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The Statute of Frauds and the Parol Evidence Rule under the NCCUSL 2000 Annual Meeting Proposed Revision of U.C.C. Article 2

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THE STATUTE OF FRAUDS AND THE PAROL EVIDENCE RULE UNDER THE NCCUSL 2000 ANNUAL MEETING PROPOSED REVISION OF U.C.C. ARTICLE 2

*W. David East**

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IN this article, I discuss the recently proposed revisions of sections 2-201 and 2-202, the statute of frauds and parol evidence provisions of Uniform Commercial Code (UCC) Article 2, together with certain related provisions. The statute of frauds establishes a level of formality (or, in the case of its exceptions, a substitute for formality) with which an agreement must be evidenced to be enforceable. The parol evidence rule applies once it is determined that a contract, at least partly evidenced by a record, is enforceable, limiting the evidence that may be admitted to prove its terms. In general, I will describe the proposed revisions and the changes in doctrine including questions that the changes may be expected to raise. In view of the recent actions of the National Conference of Commissioners on Uniform State Laws in deciding not to promulgate the 1999 Annual Meeting version of Revised Article 2, appointing a new drafting committee,¹ and postponing for one more year final approval of the 2000 Annual Meeting version,² I will also discuss whether the statute of frauds should be retained (a question already much debated),³ whether both the statute of frauds and the parol evidence rule should be changed as proposed, and whether either should be further liberalized or clarified. However, the purpose here is as much to describe what has been proposed as revisions to the statute as to critique the wisdom of the current proposals or suggest other changes.

1. See, Press Release, National Conference of Commissioners on Uniform State Laws (NCCUSL) and American Law Institute (ALI), ALI and NCCUSL Announce New Drafting Committee for U.C.C. Articles 2 and 2A, August 18, 1999, U.C.C. at <http://www.nccusl.org/pressreleases/pr8-18-99.htm>, that states:

At the annual meeting of NCCUSL in July [1999], opposition to certain sections of Article 2 . . . led the leadership of NCCUSL . . . to conclude that the prospects for uniform adoption throughout the country required additional review of some provisions. Accordingly, the NCCUSL annual meeting took no action with respect to . . . Article 2 . . . NCCUSL and the ALI have now appointed the new drafting committee. . . . ALI Director Lance Liebman made the following statement: The new Drafting Committee will draw upon the version of Article 2 previously approved by the Institute as well as the current Article 2. . . . We hope that a suitable and constructive resolution of the remaining issues can . . . be achieved.

2. See, Press Release, National Conference of Commissioners on Uniform State Laws, Work Continues on Revision of Uniform Commercial Code Articles 2 and 2A, August 15, 2000, at <http://www.nccusl.org/whatsnew-news1.htm> The Revision to U.C.C. Articles 2 and 2A had been scheduled for final approval by NCCUSL at NCCUSL's Annual Meeting in St. Augustine, Florida, July 28th through August 4th [2000], and was considered there by the Committee of the Whole. However, NCCUSL decided to defer final approval action by it for one more year; . . . discussions with interested parties about some provisions had not been concluded. Deferral to these considerations seemed in order.

3. See, e.g., articles cited *infra* at note 10.

I. PART A

A. SECTION 2-201. FORMAL REQUIREMENTS

(THE STATUTE OF FRAUDS)

1. *Introduction and Scope*

After much discussion⁴ the original Article 2 Drafting Committee proposed the retention of the statute of frauds in U.C.C. 2-201 and the new drafting committee carried that recommendation forward.⁵ The proposed revisions would (i) make it applicable only to sales contracts for a

4. Between 1993 and the fall of 1996 the drafts of revised Article 2 deleted the statute of frauds and instead provided in section 2-201 that no signed writing was necessary for the enforceability of a contract for the sale of goods. Proposed section 2-201(a) of the March 1, 1996 draft of Revised Article 2 read: "A contract or modification thereof is enforceable, whether or not there is a record signed by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year after its making." Reporter's Note 1 to proposed section 2-201 in that March 1, 1996 draft stated in part: "Revised Section 2-201(a) was approved by the Drafting Committee on March 6, 1993. A motion to restore the statute of frauds was rejected by a voice vote of the Commissioners at the 1995 Annual Meeting of NCCUSL"

At the drafting committee meeting in November 1996 the drafting committee voted to restore the writing requirement. The Reporter's Note to proposed section 2-201 in the May 16, 1997 draft of Revised Article 2 stated in part:

Section 2-201(a) in the November 1996 draft abolished the statute of frauds for Article 2. This result was strongly recommended by the PEB Study Group and was approved by the Drafting Committee on March 6, 1993. A motion to restore the statute of frauds was rejected by a voice vote of the Commissioners at the 1995 and 1996 Annuals [sic] Meeting of NCCUSL.

However, at the November, 1996 meeting, the Drafting Committee decided to restore "some version" of the statute of frauds.

At their respective annual meetings in 1997 both the American Law Institute (ALI) and National Conference of Commissioners on Uniform State Laws (NCCUSL) concurred that the statute of frauds should be retained in revised Article 2.

During the annual meeting of NCCUSL in July 1999 the Annual Meeting Draft of Revised Article 2, which had been approved by the American Law Institute in its annual meeting in May 1999, was withdrawn from consideration. The stated reasons were (1) the agenda of the meeting was too full and had to be reduced, and (2) concern about the uniform enactability of the revision. The Reporter and Associate Reporter of the Drafting Committee resigned following this withdrawal. A new Drafting Committee and Reporter were appointed, and the initial plan was to present a new revision of Article 2 to the ALI and NCCUSL in the year 2000. Thomas J. McCarthy, Chair, Article 2 Subcommittee of the ABA Business Law Section's U.C.C. Committee, email memo dated August 12, 1999, copy in author's file.

Revisions to the statute of frauds and the parol evidence rule provisions in Article 2 were not the prime concern behind the withdrawal of the NCCUSL 1999 Annual Meeting draft. The proposed warranty and remedy provisions were a more significant concern, for example.

Drafts of Revised Article 2 from January 1996 through August 2000 are available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

5. Except as otherwise indicated the remarks in this article are based on the 2000 NCCUSL Annual Meeting draft of proposed Article 2 in which the text of section 2-201 reads:

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

(a) A contract for sale for the price of \$5,000 or more is not enforceable by way of action or defense unless there is some record sufficient to indicate that a contract has been made between the parties and authenticated by the party against which enforcement is sought or by its authorized agent or broker. A record is not insufficient because it omits or incorrectly states a term

price of \$5,000 or more, (ii) harmonize the formality requirement with the reality of electronic contracting and electronic records, (iii) provide that the admissions exception could be satisfied by any admission made under oath, even if not in court, (iv) render the one-year (or similar) provision of the original Statute of Frauds inapplicable to Article 2 contracts, and (v) would eliminate the introductory phrase of original subsection (1) ("Except as otherwise provided in this section").

Original section 2-201(1) made the writing requirement applicable to a "contract for the sale of goods."⁶ Proposed section 2-201(a) just reads, "contract for sale."⁷ Does this slight change in language suggest any change in the scope of the Article 2 statute of frauds? Proposed section 2-103(a) would continue to state that Article 2 "applies to *transactions* in goods," but proposed comment 1 of section 2-103, the scope provision, says that "contract" means contract for sale, and "sale" is defined to mean "the passing of title *to goods* from the seller to the buyer for a price."⁸ So proposed section 2-201(a) would only apply to contracts for the *sale of goods*, not to other transactions in goods or to the sale of services or intangibles.⁹

agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such record.

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

(c) A contract that does not satisfy the requirements of subsection (a) but which is valid in other respects is enforceable:

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

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

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

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

6. "Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." U.C.C. § 2-201(1) (1995).

7. "A contract for sale for the price of \$5,000 or more is not enforceable . . ." § 2-201(a), *supra*, note 5. (Proposed Draft 2000).

8. § 2-102(a)(36) (Proposed Draft 2000) (emphasis supplied).

9. Proposed comment 2 of Section 2-103, the scope provision, contains a useful discussion of the application of Article 2 to mixed contracts where a sale of goods forms a part of the transaction but non-goods aspects are also included. The most challenging example is a sale of goods with embedded computer programs.

2. *Advisability of Retaining a Sales Statute of Frauds*

Of course the debate concerning whether to retain a statute of frauds in Article 2 has been on-going in the legal literature for some time with some arguing the statute no longer serves a useful purpose, if it ever did, and others believing the statute remains an eminently reasonable threshold requirement for enforcement of an alleged promise, that it screens out meritless cases at an early stage.¹⁰ It has also been suggested that the statute may be justified "by a reduction in externalized proof costs associated with establishing all contracts."¹¹ While the proposed new Article 2

10. The controversy is perhaps best illustrated by the disagreement of Professors White and Summers in their noted treatise, 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 2-8 (4th ed. 1995). Other recent opinions include: (*against the statute*) Marc E. Szafran, *A Neo-Institutional Paradigm for Contracts Formed in Cyberspace: Judgment Day for the Statute of Frauds*, 14 CARDOZO ARTS & ENT. L.J. 491, 512 (1996) (suggesting section 2-201 should be repealed because the statute has so many exceptions that litigation has become cumbersome and expensive); Michael Braunstein, *Remedy, Reason, and the Statute of Frauds: A Critical Economic Analysis*, 1989 UTAH L. REV. 383, 431 (1989).

[Because] the writing required by the statute of frauds does not fulfill any of the important functions of a writing requirement [including that] . . . [i]t does not provide good evidence of the existence of an agreement or of its terms, it does not channel their actions into recognizable juridical modes, and it does not caution the parties or give them occasion to pause about the legal consequences of their actions, [the statute should be repealed];

(*for the statute*) John C. Ward & Kim Dockstader, *Placing Article 2's Statute of Frauds in its Proper Perspective*, 27 IDAHO L. REV. 507, 522-523 (1990-1991)

Those who criticize section 2-201 for being "excepted away" or argue that the provision is too narrow in focus, miss the primary appeal of this modern day statute of frauds. The statute operates as it was intended, to prevent enforcement of questionable or non-existent oral agreements. In situations where the liberal writing requirement cannot even be met or where there are no other reliable indicia of contract formation (as the exceptions to section 2-201 contemplate), one must ask whether a plaintiff should be allowed to allege that an agreement was ever reached. If the plaintiff cannot meet the basic threshold determination of section 2-201, the inquiry must look to whether any agreement ever existed in the first place, or whether the parties ever passed the stage of speculation in their initial negotiations. Under such circumstances, one party's belated, after-the-fact perceptions of oral conversations should not be considered persuasive evidence of contract formation. Defendants should be entitled to the threshold protection that the statute offers, particularly where a liberal and less demanding standard is used for such a determination.

David J. Gass, *Michigan's U.C.C. Statute of Frauds and Promissory Estoppel*, 74 MICH. BAR. J. 524, 526 (1995) ("[The statute of frauds] encourages parties to commit their negotiated affairs to writing and impresses upon them the importance of their agreement. This is a worthy goal which is consistent with the layperson's idea that serious contracts must be committed to writing or they are not enforceable.")

This last observation suggests that the channeling function has in fact been successful to the point that people commonly (though erroneously) believe there must be a writing or there is no enforceable contract. Eliminating the statute might thus pose a trap for the unwary who might continue to believe they are not bound to a promise unless there is a signed writing.

11. CLAYTON P. GILLETTE AND STEVEN D. WALT, SALES LAW, DOMESTIC AND INTERNATIONAL, 123-24 (1999). In brief the suggestion is that it may be more costly to litigate over and prove contracts not evidenced by an authenticated record than contracts which are, and that some significant portion of these costs may be borne by third parties in the

retains a statute of frauds, it tips its hat both ways. The price threshold is significantly higher so that fewer agreements would be covered, the formality requirement would be amended to approve authenticated electronic or other records, and the exceptions would be slightly broadened. The suggested comments of the latest version do not reveal why the decision was made to retain a statute of frauds. The only traditional justification for the statute of frauds mentioned in the proposed comments is the so-called evidentiary function: "All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction."¹² Although discussions at the drafting committee meetings included the matters indicated in note 12 of this article, in the end the original drafting committee, as well as, the new one may simply have concluded it was more likely a uniform revised Article 2 could be enacted in the states if it retained a statute of frauds.¹³ Practicing attorneys, and perhaps even more their clients, may rely [albeit erroneously] on the for-

form of tax revenues paid to support the judicial system and in the form of delay in having other disputes adjudicated. Since the contracting parties do not bear all proof costs, they contract (and litigate) without taking into account the full social costs of their behavior. A Statute of Frauds, by requiring a legally sufficient memorandum as a condition of enforceability, shifts some of the proof costs otherwise borne by third parties *ex post* to the contracting parties negotiating the dispute *ex ante*. It does so by placing on the parties the cost of producing written evidence prior to litigation as a condition of enforceability.

The authors' point, however, is not that this is a sufficient justification, but that it would be useful to have empirical information on the internal and external costs discussed to inform a debate on the sufficiency of this possible justification.

12. U.C.C. § 2-201 cmt. 1 (Proposed Draft 2000). This sentence is a direct quote of the second sentence of original Comment 1. *Cf.*, Karl Llewellyn's statement that the purpose for the statute of frauds was "to require some objective guaranty, other than word of mouth, that there really has been some deal." Speech given by Karl Llewellyn before the New York Law Revision Commission, *Memorandum Replying to the Report and Memorandum of Task Group I of the Special Committee of the Commerce and Industry Association of New York, Inc., on the Uniform Commercial Code*, quoted in 1 New York State Law Revision Commission Report 106, 119 (1954) (emphasis omitted).

That other justifications were considered is apparent from the original Reporters' notes. In a memo to the Drafting Committee and Observers, dated May 1, 1997 Reporter Richard Speidel discussed the changes contained in the accompanying May 16, 1997 Draft of Revised Article 2. Concerning section 2-201 Professor Speidel wrote:

1. *Some History*: The 1996 Annual Meeting (faced with a unanimous Drafting Committee) again rejected a motion to restore the statute of frauds. The vote was 65-52. The Drafting Committee, in November 1996, however, agreed that some version of current 2-201 should be restored and a draft section appeared in the March 1997 Draft.

Why this reversal? Assuming that a statute of frauds is *not* needed in sales contracts to weed out perjured claims (and that use of the defense often promotes fraud), several reasons are given to retain the statute: (1) Article 2 should be consistent with [Articles] 2A and 2B [now the Uniform Computer Information Transactions Act] which have statutes of frauds; (2) The presence of the statute tends to channel behavior toward reducing agreements to writing; and (3) The statute of frauds defense is a proxy for resolving contract formation issues on a summary judgment motion.

The Reporters are not persuaded. Professor Caroline Brown, who has just completed the Corbin volume on the statute of frauds, has concluded: "It is impossible to read the huge body of case law without becoming convinced that the statute's role is principally an evasive device for contract breakers." If so, why retain it?

13. This impression comes in part from the author's observing a number of drafting committee meetings between 1993 and 1998, and in part from NCCUSL's own statements. See NCCUSL, *supra* note 1 at <http://www.NCCUSL.org/pressreleases/pr8-18-99.htm>; see also *supra* text accompanying note 4.

mality in many cases as marking the point at which discussions have ripened into binding promises, and there is an expectation that some sort of formality requirement will be retained. It is apparent the current proposed revision is a conservative compromise in that it retains a formality requirement, which under the revision could be satisfied electronically, but only slightly broadens the exceptions and leaves a number of issues or conflicts among cases under the current statute unresolved.

The basic questions are: (i) is there a category of cases involving sales of goods where we desire more than mere oral evidence of the making of an agreement, and (ii) in those cases, if they can be identified, what types of corroboration of the oral evidence are sufficient. Our existing Article 2 statute of frauds identifies the cases by the price of the goods and requires corroboration either by a signed writing or an "exception" whose facts are thought to furnish sufficient corroboration. It is not clear that doing away with a "signed writing" requirement (now an "authenticated record" requirement) would diminish the volume of litigation this area has produced. Instead, the litigation would probably continue, focused more on whether an agreement was made, even if not evidenced by a record, and on what the terms were. But with the minimum standards to satisfy the current statute of frauds these are already actively litigated issues. It may be correct that the statute of frauds reduces litigation by discouraging the filing of cases, where it is clear the statute's requirements could not be satisfied, and permits the early dismissal of meritless cases which cannot satisfy the requirements; and it may also be true that persons dealing in goods commonly believe there must be a sufficient writing (or record) or there is no enforceable contract.¹⁴

The author thinks there are three sufficient reasons for retaining a statute of frauds: (1) the legitimate political concern of whether the states would uniformly adopt a revised Article 2 with no statute of frauds,¹⁵ (2) the possibility that it reduces litigation or at least permits early dismissal of cases without merit,¹⁶ and (3) the advisability of the law following the reasonable expectations of people in the marketplace so as not to pose a trap for those unaware of changes contrary to their expectations.¹⁷ But the author readily admits that these reasons all rest on assumptions that are difficult or impractical to verify empirically.¹⁸

14. See WALTER & DOCKSTADER, *supra* note 10, at 522-23. (discussing articles in favor of retaining the Article 2 statute of frauds). note 10.

15. See *supra*, notes 1 and 4.

16. See Part A 12, *infra*.

17. See, GASS, *supra* note 10.

18. Of course, it might be interesting in the academic sense if half the states would enact a revised Article 2 with a statute of frauds and the other half would enact a revised version without one, and this might over time provide sufficient empirical data to verify or deny the second and third assumptions. But the potential cost of such nonuniformity surely outweighs the value of such an experiment. The same is true for the first assumption. Revised Article 2 could be promulgated without a statute of frauds so empirical observations could be made on its uniform enactability, but the commercial cost of the experiment could outweigh its value if a significant group of states added nonuniform authenticated writing or record requirements. It seems less likely that a significant group of

3. *Contracting through Electronic Media*

Historically, the statute of frauds could be called the “writing requirement” because, with certain exceptions, it mandated a signed writing for an agreement to be enforceable. The arrival of contracting through electronic media including Internet sales raised serious questions about whether the electronic records of such transactions would satisfy the writing requirement, and these questions are addressed in definitions of two new terms incorporated in the proposed revision. “Record” is a new term broader than “writing,” which it includes, and intended to make it possible to satisfy the statute electronically.¹⁹ “Authenticate” is further new term broader than “sign,” which it includes, and again intended to make it possible to satisfy the statute electronically and to validate digital signatures.²⁰ The proposed statute would require “some record . . . authenticated by the party against which enforcement is sought.”²¹ Thus an “authenticated record” requirement would replace and modernize the traditional “signed writing” requirement before a contract within the scope of the proposed statute would be enforceable. Clearly this modernization of the statute is necessary and overdue.

4. *The \$5,000 “Triggering” Price*

The proposed requirement for an authenticated record would only apply to contracts for the price of \$5,000 or more. The \$500 price in original Article 2 has been increased to reflect changes in the cost of living over the last fifty years since the original version was drafted. In fact \$500 in value was the level set for the statute of frauds to apply under the Uniform Sales Act approved by the National Conference of Commissioners on Uniform State Laws in 1906, so an upward adjustment to \$5,000 seems appropriate.²² Certainly for all contracts at that price level or above it seems generally worthwhile for the parties to reduce their agreement to an authenticated record. One authority has stated “[t]he idea of such a

states would deviate from the current proposal and enact a nonuniform version repealing the statute of frauds.

19. Proposed section 2-102(a)(34) states “Record means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”

20. Proposed section 2-102(a)(1) states (1) “Authenticate” means (i) to sign, or (ii) to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with present intent of the authenticating person to identify the person or to adopt or accept a record or term.

21. See U.C.C. § 2-201(a) (Proposed Draft 2000), note 5.

22. Section 4 of the Uniform Sales Act provided in part: “(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless . . . some note or memorandum in writing . . . be signed by the party to be charged. . . .” As to how this amount was chosen, Professor Williston, the Reporter for the Uniform Sales Act, having reviewed the £10 amount of the original statute and the various levels which had been adopted in the United States, merely said, “It should be noticed that at the time when the amount was originally fixed in the English statute £10 meant a great deal more money than it does today. It was deemed wise in fixing the amount in the Uniform Sales Act to set the limit at \$500.” 1 SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS* 173 (Baker, Voorhis, & Co., rev. ed.1948).

limit is not a reflection of *de minimis non curat lex*, but is based on the sound notion that the economy would suffer if small transactions were unenforceable unless put in writing.”²³ Whatever limit is set for the statute to apply will seem arbitrary in some cases. There will be contracts priced above that level where the parties might not find it cost effective to use a record and contracts below that level where it would be cost effective to use a record; and the economy might not suffer significantly if the cutoff for small transactions was set at \$3,000 or \$4,000, since contracting parties may always determine for themselves whether it is cost effective to reduce a contract to a record. But \$5,000 does not seem too low of an amount to set the triggering amount, and it is probably not too high when it is remembered what \$500 was worth in goods early in this century when it was selected as the original price level.²⁴ An adjustment is long overdue.

5. Sufficiency of the Record

Under original section 2-201 it has generally been held that there were three requirements for a writing to be sufficient: (1) it had to evidence a contract for sale of goods, (2) it had to be signed by the party against whom enforcement was sought, and (3) it had to specify a quantity.²⁵ The third requirement did not expressly come from the text of the statute, which merely said the agreement was not enforceable beyond the quantity of goods shown in the writing. This could have been read to mean that a writing which otherwise evidenced a contract was sufficient and that the quantity term could have been proven by extrinsic evidence like any other term not covered by the writing.²⁶ However, original comment 1 contains a sentence, which reads, “The only term which must appear is the quantity term which need not be stated accurately but recovery is limited to the amount stated,” and a paragraph, which reads, “Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be ‘signed,’ . . . and third, it must specify a quantity.”²⁷

23. 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES, § 2-201:02 (West 1992.). The idea here is that for smaller transactions the costs of reducing them to writing may be greater than the benefit obtained (avoiding the risks of nonenforcement or of enforcement of terms different from those actually agreed to).

24. There is a Consumer Price Index table and calculator going back to 1913 at the Federal Reserve Bank of Minneapolis web site, <http://www.Minneapolisfed.org/economy/calc/cpihome.html>. This site reveals that \$500 in 1952, when the U.C.C. was first promulgated, was about \$3,100 in 1999. The earliest year for which this web site has data is 1913; \$500 in that year was about \$8,400 in 1999. In 1913 the Uniform Sales Act, which also had a \$500 triggering amount for the statute of frauds, was still in its youth, not having been adopted yet in all states. This seems to identify \$5,000 as within the appropriate range for the revised statute of frauds.

25. See, e.g., *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441 (1994) U.C.C.(11th Cir. 1991).

26. 1 WHITE AND SUMMERS, *supra* note 10, at 61, n. 12.

27. U.C.C. § 2-201, cmt. 1 (1995) (emphasis added).

This has become the standard reading of the section,²⁸ and the proposed revision retains this previously perceived requirement for a quantity term.²⁹ In so doing the new revision ignores the advice of Professor Caroline Brown [formerly Bruckel], who recently rewrote the Corbin volume on the Statute of Frauds, and who argued in a previous article that a quantity term should not be required for a record to be sufficient.³⁰

The revision presumably would not disturb other well-established rules concerning the sufficiency of the record under original section 2-201, such as that a series of records may be read together to satisfy the statute.³¹ Nor would it change the rule that the presence of an authenticated record does not of itself establish the terms of the contract, or even that there was in fact a contract.³²

The revision also leaves the open question what type or how much of a record is "sufficient to indicate that a contract has been made between the parties?"³³ As White and Summers put it, "Does 'sufficient to indicate' imply a standard of proof stronger than, equivalent to, or weaker than 'by the balance of probabilities?'"³⁴ In other words would the record offered in satisfaction of the statute be sufficient if its effect is merely to

28. See 2 HAWKLAND, *supra* note 23, § 2-201:04.

29. The second sentence of Proposed section 2-201(a) reads: "A record is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such record." This is identical to original section 2-201(1), except that "record" has been substituted for "writing."

The third paragraph of proposed comment 1 is substantially the same as the third paragraph of current Official Comment 1:

Only three definite and invariable requirements as to the memorandum are made by subsection (a). First, it must evidence a contract for the sale of goods; second, it must be "authenticated," a word which includes a signature and also includes any symbol or encryption process executed or adopted for the purpose of identifying the authenticating party (Section 2-201(a)(1)); and third, *it must specify a quantity.* [Emphasis added.]

Similarly, the first paragraph of proposed Comment 1 substantially follows the first paragraph of original Comment 1 and retains the sentence which reads: "The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated."

30. Bruckel, *The Weed and the Web: Section 2-201's Corruption of The U.C.C.'s Substantive Provisions—The Quantity Problem*, 1983 U. ILL. L. REV. 811. See also, *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1990), which cited this article approvingly for the position that a writing, which omitted a quantity term, could be sufficient. This case also acknowledges frequent criticism of the statute of frauds as a means of creating fraud and counsels "courts to be careful in construing its provisions so that undesirable rigidity does not result in injustice." *Id.* at 677.

31. *Roboserve, Ltd., v. Tom's Foods, Inc.*, 940 F.2d at 1448.

32. Cf., CLAYTON P. GILLETTE AND STEVEN D. WALT, *SALES LAW, DOMESTIC AND INTERNATIONAL*, 121 (1999), "Satisfaction of the Statute of Frauds is one thing. The existence of an enforceable agreement is another, distinct matter. . . . Satisfying Article 2's Statute of Frauds allows the case to go forward to the fact-finder. But the fact-finder still might find that there is no sales contract."

See also *Advent Sys.*, 925 F.2d at 677 ("It is also clear that a sufficient writing merely satisfies the statute of frauds under the Code, i.e., it does not, in itself, prove the terms of the contract") (Citing J. MURRAY, *MURRAY ON CONTRACTS*, § 74, p. 337 (3d ed. 1990).)

33. See CLAYTON P. GILLETTE AND STEVEN D. WALT, *supra* note 32 at 124-32.

34. 1 WHITE AND SUMMERS, *supra* note 10, at 64.

make it more probable that there was an oral agreement than it would be in the absence of the offered record; or must the offered record make it at least as probable as not that there was an agreement; or must the record have enough weight or evidentiary value to make it more probable than not that there was an oral agreement?³⁵ The cases are not unified, although the majority rule is apparently that the first interpretation is correct: the record is sufficient if it merely increases the probability that there was an agreement.³⁶ It is possible to argue that retaining the requirement for a quantity term signals that the record must at least be sufficient to make it as probable as not that there was an oral agreement (the probabilities are at least evenly balanced). An authenticated record without a quantity term might still contain enough evidentiary value to make it more probable that there was an oral agreement than it would be in the absence of such a record, even if the probabilities were not yet evenly balanced. It would be unfortunate, and no doubt unintended by the new drafting committee, if retention of the quantity requirement were read this way. While the approach of the current proposed draft is conservative, it does liberalize the statute of frauds requirements by making it possible to satisfy them with an authenticated electronic record and by slightly loosening the exceptions. There is no indication of any intent to tighten the requirements for the sufficiency of the authenticated record or in any other way.

6. *The Merchant's Confirmation Exception*

Original section 2-201(2) contains an exception to the requirement that the writing (record) had to be signed (authenticated) by the person against whom enforcement is sought. If both parties to an agreement were merchants and one sent the other a written confirmation of the contract which was received within a reasonable time, that confirmation would satisfy the statute as long as it (i) would have been enforceable against (signed by) the sending merchant, (ii) it was received by the other merchant who had reason to know its contents, (iii) it satisfied the requirements of subsection (1), and (iv) the receiving merchant did not give written notice of objection to the contents of the writing within ten days after receipt.³⁷ The proposed revision retains this exception in 2-201(b),

35. See CLAYTON P. GILLETTE AND STEVEN D. WALT, *supra* note 32, pp. 127-133.

36. See Charles D. Onafry, *The Merchant's Exception to the Uniform Commercial Code's Statute of Frauds*, 32 VILL. L. REV. 133, 171-80 (1987).

37. U.C.C. § 2-201(2) (1995). The purpose of the exception is to prevent the unfair advantage to the recipient, who would otherwise have in effect an option to enforce against the sender if market conditions made it advantageous while the recipient would not be required to perform if market conditions went the other way. *Bazak Int'l. Corp. v. Mast Indus., Inc.*, 535 N.E.2d 633, 538 N.Y.S.2d 503, 637 (1989). This case also discussed what is required for a confirmatory writing (record) to satisfy original section 2-201(2), holding in essence that it must merely satisfy section 2-201(1), affording a basis for believing there was a real transaction and need not have explicit words of confirmation or reference to the oral agreement. *Id.* This is the majority rule according to Charles D. Onafry, *supra* note 36, at 173, and is consistent with the position that relatively little evidentiary value is re-

but with "writing" changed to "record."

Under original section 2-201 the question of whether or when farmers would be merchants has been especially troublesome.³⁸ While the text of proposed 2-201(b) contains nothing addressing this issue, the second paragraph of proposed Comment 4 states:

A merchant includes a person "that by occupation purports to have knowledge or skill peculiar to the *practices* or goods involved in the transaction." (Section 2-102(a)(30) [emphasis in original]. Thus, a professional or a farmer should be considered a merchant because the practice of objecting to an improper confirmation ought to be familiar to any person in business."³⁹

This proposed comment focuses on part of the definition of "merchant" retained in the revision with only minor, stylistic changes from the original.⁴⁰ This in turn seems to be a more precise statement of a concept from the second paragraph of comment 2 of original 2-104 to the effect that almost anyone in business would know about answering mail;⁴¹ but the proposed new comment instead defines the relevant business practice as that of objecting to an improper confirmation. The intent here is to draw the courts' focus away from the extent of the particular farmer's experience with the commodity involved and instead direct that focus to the relevant business practice of answering mail, especially mail which appears to be an improper confirmation of a contract.⁴² This change of focus seems to be correct. Even a farmer who is selling corn for the first time should be familiar with the common business practice and expectation that mail will be answered, especially mail that purports to confirm an oral agreement the farmer did not make or to confirm

quired to satisfy the statute or its exceptions. See also GILLETTE AND WALT, *supra* note 32, at 127-33, and notes 31-34 *supra*, and related text.

38. See Onafry, *supra* note 36, at 145-50 (discussing the split among the cases on this question and a suggestion as to the correct approach). See also *Colo.-Kan. Grain Co. v. Reifschneider*, 817 P.2d 637 (Colo. App. 1991).

39. U.C.C. § 2-201 cmt.4 (Proposed Draft 2000).

40. The proposed revised definition in section 2-102(a)(30) reads:

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

U.C.C. § 2-2102(a)(30) (Proposed Draft 2000).

41. "Sections 2-201(2) . . . dealing with the statute of frauds, . . . [and] confirmatory memoranda rest on the normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a 'merchant' under the language 'who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . .' since the practices involved in the transaction are non-specialized business practices such as answering mail." U.C.C. § 2-104, cmt. 2 (1995).

42. See Onafry, *supra* note 36, at 148-50, (note especially the discussion of *Cont'l Grain v. Harbach*, 400 F. Supp. 695 (N.D. Ill. 1975), which held the farmer was a merchant because he was familiar with the specific confirmation practices of oral forward contracts). Onafry approved the holding but questioned the rationale on the basis that the comment indicated the business practice was merely that of answering mail. *Id.*

terms different from those the farmer did make. Thus the farmer's failure to answer may be taken either as an assent to the confirmation or as a failure to protect the farmer's own interests, both circumstances justifying an adverse result. If followed, this proposed comment should encourage courts to rule more frequently that farmers are merchants in these cases.

The proposed revisions also do not address the questions of what is a "record in confirmation" or what must be contained in a record giving "notice of objection." But to the extent these questions would depend on the evidentiary value of the offered record, the same quantum of value should be required for a record to be a confirmation or an objection as would be required for the record to be "sufficient to indicate that a contract has been made" under Subsection (a).⁴³

7. *The Specially Manufactured Goods Exception*

The specially-manufactured-goods exception is retained; proposed subsection 2-201(c)(1) restates the original language, except for minor stylistic changes.⁴⁴

8. *The Admissions Exception*

The admissions exceptions is retained in proposed subsection 2-201(c)(2)⁴⁵ and expanded to apply to admissions made not just in pleadings or testimony in court, but "otherwise under oath," e.g., in deposition.⁴⁶ The proposed revision does not deal directly with one of the more challenging issues under the original admissions exception: Is the proponent of the alleged contract entitled to conduct discovery in the hope of eliciting an admission of the contract from the opponent before having the case dismissed on motion because of the bar of the statute.⁴⁷ For the

43. See GILLETTE AND WALT, *supra* note 32, at 128-32 (discussing these issues under original section 2-201(b)). See also text *supra* related to notes 33-35.

44. Proposed section 2-201(c)(1) reads:

(c) A contract that ["which" in original] does not satisfy the requirements of subsection (a) but which is valid in other respects is enforceable:

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

U.C.C. § 2-201(c)(1) (Proposed Draft 2000).

45. U.C.C. 2-201(c)(2) (Proposed Draft 2000). See note 5, *supra*, for text of statute.

46. Subsection 2-201(3)(b) of the original Article 2 statute of frauds provides that a contract otherwise valid, but which does not meet the signed writing requirement, is still enforceable "if the party against whom enforcement is sought admits in his *pleading, testimony or otherwise in court* that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted. . . ." U.C.C. § 2.201(3)(b)(1995) (Emphasis added).

47. See Michael J. Herbert, *Procedure and Promise: Rethinking the Admissions Exception to the Statute of Frauds under the U.C.C. Article 2, 2A, and 8*, 45 OKLA. L. REV. 203, 235 (1992) (If the plaintiff is able to impose such heavy costs on the defendant that the defendant will be pressured into a settlement the defendant is neither spared the costs of litigation nor relieved of liability to the plaintiff. Suppose a plaintiff alleges an oral agree-

statute to have any real significance it must make it possible to obtain an early dismissal on motion of cases likely to be without merit because they could not satisfy even the simple requirements for an authenticated record or the broadened exceptions. Permitting discovery to angle for an admission deprives the statute of any importance as a filter to prevent the imposition of heavy costs just to deal with what are likely to be meritless allegations of oral agreements.

Additionally, the proposed revision furnishes no guidance on what is an admission,⁴⁸ but adequate guidance probably can be provided only by a developed body of case law.

9. *The "Part Performance" Exception*

The former exception for "goods for which payment has been made and accepted or which have been received and accepted"⁴⁹ is proposed to be retained in its original form, so that the contract would only be enforceable as to the quantity of goods accepted or for which payment had been received. This is in keeping with the proposed revision of subsection 2-201(a) which still provides that the contract is not enforceable beyond the quantity of goods, if any, shown in the record; it is also consistent with the retention of language from the original comments stating that a quantity term is required for the writing to be sufficient.⁵⁰

10. *The Estoppel Exception*

In addition to the express exceptions contained in the statute, a number of courts have held that a proponent of an alleged oral agreement who establishes the elements of estoppel may overcome the bar of the statute of frauds.⁵¹ Courts permitting estoppel as an additional exception to the statute differ on whether the elements that must be established are those of equitable estoppel or promissory estoppel, and the label used by the courts frequently provides little help.⁵² *B & W Glass, Inc. v. Weather*

ment, a breach by the defendant, and damages of \$50,000. If a court permits the plaintiff to go to trial in an attempt to elicit an admission, the costs to the defendant will be substantial. Suppose that those costs would be \$10,000. The defendant might be will advised to settle for \$7,500. If . . . the defendant does not admit the making of a contract, it is the purpose of the statute to protect him from having to litigate the issue of fact, except in cases where the plaintiff can produce a written memorandum of the sort that the statute requires or otherwise satisfy the statutory requirements.) (quoting 2 CORBIN ON CONTRACTS, § 320, at 153 (1950)). Presumably the potential cost of enduring discovery could also pressure a defendant into settling a case in which an agreement was not in fact reached.

48. See 1 WHITE AND SUMMERS, *supra* note 10, § 2-5, (discussing procedural admissions and adverse credibility determinations, for example); see also GILLETTE WALT, *supra* note 11 (discussing whether various statements are admissions).

49. U.C.C. 2-201(3)(c)(1995).

50. See *supra*, Part A 5 of this article.

51. See cases collected at 1 WHITE AND SUMMERS, *supra* note 10, § 2-6.

52. For example, in a case involving an alleged oral agreement for sale of gasoline and fuel oil the court said:

Contrary to [defendant's] assertion, Texas courts have held that the doctrine of promissory estoppel may be asserted against the requirements of the stat-

*Shield Mfg., Inc.*⁵³ is a good, recent example of a case allowing promissory estoppel to avoid the Article 2 statute of frauds. The doctrine is described in that case in a quote from Judge Richard Posner: “If an unambiguous promise is made in circumstances calculated to induce reliance, and it does so, the promisee is hurt as a result and can recover damages.”⁵⁴ The case describes equitable estoppel as a “close relative . . . a tort doctrine that requires proof of misrepresentation.”⁵⁵

The text of the proposed revision to section 2-201 contains no reference to estoppel as an additional exception to the authenticated record requirement, but the introductory phrase of original section 2-201(1) (“Except as otherwise provided in this section”) has been deleted.⁵⁶ In the past some courts and commentators have read this clause as suggesting estoppel principles were not applicable to section 2-201.⁵⁷ Proposed comment 2 explains:

The phrase “Except as otherwise provided in this section” has been deleted from subsection (a). This means that the statement in subsection (c) of three statutory exceptions to subsection (a) does not preclude the possibility that a promisor will be estopped to raise the statute-of-frauds defense in appropriate cases.⁵⁸

This proposed comment mentions estoppel without specifying whether the intended reference is to equitable or promissory estoppel. If this or a similar comment is retained in the revision, courts should not read it as foreclosing the use of equitable estoppel to avoid the statute of frauds in cases involving misrepresentation, especially in view of the fact that some courts have historically required misrepresentation as an element of so-called promissory estoppel sufficient to overcome the absence of an authenticated record. The deletion of this clause⁵⁹ from section 2-201 and

ute of frauds. . . . But those courts have also held that the remedy is limited to those cases in which the complaining party relied on an oral promise to furnish a written contract that complied with the statute of frauds. . . . Thus, a party asserting the doctrine of *promissory estoppel* against the statute of frauds must not only satisfy the requirements of the doctrine, but must also show that the promisor either *misrepresented that the statute of frauds had been satisfied*, or promised to sign a written agreement.

Adams v. Petrade Int'l., Inc., 754 S.W.2d 696, 707 (Tex. App.—Houston [1st Dist.] 1988)(Emphasis added.) Recovery based on a misrepresentation that the statute of frauds had been satisfied would technically be on the theory of equitable estoppel, not promissory estoppel.

53. 829 P.2d 809 (Wyo. 1992).

54. *Id.* at 813 (quoting *Goldstick v. ICM Realty*, 788 F.2d 456, 462 (7th Cir.1986)); see also *A/S Apothekernes Laboratorium For Specialpraeparater v. I.M.C. Chem. Group, Inc.*, 725 F.2d 1140, 1142 (7th Cir.1984) (discussing the overlap between promissory and equitable estoppel).

55. *B & W Glass*, 829 P.2d at 813.

56. U.C.C. § 2-201(a)(Proposed Draft 2000).

57. See *Futch v. James River-Norwalk, Inc.*, 722 F.Supp. 1395 (S.D.Miss.1989), *aff'd*, 887 F.2d 1085 (5th Cir.1989), and 1 WHITE AND SUMMERS, *supra* note 10, (argument of Professor White at end of § 2-6).

58. U.C.C. § 2-201, cmt. 2 (Proposed Draft 2000).

59. “Except as otherwise provided in this section” U.C.C. § 2-201(a) (Proposed Draft 2000).

the inclusion of a new comment along the lines of the one proposed would invite courts applying the revised text to use estoppel to avoid injustice from a rigid application of the statute of frauds.⁶⁰ Though some might prefer to have the revision in the text rather than the comments, it may be just as well to deal with the issue in the way chosen here. It gives courts the flexibility to continue to develop the law in this area, where trying to deal with the issue in the text of the statute might lead to an attempt to specify appropriate situations for estoppel, producing the very rigidity which estoppel helps avoid. Placing in the comments the suggestion that estoppel should be available might also make it more likely the revision would be uniformly adopted. Some states, which have case law holding estoppel inapplicable to section 2-201, might be reluctant to adopt a statutory repeal of that rule, but might be more receptive over time to further guidance in the comments.

11. *The "One-Year" Statute of Frauds*

Proposed new subsection 2-201(d) would make it clear that the so-called "one-year" statute of frauds is not applicable to invalidate contracts that would otherwise be enforceable under the proposed revision.⁶¹ The proposed comment cites *C. R. Klewin, Inc. v. Flagship Properties, Inc.*,⁶² which discusses the lack of satisfactory rationale for this portion of the statute and also the lengths to which courts have gone in attempting to avoid its application. There have been several cases in which the issue was raised whether an oral agreement which satisfied original section 2-201 could still be unenforceable because it was within the one-year provision of a state's general statute of frauds and did not satisfy that provision's more particular requirements. *Roth Steel Products v. Sharon Steel Corporation*⁶³ is an example. In *Roth* the contract for sale of steel satisfied the admissions exception to section 2-201(3)(b) but would not satisfy the one-year statute, which contained no admissions exception and which required a memorandum containing the "essential terms of the agreement expressed with such clarity that they are understandable without the aid of parol evidence."⁶⁴ The court held that the Article 2 statute of frauds provision was a special statute that was in irreconcilable conflict with the general statute of frauds and that the special statute, section 2-201, would prevail as an exception to the general statute; hence the con-

60. This is the approach of the RESTATEMENT (SECOND) OF CONTRACTS, § 139(1)(1981).

61. The original statute of frauds, making certain alleged contracts unenforceable unless evidenced by a writing signed by the party to be charged or his agent, applied to "any agreement that is not to be performed within the space of one year from the making thereof." An Act for Prevention of Frauds and Perjuries, 29 Car. 2, c.3, § 4(5) (1677). As a proposed comment indicates some states have enacted a variation on this provision changing the period to longer than one year, hence the language "any other applicable period." U.C.C. § 2-201, cmt. 8 (Proposed Draft).

62. 600 A.2d 772 (Conn. 1991).

63. 705 F.2d 134 (6th Cir.1983).

64. *Id.* at 141, n.12.

tract was enforceable since it satisfied 2-201. *Roth* was cited in *AP Propane, Inc. v. Sperbeck*,⁶⁵ as stating the prevailing view on the question; however, *Roth* itself cites a case apparently to the contrary,⁶⁶ so it would be useful for the revision to remove any doubt about the applicability of the one-year provision. *Roth* and the proposed revision certainly appear to reach the correct outcome. If the Article 2 statute of frauds or its exceptions is satisfied, then the policies behind the requirement for an authenticated record are also satisfied; nothing extra is gained by requiring compliance with more than one statute of frauds.

12. *Disposing of Meritless Cases on Motion*

As mentioned above in Part A 2, one suggested justification for the statute of frauds is that it permits an early dismissal of meritless cases. The initial issues for any contract enforcement are whether a binding promise was actually made and whether it was sufficiently definite and certain as to its subject matter and terms to be capable of enforcement.⁶⁷ If contract formation is at issue these matters require a factual investigation, which will frequently prevent disposition of the case on motion for summary judgment. It will not be possible to decide the formation issue from summary judgment affidavit evidence where there is a dispute as to what the parties said and the context in which it was said during their negotiations. If there is a requirement for an authenticated record and a qualifying record exists, it will usually prevent disposal of the case on motion for summary judgment because plaintiff will be afforded the opportunity to prove the existence and terms of a contract.

More importantly from the viewpoint of proponents of the statute of frauds, not only is the absence of a qualifying authenticated record, or facts satisfying an exception to the requirement, frequently an indication that the parties had not yet reached an agreement, the issue of the existence of an authenticated record can usually be handled by motion for summary judgment or motion to dismiss. An affidavit can attest to the validity of the authenticated record if one is offered, and the court can examine the record to determine if it meets the statute's minimal standards. Thus the question whether there is a sufficient authenticated record operates substantially as a proxy for the issue whether an agreement was made.⁶⁸ This permits the courts to dispose of many cases involving alleged agreements on motion for summary judgment or to dismiss where the defense of the statute of frauds is available and the proponent of the alleged contract cannot meet the statute's requirements. This in turn ad-

65. 555 N.Y.S.2d 211 (N.Y. Sup. Ct. App. Div. 1990).

66. *Oskey Gasoline & Oil Co., Inc. v. Cont'l. Oil*, 534 F.2d 1281 (8th Cir.1976).

67. E. ALLAN FARNSWORTH, *CONTRACTS*, 112 (2d ed. 1990).

68. I am not ignoring the fact that the presence of an authenticated record that is sufficient under the statute still does not establish that an agreement was made. *See supra*, note 30 and accompanying text. However, the presence of a record sufficient under the statute does at least make it more probable that an agreement was made than it would be in the absence of a record.

dresses both concerns of efficiency and fairness: it is efficient to dispose of unworthy cases early on motion without having to go through a trial with its attendant preparation phase. It may also prevent the unfair outcome of defendants settling cases in which they did not in fact make a promise, just to avoid the expense of trial and the risk of an adverse result.⁶⁹

The proposed revision generally retains this efficiency as well as fairness, except it does not address whether the proponent of an alleged oral agreement is entitled to engage in discovery before the case is dismissed on motion. A closely related question has already been discussed by Judge Richard Posner in *DF Activities Corporation v. Brown*,⁷⁰ in which the defendant moved under Fed. R. Civ. P. 12(b)(6)⁷¹ to dismiss the suit on an alleged oral contract for sale of a chair designed by Frank Lloyd Wright on the grounds that the suit was barred by U.C.C. section 2-201. Attached to the motion was the *defendant's sworn affidavit that there was no agreement* to sell the chair to the plaintiff.⁷² The issue was whether the plaintiff was entitled to conduct discovery to attempt to elicit an admission from defendant to establish an exception to the writing requirement under U.C.C. section 2-201(3)(b)⁷³ before having the case dismissed on motion. Judge Posner acknowledged that there was a division of opinion among the cases decided under section 2-201(3)(b) as to whether discovery should be permitted to see if an admission would be forthcoming, but he distinguished this case since here a denial under oath had already been made:

[W]here as in this case the defendant swears in an affidavit that there was no contract, we see no point in keeping the lawsuit alive. Of course the defendant may blurt out an admission in a deposition, but this is hardly likely, especially since by doing so he may be admitting to having perjured himself in his affidavit. Stranger things have happened, but remote possibilities do not warrant subjecting the parties and the judiciary to proceedings almost certain to be futile. . . [P]laintiff in a suit on a contract within the statute of frauds should not be allowed to resist a motion to dismiss, backed by an affidavit that the defendant denies the contract was made, by arguing that his luck may improve in discovery. . . [I]t seems to us as it did to the framers of the Uniform Commercial Code that the statute of frauds serves an important purpose in a system such as ours that does not require that all contracts be in writing in order to be enforceable and that allows juries of lay persons to decide commercial cases. The methods of judicial fact finding do not distinguish unerr-

69. See Herbert, *supra* note 46.

70. 851 F.2d 920 (7th Cir. 1988).

71. Failure to state a claim on which relief can be granted.

72. *DF Activities Corp.*, 851 F.2d at 921.

73. The case was decided under Illinois law whose version of U.C.C. section 2-201(3)(b) was in line with the uniform text, providing that despite the absence of a signed writing, a contract for sale of goods was enforceable "if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made. . . ." *Id.* (quoting U.C.C. § 2-201(3)(b)(1995)).

ingly between true and false testimony, and are in any event very expensive. People deserve some protection against the risks and costs of being hauled into court and accused of owing money on the basis of an unacknowledged promise.⁷⁴

Ruling on a motion to dismiss or a summary judgment motion whose basis is failure to satisfy the statute of frauds before allowing the proponent of the agreement to engage in discovery is a reasonable accommodation of the concerns of those in favor of retaining the statute of frauds. The authenticated record requirement will remain a useful way to dispose of meritless cases at an early stage before further anticipated expense forces a settlement.

13. *Applicability to Contract Modifications*

Proposed section 2-209(c) is essentially the same as original section 2-209(3).⁷⁵ Original comment 3 would also be retained in substantially similar language.⁷⁶ Original subsection 2-209(3) is not a model for clarity,⁷⁷ and the revision clarifies nothing.⁷⁸ Consider the following possible situations:

74. 851 F.2d at 922-23.

75. Original subsection 2-209(3) reads, "*The requirements of the statute of frauds section of this Article* (Section 2-201) must be satisfied if the contract as modified is *within* its provisions." U.C.C. § 2-209(3) (1995)(emphasis added). The proposed revised subsection 2-209(c) deletes the introductory phrase and substitutes "subject to" for "within;" it reads: "Section 2-201 must be satisfied if the contract as modified is *subject to* its provisions." U.C.C. § 2-209(c)(2000)(emphasis added).

76. The first two paragraphs of original comment 3 read:

Subsections (2) and (3) are intended to protect against false allegations of oral modifications. "Modification or rescission" includes abandonment or other change by mutual consent, contrary to the decision in *Green v. Doniger*, 300 N.Y. 238, 90 N.E.2d 56 (1949); it does not include unilateral "termination" or "cancellation" as defined in Section 2-106.

The Statute of Frauds provisions of this Article are expressly applied to modifications by subsection (3). Under those provisions the "delivery and acceptance" test is limited to the goods, which have been accepted, that is, to the past. "Modification" for the future cannot therefore be conjured up by oral testimony if the price involved is \$500.00 or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to the quantity of goods set forth in it there is safeguard against oral evidence.

U.C.C. § 2-209, cmt. 3 (1995).

The only substantive change made in proposed revised comment 3 is to substitute "\$5,000.00" in place of the original "\$500.00." The citation to *Green v. Doniger* is also omitted and "authenticated record" is substituted for "authenticated memo." See U.C.C. § 2-209, cmt. 3 (Proposed Draft 2000).

77. See *Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp.*, 186 F.3d 815 (7th Cir. 1999) ("The interpretation of [U.C.C. § 2-209(3)] . . . has generated controversy among courts and commentators. One view is that all contract modifications must be in writing; another view is that only modifications of terms that are required to be in writing under U.C.C. § 2-201 must be in writing.") Cf. *Costco Wholesale Corp. v. World Wide Licensing Corp.*, 898 P.2d 347, 351 (1995) ("The plain language of U.C.C. § 2-209(3) only requires a satisfaction of the statute if the 'contract as modified' is within the statute; it does not require a satisfaction for the modification itself"). *Costco* holds that a price modification need not satisfy the statute of frauds, but that a modification increasing the quantity would be enforceable only up to the quantity shown in a qualifying writing.

78. See J. WLADIS Article in this Issue discussing proposed revised section 2-209(c).

(1) Suppose an enforceable original agreement to purchase goods, having a contract price of \$5,000 or more, is modified by the parties orally agreeing to the purchase and sale of additional goods. Under the proposed revision (as under the original) this modification would have to satisfy the statute of frauds; the contract as modified is subject to the statute (the price still exceeds \$5,000) and the modification increased the quantity of goods.⁷⁹ But suppose as a result of the quantity modification the price only increased to \$5,100. Is it cost-effective to the seller to reduce the modification to an authenticated record and obtain the buyer's signature, or to send a confirmation and rely on the merchant's confirmation exception?⁸⁰ Maybe not. According to Hawkland, the price level for application of the statute of frauds is set where the economy might suffer if contracts for a lower price were required to be evidenced by an authenticated record.⁸¹ In other words the triggering price for the statute to apply should be set by considering the point at which the costs of satisfying the statute are probably higher on the average than the risk of non-enforcement plus the risk of enforcement of terms not agreed to and not intended. Proposed comment 1 of Revised section 2-209 states the goal is to "protect and make effective all necessary and desirable modifications of sales contracts *without undue regard for technicalities*."⁸² It may well be an "undue regard for technicalities" to require an authenticated record to enforce *some* modifications producing only a one-hundred-dollar change in price, and it may certainly "hamper such adjustments,"⁸³ because satisfying the statute may not be cost-effective.

(2) What about the situation in which the original contract price is \$4,999 or less and the modification will raise the price by less than \$5,000? Whether the modification must be in the form of an authenticated record is not clear. There is authority that the statute of frauds must now be satisfied because the contract equals or exceeds the price limit for the first time, and this seems to be a natural reading of proposed section 2-209(c) and of the original version.⁸⁴ If the original contract price was \$4,950, for example, and the modification was for \$50 or more, the total value of the contract now for the first time equals or exceeds the \$5,000 floor of section 2-201(a). When the contract as modified equals or exceeds a price of \$5,000 for the first time it may be cost-effective for the parties to be required to satisfy the statute of frauds, and it is consistent

79. See *Zemco*, 186 F.3d at 819-820. Under section 2-201(a) and the comments (both original and revised) the contract is not enforceable beyond the quantity shown in the authenticated record. See *supra*, notes 25-30 and accompanying text.

80. See Part A 6, *supra*.

81. See HAWKLAND, *supra* note 23, and accompanying text.

82. U.C.C. § 2-209, cmt. 1 (Proposed Draft 2000) (emphasis added). Cf. U.C.C. § 2-209, cmt. 1 (1995) (stating "without regard to the technicalities which at present hamper such adjustments.") U.C.C. § 2-209, comment 1 (1995).

83. *Id.*

84. 1 WHITE AND SUMMERS, *supra* note 10, at 39. Professors White and Summers state their belief that this interpretation is justified for original section 2-209(3) but do not cite case authority. *But see* *Costco*, 898 P.2d at 351.

with the selection of the \$5,000 price level as the triggering amount; but on the other hand, it may not be cost-effective to reduce a mere \$50 modification to an authenticated record or otherwise satisfy the statute.

(3) Suppose the original agreement is for a price less than \$5,000, thus does not require an authenticated record. A modification that itself has a value equal to or exceeding \$5,000 would apparently have to satisfy section 2-201,⁸⁵ and it would presumably be cost-effective for the parties to do so.

If these results are intended from the statute, it would be preferable to state this directly in the text by modifying proposed 2-209(c) to read: "A modification must satisfy the requirements of the statute of frauds if the modification itself is for the price of \$5,000 or more, or increases the quantity of goods by \$5,000 or more, or if the contract price as modified exceeds \$5,000 for the first time."

Even this language still leaves unresolved questions. Suppose the original contract price exceeded \$5,000 and the authenticated record requirement was satisfied. Then suppose a modification postpones the delivery date, a term not directly affecting quantity or price. Must the modification satisfy the statute of frauds? There is case authority under the current statute that it must,⁸⁶ and this may be the position of a majority of jurisdictions.⁸⁷ But there is also authority that only a change in consideration or a change in quantity must satisfy the statute, because only the quantity term must be written and the price level is the triggering mechanism.⁸⁸

It is regrettable that the proposed revision fails to resolve any of the uncertainties in current section 2-209(3).

II. PART B

A. SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE

1. Introduction

The proposed revision of section 2-202(a) is essentially a restatement of original Article 2's parol evidence rule (insofar as it deals with the admissibility of evidence offered to contradict or supplement the terms of an agreement), together with the incorporation of part of former comment 1(c) and with more guidance in the suggested comments on the procedural aspects of the rule.⁸⁹ The proposed revision adds subsection (b) to

85. *Costco*, 898 P.2d at 350-51.

86. *Green Constr. Co. v. First Indem. of Am. Ins. Co.*, 735 F. Supp 1254 (D. New Jersey 1990), *affirmed* 935 F.2d 1281 (3d Cir. 1991).

87. *Zemco*, 186 F.3d at 819.

88. *Id.* at 820.

89. Proposed section 2-202 as contained in the National Conference of Commissioners on Uniform State Law (NCCUSL) 2000 annual meeting draft on which these remarks are based reads:

SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE.

(a) Terms with respect to which the confirmatory records of the parties agree or which are otherwise set forth in a record intended by the parties as a final

deal separately with the admissibility of extrinsic evidence to explain terms, as opposed to contradicting or supplementing them. The proposed comments provide additional help on how a court determines that a particular record is a partial or total integration of the parties' agreement.

2. *Intent Determines When the Rule Applies*

Proposed subsection 2-202(a) states the basic parol evidence rule and suggested comment 1 explains that the operation of the rule depends on the intention of the parties that the terms in a record or records are the "final expression of their agreement with respect to the included terms."⁹⁰ Absent this mutual intent no exclusionary rule applies. This intent may be ascertained from the circumstances including the presence of a merger clause.⁹¹

expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be supplemented by evidence of:

- (1) course of performance, course of dealing, or usage of trade; and
- (2) consistent additional terms unless the court finds the record to have been intended also as a complete and exclusive statement of the terms of the agreement.

(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 2000).

90. Suggested comment 1 reads:

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

U.C.C. § 2-202, cmt. 1 (Proposed Draft 2000).

91. Suggested comments 2 and 3 read:

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

3. Whether a writing is final, and whether a final writing is also complete, are issues for the court. This section rejects any assumption that because a record has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from

3. Merger Clauses

As proposed comment 3 states, "This section takes no position on the evidentiary strength of a merger clause as evidence of a mutual intent that the record be final and complete since that depends upon the particular circumstances involved."⁹² In other words it would still be possible to prove that the merger clause did not in fact state the intent of all parties. An example would be *Sierra Diesel Injection Service, Inc. v. Burroughs Corporation*,⁹³ where the signed contract contained a merger clause stating, "This Agreement constitutes the entire agreement, understanding and representations, express or implied . . . and . . . supercedes all prior communications between the parties" ⁹⁴ However, the District Court held, and the Court of Appeals affirmed, that integration is a question of the intent of the parties. Despite the presence of the merger clause, the buyer did not have the requisite intent to exclude from the contract express warranties contained in a letter from seller predating the signing of the agreement.

4. Intent Proved Inferentially

Proposed comment 3 contains the statement:

This section rejects any assumption that because a record has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon. If the additional terms are such that, if agreed upon, they would certainly have been included in the documents in the view of the court, then evidence of their alleged making must be kept from the trier of fact. This section takes no position on the evidentiary strength of a merger clause as evidence of a mutual intent that the record be final and complete since that depends upon the particular circumstances involved.⁹⁵

Proposed comment 2 states in part, "[The fact that] a record is final with respect to the included terms (an integration) does not mean that the parties intended that the record contains all the terms of their agreement (a total integration)."⁹⁶ And proposed comment 1 contains the sentence: "Where each party sends a confirmatory record, mutual intention to integrate is presumed with regard to terms 'with respect to which the confirmatory records of the parties agree.'"⁹⁷

the trier of fact. This section takes no position on the evidentiary strength of a merger clause as evidence of a mutual intent that the record be final and complete since that depends upon the particular circumstances involved.

U.C.C. § 2-202, cmt. 2,3 (Proposed Draft 2000). Proposed comment 3 is similar to the text of original comment 3.

92. U.C.C. § 2-202, cmt. 3 (Proposed Draft 2000).

93. *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp., Inc.*, 890 F.2d 108 (9th Cir. 1989).

94. The text of the merger clause in *Sierra Diesel* can be found in the District Court's opinion. *Sierra Diesel*, 656 F. Supp 426, 428 (D. Nev. 1987).

95. See full text of proposed comment 3, *supra* note 91.

96. See full text of proposed comment 2, *supra* note 91.

97. See full text of proposed comment 1, *supra* note 90.

Taken together these comments indicate that the intent of the parties must be inferred from the totality of the circumstances. What should be considered? *Betaco, Inc. v. Cessna Aircraft Co.*,⁹⁸ listed five relevant factors in determining the intent of the parties: (1) the presence of a merger clause in the writing, (2) the presence of warranty disclaimers (in this case where parol evidence was offered to prove a warranty not contained in the writing), (3) whether the extrinsic term was one the parties would certainly have included in the writing if it were in fact part of their final agreement, (4) the sophistication of the parties, and (5) the nature and scope of prior negotiations and of the offered extrinsic terms.⁹⁹

The first sentence of proposed 2-202(a) says, "*Terms with respect to 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 such terms as are included therein *may not be contradicted* by evidence of any prior agreement or of a contemporaneous oral agreement."¹⁰⁰ For example, if the confirmatory records of the parties both state the price at \$50 per unit there is a strong inference that the parties have reached a final agreement on that price, but is it conclusive? This statutory language is retained from the original with only the substitution of the word "records" for "memoranda" and "record" for "writing." Under original section 2-202 some courts construed this language to mean the inference is conclusive as to matters on which the parties' records agree.¹⁰¹ The language of the proposed text, almost identical to the original, says the terms "may not be contradicted," and it would be very difficult to read that as anything but a conclusive inference of integration as to terms on which the parties' records agree.

98. *Betaco, Inc. v. Cessna Aircraft Co.*, 103 F.3d 1281 (7th Cir. 1996). This is the second *Betaco* case. The first one is cited *infra* note 104.

99. *Id.* at 1286.

100. U.C.C. § 2-202(a)(Proposed Draft 2000)(emphasis added).

101. *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39, 42 (N.D. Ill.1970). ("Under the unambiguous wording of this provision [2-202]. . . plaintiff can only clarify uncertain terms of the contract in light of usage of the trade or prove consistent additional terms. *Plaintiff cannot, however, disavow a term of the contract by evidence of an alleged prior oral agreement when there exist subsequent confirmatory memoranda between the parties which are entirely consistent with each other.*")(Emphasis added). The case also demonstrates the interaction between original sections 2-207(3) and 2-202 and that the same result may have been dictated by both sections. Original section 2-207(3) reads:

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(3)(1998)(emphasis added).

See also *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1047 (Ill. App. Ct 1980), ("Terms contained in a confirmatory memorandum by one party does [sic] not preclude parol evidence contradicting those terms unless such terms are also found in a confirmatory memorandum by the other party to the contract.").

What is to be made then of the suggestion in proposed comment 1 that there is a presumption of integration where the “confirmatory records of the parties agree”?¹⁰² At least three situations might justify a court in using a presumption of integration: (1) when the record to which the parties have assented appears complete on its face, e.g., a fifty-page written contract signed by both parties;¹⁰³ (2) when a record contains a merger clause, e.g., a form contract prepared by one of the parties and signed by the other, which has a merger term included;¹⁰⁴ and (3) where the “confirmatory records of the parties agree.”

Presumably (pardon the expression) the comment writer of suggested comment 1 had in mind the definition of “presumption” in existing U.C.C. section 1-201(31)¹⁰⁵ when penning the comment. But that definition indicates the presumption is never conclusive, because it anticipates that evidence will be admitted in an attempt to overcome the presumption. So in the third possible situation mentioned above (taken from the first line of the proposed section) it is probably not correct to speak of a presumption, since the statute apparently means that the inference of integration is conclusive.¹⁰⁶ It is not clear that it adds anything to say in the first two situations above that there is a presumption of integration. The inference of integration from the circumstances is so strong in those cases that a finding of merger would probably occur in any event in the absence of evidence to the contrary, and saying there is a presumption, thus requiring a finding of integration in the absence of such evidence seems pointless. Additionally, according to Professor Farnsworth the issue of integration is generally treated as a question of law for the judge to decide rather than the jury, since it goes to the admissibility of evidence.¹⁰⁷ Proposed comment 3 is consistent with this approach.¹⁰⁸ Original com-

102. U.C.C. § 2-202, cmt. 1 (Proposed Draft 2000).

103. Cf. E. ALLAN FARNSWORTH, *CONTRACTS* § 7.3, at 475 (2d ed.1990) (“Some writings, such as elaborately drafted agreements signed by both parties, suggest complete integration . . .”).

104. In *Betaco, Inc. v. Cessna Aircraft Co.*, among the “General Terms” on the reverse side of the form Purchase Agreement used by seller, Cessna Aircraft Company, and signed by buyer, Betaco, was the clause “This agreement is the only agreement controlling this purchase and sale, express or implied, either verbal or in writing, and is binding on Purchaser and Seller . . .” *Betaco*, 32 F.3d 1126, 1129 (7th Cir. 1994). (This is the first *Betaco* opinion.)

105. “Presumption” or “presumed” means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence. U.C.C. § 2-201(3)(1998).

106. See *supra* text accompanying note 95.

107. See FARNSWORTH, *supra* note 103, § 7.3, at 478 (“[M]ost courts favor resolution of these issues by the trial court before the evidence goes to the jury.”) See also WHITE & SUMMERS, *supra* note 10, § 2-9, at 86,

(“[T]he trial is certainly not to be a free-wheeling affair in which the parties may introduce before the jury all evidence of terms, including the writing, with the jury then to decide on terms. Rather, it is plain from the rule and from prior history of similar rules that some of the evidence is to be heard initially only by the judge and that the judge may invoke the rule to keep this evidence from the jury.”)

108. See first sentence of proposed comment 3, *supra* note 89.

ment 3 of section 2-202 suggested this approach in its last sentence: "If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact."¹⁰⁹ This language has been retained in proposed comment 3.¹¹⁰ A court may be less in need of guidance from a presumption than a jury. It seems preferable to remove from the comments any reference to a presumption of integration, especially since the last sentence of proposed comment 3 declines to raise a presumption from the presence of a merger clause and the second sentence rejects any "assumption that because a record has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon."¹¹¹

5. *Effect of Partial Integration*

In the case of a partial integration of the agreement into a record or records, terms as to which there is such integration may not be contradicted but may be supplemented by consistent additional terms.¹¹² Suggested comment 3¹¹³ would continue the concept of original comment 3¹¹⁴ that in determining whether evidence of such terms is admissible, the court is to consider the likelihood that the offered term would have been included in the writing if it had in fact been agreed to. If the court concludes that the offered term, "if agreed upon. . . would have certainly been included in the document," evidence of the term is not admissible.¹¹⁵ In part, the finding that the term probably would have been included is a finding that the record or records are integrated as to the subject matter with which the offered term deals; but there is also an element of credibility here: the court finding that the term certainly would have been included, if agreed to, is a finding that the evidence is not credible.¹¹⁶

Suggested comment 4 of the NCCUSL 1999 Annual Meeting draft of section 2-202 gave an example of a contract without a merger clause where the records agree on a term fixing the unit price at \$500, and evidence is offered to prove that the parties in their negotiations agreed to

109. U.C.C. § 2-202, cmt. 3 (1998).

110. U.C.C. § 2-202, cmt. 3 (Proposed Draft 1998).

111. *Id.*

112. Proposed section 2-202(a) first speaks to "[t]erms with respect to 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 such terms as are included therein . . .*" U.C.C. § 2-202(a)(Proposed Draft 2000)(emphasis added.) As to those terms there is at least a partial integration and the parol evidence rule prohibits contradiction by prior agreements or contemporaneous oral agreements.

113. *Supra* note 91.

114. The second sentence of original comment 3 reads: "If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact." U.C.C. § 2-202, cmt. 3 (1998).

115. *Supra* note 91.

116. *Cf.* WHITE & SUMMERS, *supra* note 10, § 2-9, 87 ("[T]he judge may decide that the proffered evidence of terms extrinsic to the writing is not credible, and he or she may exclude it on that ground alone.")

an upward price escalation term under certain conditions. That comment indicated such evidence would be admissible if it “does not contradict the fixed price term,” and “if it is a consistent additional term.”¹¹⁷ That comment has been dropped from the current draft and would have been more clear if it said the evidence was admissible (1) so long as it did not contradict the included fixed price term¹¹⁸ and (2) if the court did not conclude that the escalation term, if agreed to, probably [certainly in current draft] would have been included in the record. However, the example still seems correct.

Proposed comment 2 states, “If a record is final but not complete and exclusive it cannot be contradicted by evidence of prior agreements reflected in a record or prior or contemporaneous oral agreements, but it can be supplemented by evidence, drawn from any source, of consistent additional terms.”¹¹⁹ A partial integration thus excludes parol evidence only of inconsistent additional terms alleged to have been part of the actual agreement of the parties. Evidence of course performance, course of dealing, and usage of trade is not excluded.

6. *Effect of Total Integration*

If the court finds the parties intended the record to be the complete and exclusive statement of all the terms of their agreement, proposed subsection 2-202(a) provides the record may not be contradicted or supplemented by evidence of any prior agreement or of a contemporaneous oral agreement. The finding of complete integration of all terms into the record automatically renders evidence of other agreed terms irrelevant. However, it is still possible the terms in the record may be supplemented (but not contradicted) by evidence of course of dealing, trade usage, or course of performance.

Suggested comment 3 of the NCCUSL 1999 Annual Meeting draft of 2-202 contained an example of a totally integrated contract with a fixed

117. The pertinent part of suggested comment 4 of the NCCUSL 1999 Annual Meeting draft stated: *PARTIAL INTEGRATION*. For example, if a term does not contradict but is additional to a partially integrated record, the court might conclude that the term is not a consistent additional term or, if agreed to, probably would have been included in the record. If so, evidence of the term is not admissible.

* * * If the plaintiff claims that the parties agreed to a \$600 price term in the pre-contract negotiations, that evidence will be excluded. The price term in the integrated record cannot be contradicted by evidence of a prior agreement.

If the plaintiff claims that the parties agreed to an upward escalation in the pre-contract negotiations and this evidence does not contradict the fixed price term, the evidence is admissible if it is a consistent additional term. If so [sic], and this depends upon inferences from the circumstances, the evidence is excluded.

The record, even if partially integrated, may be supplemented by course of performance, usage of trade, or course of dealing.

U.C.C. § 2-202, cmt. 4 (Proposed Draft 2000).

118. Such contradiction would occur, for example, if the recorded price term stated “The parties do not agree to any price adjustment under any circumstances.”

119. *Supra* note 91.

price term.¹²⁰ Extrinsic evidence of a prior or contemporaneous agreement for upward price escalation under certain conditions would be excluded, but evidence of a trade usage meeting the requirements of section 1-205 that price escalation would be available would be admissible to supplement the contract terms. While that suggested comment has also been dropped from the current version, again the example still seems correct. Comment 2 of original section 2-202 indicated that inclusion of terms from established trade usages was taken for granted by the parties when the record was prepared.¹²¹ Original comment 2 made the same point about inclusion of terms from course of dealing and there is no reason to suppose the revision intended to depart from that concept, especially when the text of the revision expressly mentions supplementation, even of a totally integrated contract, by course of dealing, trade usage and course of performance. In the example above taken from the suggested comment in the 1999 version, evidence would be admissible that the parties had in past dealings under similar fixed price contracts afforded price escalation to the seller in certain circumstances, again because such supplementation of the terms in the record was probably taken for granted.¹²²

120. The pertinent part of suggested comment 3 to section 2-202 of the 1999 NCCUSL Annual Meeting draft reads:

The effect of a total integration is clear under subsection (a). The record may not be contradicted or supplemented by "evidence of any prior agreement or of a contemporaneous oral agreement." Alleged terms from these sources are excluded even though they are perfectly consistent or are in harmony with those in the record. However, terms may be supplemented by evidence of course of performance, usage of trade, and course of performance [sic, presumably course of dealing was intended]. Thus, unless carefully negated in the merger term, evidence from trade usage may always be admitted to supplement a term in the record. The conditions of Section 1-205, however, must be satisfied.

To illustrate, suppose that a totally integrated record contains a fixed price term. An alleged term agreed in the negotiations to provide upward price escalation if certain costs increased would be excluded even though it merely supplemented the fixed price. On the other hand, a usage of trade otherwise established under Section 1-205 that price escalation is available under certain conditions would be admitted to supplement the price term unless specifically excluded. The assumption is that the inclusion of terms from this source was taken for granted when the record was prepared.

U.C.C. § 2-202, cmt. 3 (1999).

121. The text of original comment 2 states:

Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to . . . supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

Except for the sentence concerned with negation of course of dealing, course of performance, or trade usage, these statements from original comment 2 are not retained in the proposed new comments. The omission is not explained and is regrettable since these statements remain as true today as when original Article 2 was drafted.

U.C.C. § 2-202, cmt. 2 (1998).

122. Cf. *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981). (price protection for buyer implied from trade usage and course of performance).

One of the best benefits from the proposed revision of section 2-202 is the way deals with distinct concepts somewhat more precisely than the original version, separating supplementation of terms from explanation of terms and separating evidence of supplementation by agreement from evidence of supplementation from trade usage, course of dealing and course of performance.

7. *Excluding Evidence of Course of Dealing, Course of Performance, or Trade Usage*

The parties to an agreement may wish to go beyond a standard merger clause stating, for example, "This record is a final expression of all the terms of the agreement of the parties and is a complete and exclusive statement of those terms." Such a merger term, if found by the court to state the intentions of the parties, would still not have precluded introduction of evidence of course of dealing, course of performance, or trade usage, because subsection (a) of proposed section 2-202 indicates that such evidence is still admissible to supplement the terms in the record, and subsection (b) indicates that evidence of course of performance, course of dealing or usage of trade may be admitted to explain terms in a record. Proposed comment 2 states in part, "Even if the record is final, complete and exclusive it can be supplemented by evidence of noncontradictory terms drawn from an applicable course of performance, course of dealing or usage of trade unless those sources are carefully negated by a term in the record"¹²³ The rationale as expressed in comment 2 of original section 2-202 was that the parties are assumed to have negotiated the contract and prepared the record with the expectation that supplementary terms from these sources would be included.¹²⁴ Language such as, "The parties do not intend for the terms in this record to be supplemented [or explained] by course of dealing, course of performance, or usage of trade," should be sufficient, though obviously the parties should think carefully and make sure they have a complete statement in the record of all their expectations before including such language, especially the bracketed words which purport even exclude course of dealing, course of performance, and trade usage from being admitted to explain the meaning of terms.¹²⁵

Course of performance may be treated somewhat differently from course of dealing or trade usage because performance comes after the contract is agreed to and recorded. As a result course of performance may be admissible to prove subsequently-agreed-to modifications or waivers.¹²⁶ Of course section 2-209 would have to be satisfied as to proof

123. *Supra* note 91.

124. *Supra* note 121.

125. See HAWKLAND, *supra* note 23, § 2-202:3 (discussing express negation of these sources). See also, text of suggested comment 5 questioning whether a contract clause may exclude "an otherwise applicable implied-in-fact source." *Infra*, note 136.

126. See *supra* text accompanying note 14.

of modification or waiver.¹²⁷ But under revised section 2-202(a) course of performance would still not be admissible to prove a contradictory prior or contemporaneously-agreed-to term, and proposed section 2-208 must be satisfied as to evidence of course of performance introduced for other permitted purposes.

8. Article 2 "Gap-Fillers"

The parol evidence rule has no application to Article 2's gap-filling provisions such as section 2-305 on open price terms or section 2-308 specifying the place for delivery. These are not prior or contemporaneous agreements but terms (sometimes called default terms) that will apply as a matter of law to the extent the parties do not provide otherwise.

9. Evidence Offered to Explain Terms

The proposed new rule would add clarity in subsection (b) by treating separately the admissibility of evidence to explain terms. This provision makes it clear that course of dealing, course of performance, and trade usage may be used to explain terms in a record without a preliminary finding by the judge that the term is ambiguous;¹²⁸ this follows former section 2-202(a) and original comment 1(c). Of course it is not always easy to tell the difference between supplementation and explanation. For example, suppose a contract term in a record at least partially integrated says the goods are to be "delivered by March 18." Seller attempted a partial delivery on March 10, planning to complete performance with a further delivery on March 17. Buyer rejected the partial delivery because the record did not provide for partial deliveries and proposed section 2-307 would have required one single delivery.¹²⁹ Evidence is offered to establish a trade usage (or a course of dealing) under which the partial delivery would have been acceptable. Is the evidence being offered to add a supplemental term (that partial deliveries will be acceptable) or to explain that "delivered by March 18," means that partial deliveries will be acceptable as long as full delivery is completed by that date? In the latter case the evidence is admissible; but in the former it is not if the court either finds that there was an integration as to the delivery term, or finds

127. See J. WLADIS article in this issue dealing with contract formation and section 2-209.

128. See text of subsection 2-202(b), *supra*. The Preliminary Comment to the proposed revision reads:

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

U.C.C. § 2-202, preliminary cmt. (Proposed Draft 2000) (emphasis added).

129. The pertinent part of proposed section 2-307 reads: "Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery" U.C.C. § 2-307 (Proposed Draft 2000).

that the offered term, if agreed upon, would certainly have been included in the record.

As one commentator points out¹³⁰ the Code's definition of "term" provides some guidance. "'Term' means that portion of an agreement which relates to a particular matter."¹³¹ Hawkland suggests, "a term is not completely stated unless all of its aspects are covered. For example, a delivery term that states only the time and place of delivery is not complete, because it has not dealt with the manner of delivery. It may be said in such a case that there is a 'missing' or 'silent' term (manner of delivery) which may be *supplemented* by evidence outside of the contract."¹³² According to this view, in the example above involving partial delivery the evidence would be attempting to supplement the record with a further term covering the number of deliveries permitted. Whether the evidence is admissible would depend on whether the court found that there was a complete integration as to the terms dealing with the subject matter of delivery and whether supplementation by trade usage or course of dealing had been "carefully negated."¹³³

"Under the newer, more liberal view, championed by Corbin and followed by the Restatement, Second, [of Contracts], the parol evidence rule does not apply at all to matters of interpretation."¹³⁴ Proposed subsection (c) of the NCCUSL 1999 Annual Meeting draft of 2-202 contained a sentence stating, "Terms in a record may also be explained from other sources as determined by the court under applicable law." A suggested comment, which was not retained, said in part, "Terms in a record may also be explained by evidence from other sources as determined by the court under applicable law. Put differently, Section 2-202 does not state the principles of contract interpretation beyond those provided in subsection (c) [now (b)]."¹³⁵ Although the textual provision and the comment have not been retained, the rule they stated seems to be correct.¹³⁶ Nonetheless suggested comment 5 of the current version takes a

130. See HAWKLAND, *supra* note 23, at § 2-202:3.

131. U.C.C. § 1-201(42) (1998).

132. See HAWKLAND, *supra* note 23, at § 2-202:3 (emphasis added).

133. See *supra* Parts B. 6 & 7 of this article.

134. FARNSWORTH, *supra* note 103, at 522. (footnotes omitted). The quote continues:

Integrated and unintegrated agreements are treated alike, and extrinsic evidence of prior negotiations is always admissible as long as it is used for the purpose of interpretation. The court need not first determine that the language is unclear In Corbin's words, "No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation the meaning of the writing is determined." *Id.* (quoting Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 622 (1944), adapted in 3 A. CORBIN, CONTRACTS § 579 (1960).

135. U.C.C. § 2-202, cmt. 5 (Proposed Draft 1999) (citing RESTATEMENT (SECOND), OF CONTRACTS, §§ 212, 200-203, and Margaret N Kniffen, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 OREGON L. REV. 643 (1995)).

136. Cf. WHITE AND SUMMERS, *supra* note 10, at 103-4 ("It is well understood that the parol evidence rule does not bar evidence bearing on a genuine issue of interpretation arising because of ambiguity or other unclarity. Some courts require that the term to be interpreted be ambiguous on its face, though 2-202 does not so provide.") (footnotes omitted).

more conservative approach.¹³⁷ The last sentence of this proposed comment 5 appears to contradict the next to last sentence of proposed comment 2, which suggests that a term in a record could “carefully negate” (exclude) application of course of performance, course of dealing, or trade usage.¹³⁸ It is possible that comment 2 is addressing only *supplementation* of the record, in which case the parties may agree to the exclusion of implied-in-fact terms. Comment 5, on the other hand, addresses only *interpretation*, and declines to state a rule on whether the parties could also validly agree that implied-in-fact terms are excluded from assisting in contract interpretation.¹³⁹ Again it is not always easy to tell the difference between “interpreting,” “contradicting,” and “supplementing.”¹⁴⁰

10. *Evidence of Fraud, Mistake, Duress, ETC.*

Finally, suggested comment 4 would preserve the cases under original section 2-202 holding that the parol evidence rule does not exclude evidence offered to establish a variety of matters including misrepresentation, duress, mistake, unconscionability, modification, and impracticability.¹⁴¹ The goal of the parol evidence rule is to assist in finding and enforcing the actual agreement of the parties, taking into account that a record is considered to be a more reliable indication of that agreement than the memory of the parties. All these exceptions are in keeping with that goal.

137. The text of suggested comment 5 reads:

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

U.C.C. § 2-202, cmt. 5 (Proposed Draft 2000).

138. See text of suggested comment 2 *supra* note 91.

139. There is amusing irony in the possibility that the comments to revised section 2-202 may be unclear.

140. FARNSWORTH, *supra* note 103, at 522-23.

141. The text of suggested comment 4 reads:

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

U.C.C. § 2-202, cmt. 4 (Proposed Draft 2000).