhetoric of the lobbyists' positions who threaten to stop enactment unless the act is to their liking? Conference leadership, upset by the volume of mail received on revised Article 2 regardless of the merits of the arguments, is a prime target for the persuasive effect of lobbyists' rhetoric. The greater the concern about enactability, regardless of the merits of the arguments, the less likely that NCCUSL functions as an independent body that deserves respect for its acts as representing statements of good policy made independent of lobbyists' positions. This is not a novel observation, but is certainly one that is borne out in the revision of Article 2 so far.

NCCUSL needs to examine its method of doing business. Uniform enactability results when the act represents a balanced product forged in a process of consensus. If the process is not conducted in a manner that forges that consensus, but rather gives power to lobbying groups to have it their way, pursuit of the enactability goal runs roughshod over the reason why enactability is desirable—that the act represents good balanced policy. If NCCUSL loses its focus on balanced policy, the respect that NCCUSL has garnered for its products over the years will erode. That would be a tragedy. Whether that will ultimately be the result of the Article 2 and 2A revision process remains to be seen.

Speeches

