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## “UNIFORM COMMERCIAL CODE ARTICLE TWO REVISIONS: THE VIEW OF THE TRENCHES”

*Henry Gabriel\**

### I. INTRODUCTION

In an attempt to lessen the legal burdens on the sellers of mass-produced goods, the proposed amendments to Article 2 of the Uniform Commercial Code (UCC) set out a single statutory standard for the responsibility of sellers that direct advertisements to the ultimate buyer of the goods.<sup>1</sup> Generally consistent with the existing case law, the new rule eliminated the problems sellers had in dealing with the differences in this area among the various state laws.<sup>2</sup> The provision was manufacturer friendly. How did the manufacturing industry react to this helpful amendment? They opposed it.<sup>3</sup>

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1. AMENDMENTS TO UNIFORM COMMERCIAL CODE, ARTICLE 2—SALES § 2–313B (AM. LAW INST. & NAT’L CONFERENCE COMM’RS UNIF. STATE LAWS 2002) [hereinafter AMENDED U.C.C.].

2. See *infra* note 73.

3. See Nat’l Ass’n of Mfrs., Industry Concerns About Final Article 2 Revisions (2005) (on file with author). The reason articulated by the National Association of Manufacturers was that:

The new rule is a major change that conflicts with the direction of most recent court and legislative action. It creates liability for public communications, even though the communication was not a part of the agreement and even if it did not cause personal injury. The rule may be unconstitutional under the First Amendment. In any event, this is a contract statute and should deal with contracts. This rule is a huge step backward that invites class action litigation and is outside the domain of a commercial contract law. *Id.*

It may be that some did not fully appreciate the limited and clarifying purpose of this section. It is well explained in a report of the Uniform Commercial Code Committee of the California State Bar which wrote a detailed response to the memo from the National Association of Manufacturers:

A majority of state courts that have ruled on the issue have held that statements contained in brochures, catalogs and other advertisements could create a basis for an express warranty under [e]xisting UCC [s]ection 2–313. Many states have also held that privity is not required in order for an express warranty to be asserted. Furthermore, to a large extent, the absence of privity is either effectively conceded, or not raised, in such litigation. To the extent a state has adopted these rules, [a]mended UCC [section] 2–313B codifies these rules, and does not create any new liability (indeed, it might even serve in some jurisdictions to limit liability that might exist by virtue of prior court decisions). In a state which has not adopted these rules, [a]mended UCC [section] 2–313B may create a new potential liability for sellers in that state. One of the goals of the UCC is to promote commerce through a uniform set of rules governing commercial transactions in all states. This not only protects customers, but also creates a level playing field among competing sellers. Thus, when different states have different rules, it is a necessary and desirable outcome that, when a uniform rule is adopted, the rule in some states will change.

Unif. Commercial Code Comm., *Analysis by the UCC Committee of the State Bar of California Business Law Section of the NAM Industry Concerns About the UCC Article 2 Revisions 4*, STATE BAR OF CAL. BUS. LAW SECTION, (Feb. 25, 2005) (footnotes omitted).

That, in a nutshell, was the attempted revision of Article 2 of the Uniform Commercial Code. With substantial organized opposition, the Uniform Law Commission (ULC) lost the political will to move forward with the enactment of the revisions to Article 2, and the revisions were officially withdrawn in 2011.<sup>4</sup>

The proposed revisions of Article 2 of the Uniform Commercial Code began in 1987 when the Permanent Editorial Board (PEB) for the Uniform Commercial Code, in conjunction with the sponsors, appointed a study group and charged it with identifying major problems of practical importance in the interpretation and application of Article 2.<sup>5</sup> The drafting process began in 1991 with the original drafting committee.<sup>6</sup> That drafting committee was disbanded in 1999, and the second drafting committee was appointed.<sup>7</sup> This second drafting committee worked for four years from 1999 until 2003. The completed revisions sat unenacted anywhere until 2011. Out of an appreciation that there was no future for the revisions, The Uniform Law Commission and the American Law Institute officially withdrew the revisions that year.<sup>8</sup> The proposed revisions of Article 2, from the time the process began until the time the revisions were withdrawn, took 24 years.

The reader should appreciate that my perspective is not merely one of a disinterested academic. I served as the reporter for the revisions of Uniform Commercial Code Article 2 from 1999 until 2003. During that time, we drafted the full set of revisions in two years, and then spent the next two years working on the scope provision. However, as my position as the reporter was one of being literally in the middle of the process and trying to constantly balance the competing interests and demands, I believe I maintained a certain neutrality at the time that still informs my view now.

In this Article, I explain how we ended up with a second drafting committee and what the committee attempted to accomplish with the 2003 revisions. I also explain the reasons why, as modest and as balanced as the proposed amendments turned out to be, the political impediments to law revision prevented the enactment of the revisions. I will specifically examine several proposed amendments and show how various interest groups systematically and successfully fought them so that what we ended up with was a set of revisions that had neutralized most opposition but at the same time destroyed any sense of urgency for their adoption.

4. *Recommendation of the Permanent Editorial Board for the Uniform Commercial Code to withdraw the 2003 Amendments to UCC Articles 2 and 2A from the Official Text of the Uniform Commercial Code*, 65 Consumer Fin. L. Q. Rep. 150, 160 (2011). [hereinafter *Recommendation of PEB*].

5. *See generally* Permanent Editorial Bd. for the Unif. Com. Code, *PEB Study Group Uniform Commercial Code Article 2, Permanent Editorial Bd. for the Uniform Commercial Code, Preliminary Report (1990)*; *PEB Study Group Uniform Commercial Code Article 2, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (1991) (providing a concise summary of the PEB preliminary report).

6. Henry Deeb Gabriel, *The 2003 Amendments of Article Two of the Uniform Commercial Code: Eight Years or a Lifetime After Completion*, 52 S. TEX. L. REV. 487, 489 (2011).

7. *Id.* at 491.

8. *See Recommendation of PEB, supra* note 4, at 161.

## II. THE UNIFORM COMMERCIAL LAW

“Commercial law in America is primarily state, not federal law, and it is independently promulgated in 51 separate jurisdictions.”<sup>9</sup> Until the late 19th century, American commercial law was primarily based on English common law<sup>10</sup> and the law of merchants. Each state’s law evolved independent of the other states’ law. Although commercial law is still the law as adopted by the individual states, today commercial law is primarily uniform throughout the United States because of the existence and passage of the Uniform Commercial Code in all of the states<sup>11</sup> and the District of Columbia. The UCC has been adopted in some form by all jurisdictions and embodies the major corpus of American commercial law.

The beginning of the move in commercial law from primarily case law to the statutory framework of the Uniform Commercial Code began early in the 20th century with the drafting and adoption of several discrete uniform acts which were drafted by the Uniform Law Commission (ULC)<sup>12</sup> to codify areas of commercial law. These acts included negotiable instruments,<sup>13</sup> sales,<sup>14</sup> documents of title,<sup>15</sup> and security rights in personal property.<sup>16</sup> These uniform acts were adopted in various degrees by the states and made some progress in unifying the commercial law in America, but their adoption was not widespread and therefore failed to achieve the goal of national uniformity in their respective areas of commercial law.

9. Henry D. Gabriel, *The Revisions of the Uniform Commercial Code—Process and Politics*, 19 J. L. & COM. 125, 125 (1999).

10. *Id.* All I intend here is to suggest that there was some generally recognized commercial law principles that were common in the various states. I do not intend to suggest that there is or was a unified “common law” in the United States or elsewhere. Such a notion of a “common law” has long been recognized as not existing. *See e.g.*, *Black and White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). It is clear, though, that during the late nineteenth century the standard American treatises on commercial law that were used by the courts and practitioners synthesized myriad American as well as English cases. *See e.g.*, ARTHUR BEILBY PEARSON & HUGH FENWICK WITH JAMES M. KERR, BENJAMIN’S TREATISE ON THE LAW OF SALES OF PERSONAL PROPERTY: WITH REFERENCE TO THE AMERICAN DECISIONS, AND TO THE CODE AND CIVIL LAW, (Boston, Charles H. Edson & Co. 3d ed. 1888).

11. *Id.* at 136 n.1. (“Louisiana has not adopted the sales (Article 2) or the leases (Article 2A) provisions, but has adopted the rest of the UCC.”).

12. The official name of the organization is the National Conference of Commissioners on Uniform State Laws (“NCCUSL”), and until a rebranding a few years ago, was known by that name. NCCUSL was created in 1892, and it consists of representatives (“Commissioners”) from each State, the District of Columbia, Puerto Rico, and the United States Virgin Islands. The Commissioners are appointed by their respective States, either by the State’s Governor or the Legislature of the State. All Commissioners are lawyers, and they serve without compensation. The purpose of NCCUSL is to determine what areas of private state law might benefit from uniformity among the States, to prepare statutes or “uniform acts” to carry that object forward, and then to have those statutes enacted in each American jurisdiction. The work of the Commission is done through Drafting Committees of appointed Commissioners, and through an annual meeting of all of the members that lasts eight days each summer. For a history of NCCUSL, *see* ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION, (2013); WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE, A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1991).

13. UNIF. NEGOTIABLE INSTRUMENTS ACT § 5 U.L.A. pts. 1-2 (1896).

14. UNIF. SALES ACT § 1 U.L.A. pts. 1-1A (1906).

15. *See* UNIF. WAREHOUSE RECEIPTS ACT § 3 U.L.A. (1906); UNIF. BILLS OF LADING ACT § 4 U.L.A. (1909).

16. *See, e.g.*, UNIF. CONDITIONAL SALES ACT § 2 U.L.A. (1918).

In 1935, the two major American legal bodies involved in creating private law, the American Law Institute (“ALI”)<sup>17</sup> and the Uniform Law Commission<sup>18</sup> entered into an agreement to jointly sponsor the drafting of new commercial law legislation. In 1940, the ULC adopted a plan to unify all the commercial law in one commercial code.<sup>19</sup> The ALI was invited to join in the task and accepted.<sup>20</sup> The drafting committees consisted of members of the ULC, official representatives from the ALI, as well as official representatives from the American Bar Association (“ABA”). This has been the structure of drafting committees throughout the entire history of the UCC up to the most current revisions. Since the beginning, the meetings have been open and representatives from trade groups have attended in abundance.

The first draft of the UCC was approved in 1951.<sup>21</sup> Pennsylvania was the first state to adopt it in 1953, and it would take another two decades for it to be adopted in all states.<sup>22</sup> The UCC is now nearly 70 years old, and during this time the UCC has gone through substantial changes and revisions. The need for revisions to the UCC arose from essential changes in business practices, as well as the development of more inclusive and faster methods of communication since the adoption of the original text.

The UCC originally consisted of: Article 1: General Provisions, Article 2: Sales, Article 3: Negotiable Instruments, Article 4: Bank Deposits and Collections, Article

17. *The American Law Institute Proceedings*, 2 A.L.I. PROC. 429 (1924). The stated purpose of the Institute is “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” ALI By-Laws Article 1, reprinted in Volume II). *Id.* The ALI was organized in 1923 following a study conducted by a group of prominent American judges, lawyers, and teachers known as “The Committee on the Establishment of a Permanent Organization for the Improvement of the Law.” The Committee had reported that the two chief defects in American law, its uncertainty and its complexity, had produced a “general dissatisfaction with the administration of justice.” COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR THE IMPROVEMENT OF THE LAW, *The 1923 Report of the Committee*, 1 A.L.I. PROC. 1 (1923), reprinted in AMERICAN LAW INSTITUTE 50TH ANNIVERSARY (2d ed., 1973). The Committee recommended that a lawyers’ organization be formed to improve the law and its administration. This led to the creation of the ALI. The Institute is a self-perpetuating voluntary organization, and under its bylaws has authorized an elected membership of 3,000. This membership consists of judges, lawyers, and law teachers from all areas of the United States as well as some foreign countries, selected on the basis of professional achievement and demonstrated interest in the improvement of the law. *See id.*

From its founding, the ALI has defined its purpose to address uncertainty in the American law through a series of restatements of the basic legal subjects that would allow judges and lawyers to know what the law is. *See Creation*, AM. L. INST., <https://www.ali.org/about-ali/creation/> (last visited Apr. 15, 2018). Between 1923 and 1944, Restatements of the Law were written on Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Security, Torts, and Trusts.

In 1952, the Institute began the drafting of the Restatements (Second). These were updated editions of the original Restatements, which reflected new analyses and concepts, as well as expanded use of authorities. Restatements (Second) also covered subjects not included in the first series of Restatements. In 1987, a third series of Restatements were inaugurated.

Since 1923, the Institute has also drafted several Model Codes, such as the Model Penal Code, a Model Code of Evidence, and, as mentioned above, in collaboration with NCCUSL, the Institute has drafted and promulgated the UCC. *See Past and Present ALI Projects*, AM. L. INST., [https://www.ali.org/media/filer\\_public/ff7c/ff7c6940-a48c-4e70-a7ae-bb7c56d4ed94/projects-past-present-2017b.pdf](https://www.ali.org/media/filer_public/ff7c/ff7c6940-a48c-4e70-a7ae-bb7c56d4ed94/projects-past-present-2017b.pdf) (last visited Apr. 15, 2018).

18. For a history of the Uniform Law Commission, *see* STEIN, *supra* note 12, at 62, and ARMSTRONG, *supra* note 12, at 53.

19. For a history of the Uniform Commercial Code, *see* STEIN, *supra* note 12, at 77-96.

20. *See* STEIN, *supra* note 12, at 83.

21. *See* STEIN, *supra* note 12, at 86-87.

22. *See* STEIN, *supra* note 12, at 87.

5: Letters of Credit, Article 6: Bulk Sales, Article 7: Documents of Title, Article 8: Investment Securities, and Article 9: Secured Transactions. Article 2A was added in 1987 to provide for personal property leases. Article 4A on funds transfer was added in 1989.

Major revisions of the individual articles began with the revision of Article 8 in 1977 to provide for uncertificated securities, with additional major revisions to Article 8 in 1994. Article 6 was revised in 1989. Articles 3 and 4 were revised in 1990 and further amended in 2002. Article 1 was revised in 2001. Article 5 was revised in 1995. Article 7 was revised in 2003, and Article 9 was revised in 1999 with additional amendments in 2013. The project to revise article 2 was part of this overall reevaluation of the Code during the 25-year period between the mid-70s and the beginning of the new century.

### III. FAILURE WAS ANTICIPATED

There were signs from the beginning that there were problems ahead, and these were duly noted by some commentators.<sup>23</sup> Regardless, we trudged ahead. The problem that would continue to vex the Article 2 process was the tension between industry groups and consumer interests.

It is important to note that from the beginning of the drafting of Article 2 in the 1940's, the philosophy behind the Code was to move away from the traditional legal formalism and instead focus on actual commercial practices.<sup>24</sup> The drafting

23. There is a long and illustrious history of academics critiquing and complaining about the revision process of the Uniform Commercial Code as a whole. See e.g., Richard A. Elbrecht, *The NCCUSL Should Abandon Its Search for Consensus and Address More Difficult and Controversial Issues Applying "Process" Concepts*, 28 LOY. L.A. L. REV. 147 (1994); Donald B. King, *Major Problems with Article 2A: Unfairness, "Cutting Off" Consumer Defenses, Unfiled Interests, and Uneven Adoption*, 43 MERCER L. REV. 869 (1992); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Donald J. Rapson, *Who Is Looking out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249 (1994); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991) [hereinafter Rubin, *Efficiency, Equity*]; Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993) [[hereinafter Rubin, *Thinking Like a Lawyer*]; Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994) [hereinafter Scott, *The Politics*]. Miller goes on to point out that, "None of these authors at the time they were writing had directly participated in drafting committee meetings which produced the provisions being complained about," see Miller Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 708 n.5 (1998), as well as pointing out some favorable commentaries on the revision process. *Id.* (citing Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who Is Saving the UCC?*, 26 LOY. L.A. L. REV. 563 (1993); Marianne B. Culhane, *The UCC Revision Process: Legislation You Should See in the Making*, 26 CREIGHTON L. REV. 29 (1992); Fred H. Miller, *Is Karl's Kode Kaput?*, 26 LOY. L.A. L. REV. 703 (1993); Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 MINN. L. REV. 861 (1995); Fred H. Miller, *The Uniform Commercial Code: Will the Experiment Continue?*, 43 MERCER L. REV. 799 (1992); Fred H. Miller, *U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405 (1991); Fred H. Miller & Albert J. Rosenthal, *Uniform State Laws: A Discussion Focused on Revision of the Uniform Commercial Code*, 22 OKLA. CITY U. L. REV. 257 (1997); A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645 (1996); Carlyle C. Ring, Jr., *The UCC Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287 (1994); William D. Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811 (1993).

From the drafters' perspective, these commentaries are rarely helpful.

24. See, e.g., U.C.C. § 2-101, Official Cmt. (AM. LAW INST. & UNIF. LAW COMM'N, 2017).

committees have always relied heavily upon industry representatives to achieve this goal. This not only limited the scope of the project to those areas found acceptable by industry groups but also strongly influenced the final text. The industry perspective not only was baked into the perspective of the text as the perspective of the drafting committees as to the appropriate rules, but it also has had an overarching political aspect to it, as one of the fundamental principles of ULC projects is that the uniform laws should be enactable. For commercial laws, this means industry support, or at least lack of industry opposition, as it is the industry groups that are the most organized to support or block legislation in the various states.

Article 2, as it was drafted in the 1940s, was a product of professors and practitioners trying to craft a product that reflected the commercial practice at that time. The notion that there were specific consumer interests that should be represented in the project was an idea that simply was not present at that time.<sup>25</sup> By the time the revision of Article 2 began in the late 1980s, the concern for consumer interests were very much a part of the legal and academic milieu that pervaded law revision.<sup>26</sup> The collision course was set into motion.

In 1995, Alan Schwartz and Robert Scott predicted:

...that the Article 2 process...would result in a vague and open-ended revision that largely reinforced the status quo. This prediction would hold...irrespective of the dedication, the effort, and the integrity of the participants in the process. This is because the outcome of the uniform laws process is the product of structural—not personal—forces. Whenever there is competition among interest groups with no single group dominating, as in the case of Article 2, ...the process would result in vague and imprecise rules that delegated broad discretion to courts.<sup>27</sup>

This prediction was close to, but ultimately missed the mark. The result was not a set of new and vague rules, but the collapse of the project itself. The reasoning was correct, though.

Another way to address the question is whether “the effort to join mandatory consumer protection with commercial law default rules in a single statute wise?”<sup>28</sup> To attempt this, as we did, guaranteed the clash of competing interests that could not be reconciled.

25. I do not mean to suggest that the drafters did not consider non-commercial contracts as part of the scope of Article 2, but that there was not any particular focus on consumer rights as a separate and significant concern. It is worth noting that most contemporary consumer rights in the sale of goods are created in state and federal laws outside of Article 2. Even though Article 2 was never intended to be a consumer protection statute, this point apparently is lost on many. See, e.g., Caroline Edwards, *Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment*, 78 ST. JOHN'S L. REV. 663, 633 (2004).

26. The decision to include specific consumer protections in revised Article 2 was made in 1996. See Gail Hillebrand, *What's Wrong with the Uniform Law Process?*, 52 HASTINGS L. J. 631, 631-32 (2001).

27. Robert E. Scott, *Is Article 2 the Best We Can Do?*, 52 HASTINGS L. J. 677, 680 (2001), [hereinafter Scott, *Is Article 2 The Best*], in which the author discusses his earlier article, Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 645-47 (1995).

28. Scott, *Is Article 2 The Best?*, *supra* note 27, at 679.

#### IV. DRAFTING COMMITTEE ONE: PROBLEMS AND PROCESS

##### A. The Problems

The original drafting committee had three problems throughout the process that, in retrospect, indicated a high probability of failure.

##### i. Competing Interest Groups Will Not Communicate

First, the presence of highly polarized, strong advocates, representing consumer and business interests, made it difficult to find a neutral middle ground. Compromise was not in the vocabulary of the observers to the drafting process.

##### ii. Two Projects Running Simultaneously

A second problem was the inability to coordinate the Article 2 revision committee and the Article 2A (Leases) revision committee. Although both committees were formed and operated independent of each other and each committee had separate mandates to revise their respective parts of the UCC, it was assumed that the two committees would coordinate on common issues. To a large extent this was the case. However, in areas where outside pressures affected different parts of the respective articles, there was some diversion. These differences usually made sense because of the different policies that underlie sales and leases contracts. However, in the highly charged atmosphere of the revision process, these differences sometimes created an impression of contentiousness that was not there. Anything that created this impression, though, weakened the effectiveness of the project.

##### iii. Three Projects Running Simultaneously

A third problem with the original drafting committee was the effect on the Article 2 drafting process by the Article 2B: Licenses committee that morphed into the Uniform Computer Information Transactions Act (UCITA). The inclusion and then exclusion of computer software agreements into the article 2 revision process created such chaos, that it alone might have been the single most important factor in the failure of the original drafting committee.

Uniform legislation for software licensing transactions began as a parallel project to the revision of Article 2. The path getting there was rather crooked. A 1987 report from a subcommittee of the Uniform Commercial Code Committee of the American Bar Association's Section of Business Law recommended uniform legislation for software licensing.<sup>29</sup> The recommendation suggested that it might be a freestanding act, amendments to UCC Article 2, or a new article to the Uniform Commercial Code. The recommendation was forwarded to the ULC, which appointed a study committee. The study committee recommended a free-standing act. Because of opposition to uniform legislation by some segments of the software

29. William H. Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L.J. 131, 133 (2009).



industry, the ULC then asked the Section of Business Law to form an *ad hoc* group to advise it. That group suggested more areas of consideration. The ULC then requested its study committee to prepare yet another report in light of the *ad hoc* group's suggestions. That report reiterated the recommendation for uniform legislation, but this time recommended that the Code include software transactions in Article 2.<sup>30</sup>

With this background, in 1991, when the ULC appointed the original committee to revise Article 2, it also appointed the Special Committee on Computer Software Contracts to work with the Article 2 Committee and the existing Article 2A Standby Committee to identify “the areas, if any, in Articles 2 and 2A which should be modified in order properly to accommodate or exclude computer software transactions within the scope of those Articles’ and, upon request, to draft appropriate language.”<sup>31</sup> As well as the beginning, this was probably the end of the original drafting committee project.

### B. The Process

From the beginning of the Article 2 revision project, software licensing concerns were addressed, and both expert as well as industry advisors participated in the process. This inclusion of what was, in effect, the interests and concerns of a wholly separate, and very contentious project on software contracts, created a chaos of competing issues and interests that were difficult to address in any systematic and coherent manner.

By 1994, the Committee was totally out of control as there were simply too many issues and parts running simultaneously. The decision was made to adopt a “hub-and-spoke” approach. This would entail “a chapter containing general principles (the hub) and separate chapters containing special rules for sales and licensing transactions (the spokes).”<sup>32</sup> It was during this period that the drafters began to include wholesale amendments and renumbering of Article 2 to accommodate this new conceptual approach to the commercial code.

This division did not last long. “In 1995, it was determined that the range of differences between the transaction types made the hub-and-spoke approach unworkable, and a separate committee was appointed to draft a new Article 2B on licensing.”<sup>33</sup> Although the Article 2 project had been disengaged from computer information transactions, it could not escape the continuing fallout from its earlier engagement.<sup>34</sup> The original Article 2 drafting committee never regained its focus.

In this new iteration of the revisions, another drafting committee was also formed to revise the leasing provisions in Article 2A to conform with the work on Articles 2 and 2B. Adding to the overall complexity of the coordination among these three projects was the necessity to coordinate these with the ongoing revisions of

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30. *Id.* at 134.

31. *Id.* (footnote omitted) (quoting the August 6, 1991 minutes of the NCCUSL’s executive committee).

32. *Id.*

33. *Id.* at 134.

34. This was a problem that continued with the new drafting committee.

Articles 1 and 9. With the door open by now to so many competing interest groups, the project was besieged on all sides.

By the time of the annual meeting of the American Law Institute (ALI) in May of 1999, and after 25 meetings of the drafting committee, a draft had been cobbled together with a number of compromises that were necessary to hold it together. Although the draft was approved by the ALI during that meeting, the compromises quickly began to unravel, and before the ULC annual meeting that July, the commissioners were inundated with letters—primarily from industry groups objecting to the draft.

This all came to a head at the ULC annual meeting in 1999. After consultation with the ALI, the executive committee stopped the floor debate and pulled the draft from consideration. The reporter and the associate reporter resigned.<sup>35</sup>

## V. DRAFTING COMMITTEE TWO

Instead of abandoning the project altogether, the ULC quickly created a new drafting committee with a much smaller mandate. Within 18 months, the bulk of a new draft had been completed.

It was not an easy process. During the entire time the new revision committee worked, and for several years after, the project was besieged on many fronts. The one issue that remained highly contentious with the new drafting committee, and which delayed the completion by two years, was the scope provision. I will discuss this problem and how we tried to resolve it in some depth later, but scope was only one of the problems for the committee. In addition, the committee also inherited a variety of problems from the first drafting committee; problems that regardless of how the new committee tried to resolve or avoid, would simply not go away.

For example, there was the *Gateway* problem—named after a case involving the Gateway Computer Company<sup>36</sup>—which raised the question about the validity of terms first disclosed to a “buyer” after payment and delivery of the product. Some wanted to preclude a seller’s deferred terms from becoming part of the contract unless the buyer expressly manifested assent to the terms. Others preferred that the terms become part of the contract if the buyer was given a reasonable post-delivery right of return for a refund. To avoid the contentiousness of this question, a question that plagued the original drafting committee, the new committee chose to avoid the issue and leave it to further development by the courts.<sup>37</sup> This answer seemed to satisfy no one except the members of the drafting committee. Other parties wanted clarity—a firm position, but of course, one that favored their respective views.

35. Gabriel, *supra* note 6, at 491.

36. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997). The case was actually one of a pair of cases from the United States Court of Appeals for the Seventh Circuit. See Pro CD, Inc. v. Zeidenberg, 86 F.3d 1447, 1448-49 (7th Cir. 1996).

37. The section omits any specific treatment of terms attached to the goods, or in or on the container in which the goods are delivered. This article takes no position on whether a court should follow the reasoning in Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991) and Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000) (original 2-207 governs), or the contrary reasoning in Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997) (original 2-207 inapplicable).

Regardless of the problems, the drafting committee completed the new amendments<sup>38</sup> and had them approved by the two sponsoring organizations in 2003. After that, though, every attempt to have the amendments adopted in any jurisdiction was met with strong opposition in the various legislatures. This happened year after year, and over the years, the number of attempts to introduce the amendments dwindled down to none.

In the summer of 2010, the ULC and the ALI appointed a committee to prepare a report on the amendments for the PEB. The committee noted that the sponsoring organizations had three alternatives: (1) leave the 2003 amendments in the official text and continue to seek enactment as promulgated; (2) withdraw the 2003 amendments and thereby conform the official text to the existing Article 2; or (3) amend the amendments “so that they [would be enactable] and, in the view of the sponsoring organizations, [are worthy] of being enacted.”<sup>39</sup>

The first alternative had been the approach taken by the sponsoring organizations since 2003. Since there appears to be no movement toward enactment of the amendments, this did not appear to be a long-term option.

After this many years, there was no will for yet another drafting committee and another attempt at revisions or amendments. Thus, the alternative to withdraw the project was approved. Based on the report submitted to the PEB, the PEB recommended to the executive committee of the ULC that the 2003 amendments be officially withdrawn.<sup>40</sup> This recommendation was approved by the ULC executive committee at its midyear meeting in January 2011, and the recommendation was presented and approved by the full body of the ULC at its annual meeting in the summer of 2011.<sup>41</sup>

There were very few sections of the proposed amendments that drew serious opposition. The single most important factor that hindered adoption of the amendments was the lack of any clear legislative support. Unlike Article 5: Letters of Credit and Article 9: Secured Transactions, which had the active, strong support of the banking industry, amended Article 2 had no natural allies. As opposition was whittled away, by compromise after compromise, what was left was indifference. In the end, most opposition was eliminated, but so was support.

Article 2 polarized two groups that can be roughly summarized as consumer-buyer interests and manufacturing-seller interests. Article 2 transactions cover many more potential parties, and transactions are rarely reducible to the blunt interests of any constituent group as broadly defined as “consumers” or “manufacturers.”

38. You will note that I have abruptly changed from using the term “revisions” and I am now referring to “amendments.” This was done during the drafting process to avoid having the work of the drafting committee submitted to the “Style” committee of the ULC. The Style Committee serves the important function of conforming all products of the ULC to a uniform, and quite elegant, statutory form. A “revision” of the UCC, under Conference rules, are subject to the Style Committee. Because all of the changes in the revisions had been hammered out through a lengthy and contentious process, any changes to the agreed language could unravel the agreement. An “amendment” is not subject to the work of the Style Committee, and by changing the project from a “revision” to a set of “amendments” the language of the drafting committee would remain unchanged.

39. See *Recommendation of PEB*, *supra* note 4, at 160.

40. See *Recommendation of PEB*, *supra* note 4, at 161.

41. See *Discussion of the Recommendation to Approve Withdrawal of the 2003 Amendments to Uniform Commercial Code Articles 2 and 2A*, 88 A.L.I. Proc. 151, 151-55 (2011).

Having said that, these two broad categories were strongly represented in the drafting process, and to a large extent, had a major influence on the final result.

It is also important to understand that the 2003 amendments were not drafted in a political vacuum. Although the 1999–2003 drafting committee was working from original Article 2—and not from the 1999 revisions—much of the resistance to the 1999 revisions colored the attitudes of various groups toward the 2003 amendments. In the case of some of the more vocal opposition, these groups retained their opposition irrespective of what the new drafting committee did.

## VI. SCOPE

If there were a single issue that became the focal point of the problems attributed to the revisions, it was scope. The 2003 amendments began in 1999. By 2001, most of the amended sections were drafted, discussed, and approved except the question of scope.

There were three proposed changes to the scope of Article 2. First, there was a proposed new section that clarifies the relationship of Article 2 to other law.<sup>42</sup> This section copied existing UCC § 2A–104(1) and did not create any new substantive rules. It was uncontroversial.

The other two proposed changes were in the new proposed definition of “goods.” The first change was the express exclusion of “foreign exchange transactions.”<sup>43</sup> This change also created no controversy.

The second change in the definition of goods was the express exclusion of “information.”<sup>44</sup> This created a major problem. The term information was not defined in the amendments, but what this term was meant to capture was set out in the long, drawn out, and painfully negotiated comment that accompanied the definition:

The definition of “goods” in this article has been amended to exclude information not associated with goods. Thus, this article does not directly apply to an electronic transfer of information, such as the transaction involved in *Specht v. Netscape*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff’d*, 306 F.3d 17 (2d[] Cir. 2002). However, transactions often include both goods and information: some are transactions in goods as that term is used in [s]ection 2–102, and some are not. For example, the sale of “smart goods” such as an automobile is a transaction in goods fully within this article even though the automobile contains many computer programs. On the other hand, an architect’s provision of architectural plans on a computer disk would not be a transaction in goods. When a transaction includes both the sale of goods and the transfer of rights in information, it is up to the courts to determine whether the

42. See AMENDED U.C.C. § 2-108.

43. See AMENDED U.C.C. § 2-103(k).

44. See AMENDED U.C.C. § 2-103(k).

transaction is entirely within or outside of this article, or whether or to what extent this article should be applied to a portion of the transaction. While this article may apply to a transaction including information, nothing in this [a]rticle alters, creates, or diminishes intellectual property rights.<sup>45</sup>

This exclusion of “information” was an attempt to resolve the question of the relationship between Article 2 and software. Prior to the work on the 2003 amendments, this problem was thought to have gone away. Sadly, it had returned. As discussed above, early in the Article 2 revision process, software contracts were removed from the scope of Article 2 to become a new article to the UCC: Article 2B. In early 1999, prior to disbanding of the original Article 2 drafting committee, the ULC renamed the project the UCITA, and spun it off as an act separate from the UCC.<sup>46</sup> Both Article 2B and the UCITA were intended to address and resolve the legal questions that govern software contracts. The only major issue regarding software that would be left in Article 2 would have been the question of where one law began and the other one ended.

After the effective demise of UCITA, the question of the relationship between Article 2 and software, either as a stand-alone product or as otherwise embedded in goods, again came rushing to the forefront of amended Article 2. The obvious result would have been to avoid the question altogether and let the law continue to develop on a case-by-case basis until an emerging consensus arose. This was my position both as a member of the drafting committee as well as a commissioner on the ULC.

Alas, this view did not prevail. There was a widely held belief that the problem needed to be addressed in the amendments. There was, however, no agreement for a solution.

A major concern expressed by the software industry was that by not resolving the question in the Code, we were tacitly approving the existing case law. To a large extent, the cases brought software within the scope Article 2, and therefore provided software users with article 2 warranty and other protections. The software industry thought these Article 2 protections did not accurately reflect the true nature of a software agreement, and therefore the industry was not content with this result.<sup>47</sup>

45. AMENDED U.C.C. § 2-103(k) cmt. 7.

46. See *108th Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting* 83 (1999); Charles Alan Wright, *Thursday Morning Session—May 20, 1999*, 76 A.L.I. Proc. 382 (1999).

47. In 2004, a year after the amendments were completed and approved, the ALI began a project called the Principles of the Law of Software Contracts. This project, completed and approved by the ALI in May 2009, sets out basic principles to govern software contracts, irrespective of whether the parties call their transaction a license, sale, lease, or something else. The Principles are designed to set out rules that transcend Article 2, UCITA, or the common law, and thereby avoid the question of which of these laws would govern. The clear intent of the Principles is to fill in the gap left by Article 2 as to when a software agreement is covered by the UCC. See PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, Introduction (AM. LAW INST. 2010).

Not surprisingly, even before the Principles were promulgated, representatives of the software industry had already complained about them. One major complaint was that the standard of performance for software that the Principles created extended warranty protection beyond what was provided for under the current Article 2. In a letter to the ALI, Microsoft Corporation and the Linux Foundation note:

In the end, we reached a compromise and excluded “information” from Article 2 (information being a proxy for software). As for pure software transactions, this at least drew a coherent bright line to exclude some transactions from Article 2; albeit, this did not satisfy those who thought the protections of Article 2 should be imported into software transactions.

What we did not do—because we could not figure out how—was to give clear guidance for the application of Article 2 to mixed contracts, those contracts that include both goods and software. This lack of guidance appeared to please no one but the beleaguered reporter and chair of the drafting committee. It was this state of unhappiness about the scope of Article 2 that had the most lasting effect toward the non-adoption of the amendments.

## VII. THE SUBSTANTIVE PROPOSED AMENDMENTS TO ARTICLE TWO

Unlike the proposed 1999 revision, which sought to revise all of Article 2, the 2003 amendments were much more modest. They proposed a set of discrete changes, rather than a thoroughgoing revision. The changes suggested in the 2003 draft were designed to clarify ambiguities in the existing Code; to update Article 2 considering modern commercial practices, in particular electronic commerce; and in a few places, to place in the black-letter text what has developed in the case law. The claim that the amendments favored any specific group, such as consumers or industry, was neither true nor evident in the draft. If we ignore purely stylistic changes, such as making the text gender neutral, or those made to conform Article 2 with changes in other articles of the UCC, the amendments covered few areas. Among these, even fewer would have changed the law.

### A. Where the Result Would Probably Be the Same as Existing Law

#### i. Electronic Contracting

The amendments provided for electronic contracting.<sup>48</sup> These provisions were hardly exceptional at the time the amendments were drafted and are wholly

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We have particular concerns with [section] 3.05(b), which establishes an implied warranty of no material hidden defects that is non [ ]disclaimable. This warranty does not reflect existing commercial law: no similar warranty appears in the Uniform Commercial Code (UCC), and no explanation is given in the commentary for treating software contracts differently from sale of goods [contracts] on this point.

The reporters of the Principle responded to this criticism by suggesting that this rule only states the existing law of contracts. Whether this is true or not will continue to be debated. What is clear, however, is that the ALI has picked up the discussion on what law governs software contracts where the amendments of Article 2 left off. The debate on the Principles is just as heated as it was with the Article 2 amendments. It has yet to be seen what effect this debate will have on the viability of the Principles. Thus far, only two cases have cited the Principles, both from the time the Principles were still being drafted, so the utility of the Principles has yet to be shown. *See, e.g., Wong v. True Beginnings, LLC.*, 2008 No. 3:07-CV-1244-N, 2008 WL 11348237, at \*2 (N.D. Tex. Dec. 3, 2008); *Conwell v. Grey Loon Outdoor Marketing Group, Inc.*, 906 N.E.2d 805, 811 (Ind. 2009).

48. The term “writing” was changed to “record” throughout the article. AMENDED U.C.C. prefatory note. *See* AMENDED U.C.C. § 2-103(m). The definitions of sign and conspicuous were changed to accommodate electronic communications, and new definitions for electronic, electronic agent, and electronic record were added. *See*

unnecessary today because the application of the Uniform Electronic Transactions Act (UETA), which has been adopted in forty-nine jurisdictions, provides essentially the same rules.

## ii. Parol Evidence Rule

The one substantive point that was debated at some length is the evidentiary effect of a merger clause. Endless discussions ensued about the various but contradictory merits of adopting either a rule that merger clauses are mere presumptions or that they should be treated as conclusive. The discussions brought much heat and very little light. The committee took the enlightened view that the Code should not answer this question, and that it should, as it had in the past, be left to the sound discretion of the courts.

## iii. Shipping and Delivery Terms

The delivery terms in the UCC have never reflected commercial practice outside, and to a large extent inside, the United States. Only in the UCC does “free on board” not mean “on board.” In an attempt to conform the UCC to general commercial usage, the amendments eliminated the statutory shipping terms for F.O.B., F.A.S., C.I.F., C. & F., ex-ship, and all cross-references to those terms. Also eliminated were the provisions on overseas shipment, bills of lading in a set, and a provision setting out the meaning of the “no arrival, no sale” term. It was generally recognized that these terms, as statutorily defined in the Code, were outdated at best and in some cases inconsistent with generally accepted practices.<sup>49</sup>

The elimination of these terms recognized that parties did not rely on them, and often would use more current and widely recognized shipping terms such as the Incoterms.<sup>50</sup> It is interesting that the drafting committee quite sensibly did not attempt to rewrite the shipping terms in Article 2 to conform to current commercial practice, as the committee quite correctly noted that the terms used in actual practice change over time. By eliminating them from the UCC altogether, Article 2 would have allowed the parties by trade usage or express choice to set out shipping terms that reflect actual commercial practices and party expectations.<sup>51</sup> Although this

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AMENDED U.C.C. § 2-103(b), (f), (g), (h), (m), (p) and accompanying cmts. Consistent with what has become universal principles of electronic contracting, the amendments also provide substantive rules to govern electronic transactions. The amendments also provided that a record, signature, or contract could not be denied legal effect and enforceability merely because it is electronic in form. AMENDED U.C.C. § 2-211(1). Also consistent with the Uniform Electronic Transaction Act (UETA), the amendments provided an attribution rule. AMENDED U.C.C. § 2-212 & cmt. 1.

49. The terms are also somewhat limited in their application, as they are limited to questions of risk of loss, contract price and in some instances insurance, whereas the INCOTERMS, for example, also include the risk of having to clear customs and arrange for import and export of the goods.

50. The INCOTERMS or International Commercial Terms are commercial terms published by the International Chamber of Commerce that are widely used in contracts of carriage.

51. The need for shipping terms in a statute for the sale of goods has not been shown to be necessary. For example, neither the United Nations Convention on Contracts for the International Sale of Goods nor the English Sale of Goods Act contain shipping terms. *See generally* United Nations Convention on Contracts for the

change would have brought the Code closer to conformity with current business practices, since the Code terms are generally superseded expressly or by trade practice, these terms' continued presence in the Code is not likely to be significant.

#### iv. Warranties of Title and Noninfringement

The amendments moved from the comments into the black-letter text the proviso that the warranty of title is breached if it “unreasonably expose[s] the buyer to litigation...because of any colorable claim to or interest in the goods.”<sup>52</sup> This not only conforms the text to the comments, but also states what had long been recognized by the courts. The amendments also clarified that not only can the warranty of title be disclaimed, but the warranty against infringement can be disclaimed as well. This would have made explicit what is already available to the parties under general freedom of contract.

#### v. Cure

The amendments make a series of clarifying changes to § 2-508 on the seller's right to cure. What appears to be a total revision of the section does very little other than make explicit results that were already part of Article 2.<sup>53</sup> The amendments clarified that the right to cure would not be limited to rejections of the goods, but also, in appropriate circumstances, when there was a revocation of acceptance. This, however, should have been obvious from § 2-608(3).<sup>54</sup>

The amendments also explicitly provided that the right to cure under § 2-612 in installment contracts would be governed by § 2-508.<sup>55</sup> This has caused some confusion in the cases, as it is not explicit in the text.<sup>56</sup> The amendments also provided explicitly that the seller would have to perform in good faith,<sup>57</sup> but this requirement should never have been in doubt without this amendment to the section.<sup>58</sup> The amendments also specifically provided that the cure must be of conforming goods and must be at the seller's expense;<sup>59</sup> but as with many of the clarifications, both of these points should have been obvious from Article 2.<sup>60</sup>

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International Sale of Goods, Apr. 11, 1980, S. TREATY Doc. No. 98-9, 1489 U.N.T.S. 3; Sale of Goods Act 1893, 56 & 57 Vict. c. 71 (Eng.).

52. AMENDED U.C.C. § 2-312(1).

53. The amendments did provide one limitation on the right to cure when there has been a revocation of acceptance; the revisions limit this right to nonconsumer contracts. *See* AMENDED U.C.C. § 2-508 & cmt. 2. This apparent victory for consumers could be easily contracted around by sellers, and therefore would not have operated as a limitation to sellers unless the sellers were not change their form agreements to accommodate this.

54. Amended U.C.C. § 2-608(3) (“A buyer that so revokes has the same rights and duties with regard to the goods involved as if the buyer had rejected them.”).

55. *See* AMENDED U.C.C. § 2-508(1)-(2) (cure), and § 2-612(1)-(3) (installment contracts).

56. *See, e.g.,* *Midwest Mobile Diagnostic Imaging v. Dynamics Corp. of Am.*, 965 F. Supp. 1003, 1011 & n.6 (W.D. Mich. 1997).

57. *See* AMENDED U.C.C. § 2-508(1).

58. *See* AMENDED U.C.C. § 1-304 (imposing an obligation of good faith on all contracts under the UCC).

59. *See* AMENDED U.C.C. § 2-508(1).

60. *See* AMENDED U.C.C. § 2-508 cmt. 1 (permitting a seller to cure a nonconforming tender); U.C.C. § 2-715 cmt. 1 (providing seller reimbursements for a buyer of rightfully rejected goods).



## vi. Clarifying Changes

The amendments defined “repudiation.”<sup>61</sup> The meaning of this term has never been in doubt, and the absence of this revision will go unnoticed.

The amendments provided a comprehensive index of seller and buyer remedies in §§ 2–703 and 2–711.<sup>62</sup> This could be a useful tool to provide a quick list of the available remedies, but it neither created nor eliminated any existing remedies. The absence of this revision will also go unnoticed.

As to performance and breach, the amendments also made a series of clarifications. Amended § 2–612 on installment contracts would have provided that the test is whether the value of that installment to the buyer is substantially impaired.<sup>63</sup> Amended § 2–602 would have clarified that the buyer has the obligation to take reasonable care of the goods in the case of a wrongful rejection as well as a rightful rejection.<sup>64</sup> Revised § 2–603 clarified that a merchant buyer has the obligation created in that section for goods in the case of both rightful and wrongful rejections.<sup>65</sup> Amended § 2–604 would expressly have provided for a buyer to store, reship, or resell the goods following both a rightful and wrongful rejection.<sup>66</sup> Amended § 2–615 was changed to note that the seller may have an excuse for “performance,” and not merely “delivery.”<sup>67</sup> The amendments also expressly noted that a buyer’s reasonable use of the goods post-rejection or post-revocation of acceptance is not an acceptance of the goods, but the buyer may be “obligated to the seller for the value of the use to the buyer.”<sup>68</sup> Since this list of clarifications are quite useful, I can only hope that they will be explained in future PEB commentary.

### B. Where the Amendments Would Have Changed the Result

#### i. Battle of the Forms

Probably the most significant proposed change to Article 2 was the total overhaul of § 2–207 on the battle of the forms.<sup>69</sup> The proposed section is stark in its analytical

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61. See AMENDED U.C.C. § 2-610(2) cmt. 2.  
 62. See AMENDED U.C.C. §§ 2-703 and 2-711.  
 63. See AMENDED U.C.C. § 2-612(2).  
 64. See AMENDED U.C.C. § 2-602(2)(6) cmt 3.  
 65. See AMENDED U.C.C. § 2-603(1)-(2) & cmt. 6.  
 66. See AMENDED U.C.C. § 2-604.  
 67. See AMENDED U.C.C. § 2-615(a).  
 68. AMENDED U.C.C. § 2-608(4)(b).  
 69. AMENDED U.C.C. § 2-207 provided:

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

- (a) terms that appear in the records of both parties;
- (b) terms, whether in a record or not, to which both parties agree; and

approach. Those terms that the parties have agreed upon, either expressly or by implication, are part of the agreement. No other terms are. The result of this is that the parties are only bound where there has been assent.

This contrasts greatly from either the common law or existing § 2–207, both of which tend to force one party’s terms on the other party.<sup>70</sup> Moreover, because of the inconsistencies in the official comments,<sup>71</sup> as well as differing court interpretations of the section,<sup>72</sup> the current § 2–207 can be a nightmare to negotiate through. This was the one section where the amendments truly were a major improvement from the existing law. It is interesting that the amendment of this section was contentious.<sup>73</sup> I have never understood whether this was based on real objections or whether it was just a reason to attack the amendments as a whole.

## ii. Statute of Frauds

The amendments raised the requirements for the statute of frauds from \$500 to \$5,000 to reflect the change in the value of the dollar. The \$500 amount comes from the 1906 version of the Uniform Sales Act,<sup>74</sup> and the drafters felt that 100 years of inflation justified this change. Certainly, this change would have had some impact on the enforceability of contracts, but whether that impact would have been significant is not clear. Given that parties routinely reduce nonelectronic contracts to paper along with the generous exceptions to the rule provided for under paragraphs two and three of UCC § 2–201, the statute of frauds has not been a major source of problems under the Code. Moreover, to the extent that the business world is rapidly moving toward electronic contracting, the statute of frauds will likely have less significance in the future. Thus, the lack of this amendment will be a loss, but not a significant one.

Another proposed change to the statute of frauds was a pure policy choice. The question of whether an action in promissory estoppel is subject to the statute of frauds is neither clear from the text of the existing Code, nor the cases. Although many

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

70. See Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code*, 49 BUS. LAW. 1053, 1055, 1062 (1994).

71. See *id.* at 1059-60 & n.37.

72. See *id.* at 1060 & n.41.

73. The National Association of Manufacturers complained that the amendment to § 2-207 “creates confusion in contract formation.” Press Release, Nat’l Ass’n of Mfrs., *supra* note 3. The UCC Committee of the California State Bar responded to this rather astounding claim by noting that:

Under [e]xisting UCC [section] 2-207 there is a deference to the first writing. Amended UCC [section] 2-207 treats the varying terms on an even-handed basis, removing this artificial deference to one writing over another. Elimination of the arbitrary battle of the forms rule under [e]xisting UCC [section] 2-207 is a beneficial change. Existing UCC [section] 2-207 has spawned expensive litigation over the years due to its lack of clarity. Amended UCC [section] 2-207 will eliminate unfair advantage, provide more clarity, and should lead to less litigation.

Unif. Commercial Code Comm., The State Bar of Cal. Bus. Law Section, *supra* note 3, at 4 (footnotes omitted).

74. UNIF. SALES ACT OF 1906 § 4(1) (amended 1948), reprinted in JOHN BARKER WAITE, *THE LAW OF SALES* 288-89 (1921). The original Statute of Frauds applied to the sale of goods for £10 or more. See Statute of Frauds, 1677, 29 Car. 2, c. 3, § 16 (Eng.).

courts have determined that the statute of frauds does not apply because the statute only applies to contract actions, a substantial number of courts have extended its reach to promissory estoppel cases. Usually, these decisions have been ostensibly based on a textual reading of the statute. The justification of applying the statute of frauds has been based on the first clause of § 2–201, which provides “[e]xcept as otherwise provided in this section . . . ;” it is therefore argued that all exceptions to the application of the statute of frauds are contained in the section.<sup>75</sup> The contrary argument has been statutorily gleaned from § 1–103(b), which provides that the Code does not displace principles of estoppel.<sup>76</sup> The drafters concluded that the statute of frauds should not be a bar to promissory estoppel cases, and in doing so consciously overruled the line of cases that provided for this. Although this clear direction is lost without the enactment of the amendments, this is an issue that could be resolved by PEB commentary.

### iii. Express Warranties

Amended § 2–313 proposed major changes to the law of express warranties. The purpose of these changes was to accomplish two goals: to bring disparate rules that govern privity into uniformity, and to handle the question of the statute of limitations for remedial promises.

First, amended § 2–313 limited express warranties to those buyers who are in privity with the seller.<sup>77</sup> This was intended to overrule and limit the effect of those cases that have provided a claim for express warranties under Article 2 for parties not in privity with the seller. Although subject to the exceptions provided for in amended §§ 2–313A and 2–313B, this change substantially restricted the availability of express warranties in the majority of states by disallowing nonprivity claims for the breach of an express warranty under the UCC.<sup>78</sup> The trade-off was contained in two new §§, 2–313A and 2–313B, which would have provided warranty-type obligations to nonprivity parties in two circumstances.

Section 2–313A would have applied to “new goods and goods sold or leased as new goods in a transaction of purchase in the normal chain of distribution,” bought or leased by a remote purchaser.<sup>79</sup> The seller’s obligation arises if the seller “makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise”; that affirmation, promise, description, or remedial promise is “in a record packaged with or accompanying the goods”; and “the seller reasonably expects the record to be, and the record is,

75. See, e.g., *Futch v. James River–Norwalk, Inc.*, 722 F. Supp. 1395, 1402 (S.D. Miss. 1989); *Renfroe v. Ladd*, 701 S.W.2d 148, 149-50 (Ky. Ct. App. 1985); *Golden Plains Feedlot, Inc. v. Great W. Sugar Co.*, 588 F. Supp. 985, 992-93 (D.S.D. 1984); *Lige Dickson Co. v. Union Oil Co. of Cal.*, 635 P.2d 103, 106–07 (Wash. 1981) (certified question from the Ninth Circuit United States Court of Appeals).

76. U.C.C. § 1-103(b); see also Restatement (Second) of Contracts § 139(1) & cmt. b (1981) (providing authority for the application of estoppel principles to the statute of frauds).

77. AMENDED U.C.C. § 2-313(1)-(2).

78. Warranty claims provided for outside Article 2, as well as products liability claims in tort law were not intended to be affected.

79. AMENDED U.C.C. § 2-313A (1)-(2).

furnished to the remote purchaser.”<sup>80</sup> In other words, this obligation would be created by the nonprivity seller when the terms are in a record contained with the goods (the “warranty in the box”).

Likewise, proposed § 2–313B would have created express warranty–like obligations for representations to the public by a seller to remote purchasers for “new goods and goods sold or leased as new goods in a transaction of purchase in the normal chain of distribution” if the seller “makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise”; that affirmation of fact, promise, description or remedial promise is made “in an advertisement or a similar communication to the public”; and the remote purchaser purchases the goods “with knowledge of and with the expectation that the goods will conform to the affirmation of fact, promise or description, or that the seller will perform the remedial promise.”<sup>81</sup> In other words, this obligation would arise from advertisements to users when the user is aware of the advertisement and has reason to believe the seller is actually promising something.

By statutorily limiting nonprivity express warranty–type obligations to those contained in the packaging of the goods or made by advertisements, the drafters attempted to achieve both logically coherent results as well as national uniformity in the application for nonprivity express warranties by providing only for those claims that nonprivity sellers should necessarily be responsible for, as the claims are based on information that the sellers specifically provide for the targeted users.<sup>82</sup>

The second substantive change in the law of express warranties is the inclusion of “remedial promises.”<sup>83</sup> This addition was not intended to create any new rights,<sup>84</sup> but to clarify the relationship between the remedial promise and the statute of limitations.<sup>85</sup> As recognized by the drafters of the amendments, sellers have long

80. AMENDED U.C.C. § 2-313A (3). This is essentially the same standard for the creation of a direct express warranty under § 2-313.

81. AMENDED U.C.C. § 2-313B (1)-(2).

82. The drafters thought it fair and reasonable to allow nonprivity buyers to have a claim based on their reasonable expectations for several reasons: (1) the express obligations are directed toward specific users, (2) the content and the ability to exclude these obligations are fully within the power of the nonprivity seller, and (3) nonprivity buyers’ expectations are created by the sellers with the intent to target the buyers who rely on this information. *See* AMENDED U.C.C. §§ 2-313A(5)(a), 2-313B(5)(a).

Given that the obligations created in amended §§ 2-313A and 2-313B do not increase the obligations non–privity sellers already have, combined with the express right to limit these obligations, the drafters thought that manufacturers would be in support of these changes. This was not the case:

The new rule is a major change that conflicts with the direction of most recent court and legislative action. It creates liability for public communications, even though the communication was not a part of the agreement and even if it did not cause personal injury.

The rule may be unconstitutional under the First Amendment. In any event, this is a contract statute and should deal with contracts. This rule is a huge step backward that invites class action litigation and is outside the domain of a commercial contract law. *See* Nat’l Ass’n of Mfrs., *Industry Concerns About Final Article 2 Revisions* (2005) (on file with author).

83. A remedial promise, as defined in Amended § 2-103, is “a promise by the seller to repair or replace goods or to refund...upon the happening of a specified event,” which distinguishes these promises about the seller’s performance from promises about the performance of the goods. AMENDED U.C.C. § 2-103(1)(n).

84. Remedial promises have long been recognized in the law. *See* Magnuson–Moss Warranty–Federal Trade Commission Improvement Act, 15 U.S.C. § 2301(6)(B) (2006).

85. The problem can be explained by looking at *Nationwide Ins. Co. v. GMC*, 625 A.2d 1172 (Pa. 1993). In this case, the majority held that the remedial promise given to the buyer by General Motors was not an independent

made, and expect to comply with, remedial promises. The amendments were intended neither to encourage nor discourage this. What was intended was how to determine the limitations period for a remedial promise.<sup>86</sup>

To understand these proposed changes, one must appreciate that courts have long had difficulty determining the appropriate limitation period for remedial promises, in part due to the confusion of whether a remedial promise is a separate contractual obligation from the contract for sale or whether it is an Article 2 express warranty. Since a breach of the remedial promise would appear to occur when the obligation to remedy the defect has arisen, it makes sense to begin the limitation period at that time. Yet, if the remedial promise is considered part of the Article 2 warranty and remedy scheme, under § 2-725, the limitation period begins to run when the tender of delivery is made. This point in time, though, has no real connection to the actual breach of the remedial promise.

Courts have responded to this problem in three ways. First, they have found that the four-year statute of limitations runs from the time the goods are tendered, irrespective of when the remedial promise is not met.<sup>87</sup> Second, some courts have treated the remedial promise as a separate contractual obligation, with the statute of limitations to begin when the remedial promise is not met.<sup>88</sup> A third line of cases has used a creative interpretation of the language of the remedial promise to find that it provides for “future performance” and therefore extends the beginning of the limitation period.<sup>89</sup>

To avoid these disparate interpretations and results, the amendments set out a two-step process to harmonize and rationalize the statute of limitations for remedial promises. First, the amendments make a remedial promise an express warranty under Article 2.<sup>90</sup> This removes the question of whether a remedial promise should be treated as a separate contractual obligation. Second, the amendments change the statute of limitations to provide that the limitation period for a remedial promise

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contractual obligation to repair but was an express warranty under Article 2 of the UCC. *See id.* at 1174-75. Having determined Article 2 governed the remedial promise, the court noted the statute of limitations, as provided by § 2-725, was four years from the time the buyer received the goods. *See id.* at 1175. Because this created the anomaly that the statute of limitations was running even though neither the need to remedy the defect nor the failure to remedy the defect had occurred, the court read the language of the promise to include a promise of future performance, thereby extending the limitation period. *See id.* As pointed out by the defendant, General Motors, the language in the agreement was not language normally interpreted as creating a guarantee of future performance. *See id.* at 1176 & n.7. It may well have been the court knew this but chose to read the language in a way that forced the result of extending the statute of limitations. One basis the majority used for finding the remedial promise is an express warranty was that the language of the agreement used the term warranty to describe the remedial promise. *See id.* at 1177. However, as set out in a dissent, this was language forced upon the seller by the federal Magnuson-Moss legislation and was intended to denote a federal Magnuson-Moss “warranty,” (the language the federal Act uses for remedial promises) and not as a UCC express warranty. *See id.* at 1180-81 (Zappala, J., dissenting).

86. *See* AMENDED U.C.C. § 2-103(1)(n) & preliminary official cmt.

87. *See, e.g.,* Tittle v. Steel City Oldsmobile GMC Truck, Inc., 544 So.2d 883, 891 (Ala. 1989).

88. *See, e.g.,* Brown v. GMC, 14 So.3d 104, 113 (Ala. 2009).

89. *See, e.g.,* Docteroff v. Barra Corp. of Am., Inc., 659 A.2d 948, 954-55 (N.J. Super. Ct. App. Div. 1995); R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 823-24 (8th Cir. 1983). There are, of course, some express warranties that do promise future performance, and therefore do invoke the extended limitation period. *See* Joswick v. Chesapeake Mobile Homes, Inc., 765 A.2d 90, 96-97 (Md. 2001). The cases that concerned the drafting committee were those where the language of the express warranty does not expressly promise future performance. *See, e.g.,* Nationwide Ins. Co. v. GMC, 625 A.2d at 1175-76 (Pa. 1993).

90. AMENDED U.C.C. § 2-313(4).

begins “when the remedial promise is not performed when performance is due.”<sup>91</sup> Because the amendments to the express warranty provisions were designed to clear up nonuniformity in the cases, the failure to adopt these provisions will result in continued nonuniformity and inconsistent interpretation of warranty language.

#### iv. Implied Warranties

A proposed official comment to amended § 2–314 provided, “[w]hen recovery is sought for injury to person or property, whether goods are merchantable is to be determined by applicable state products liability law.”<sup>92</sup> This comment, which was a holdover from the 1999 revisions, was a response to the line of cases such as *Denny v. Ford Motor Co.* that holds that the standard for merchantability under Article 2 was based on a different standard than what constituted defectiveness under tort law.<sup>93</sup>

Note that the comment only suggests using the same contract and tort standard for personal injury and property damages, but not for other harms. If there were a principled analytical basis for conflating the two standards, then there would be no reason to limit this to the type of damages suffered. The comment was never intended to be an objective policy choice, but a political compromise to appease detractors of the revisions. Whether the comment would have been followed by courts that would have otherwise followed the *Denny* analysis will never be known. This proposed comment will simply be lost in history.

#### v. Warranty Disclaimers

The substantive proposed revisions to § 2–316 on warranty disclaimers and modifications were limited to changes in the language necessary to create a safe harbor disclaimer.<sup>94</sup> The intent is to make the language of disclaimers more readily understandable. Enactment of these changes would require changes in many form contracts, and therefore places a burden on sellers to make the changes. The

91. AMENDED U.C.C. § 2-725(2)(c).

92. AMENDED U.C.C. § 2-314 cmt. 7. State products liability law means tort products liability law. Since products liability law includes breach of warranty actions under the U.C.C., if the comment was read to include both contract and tort claims, it would be meaningless.

93. See *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 736 (N.Y. 1995); *Castro v. QVC Network, Inc.*, 139 F.3d 114, 118 & n.7 (2d Cir. 1998). But see, e.g., *Morrison’s Cafeteria v. Haddox*, 431 So.2d 969, 977 (Ala. 1983) (holding the standards for merchantability and defective product in tort are the same) (citing *Matthews v. Campbell Soup Co.*, 380 F. Supp. 1061 (S.D. Tex. 1974)).

94. Under the amendments, to disclaim the implied warranty of merchantability in a consumer contract, the disclaimer would need to be in a record, be conspicuous, and include the following language: “The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract.” AMENDED U.C.C. § 2–316(2). To disclaim the implied warranty of fitness for a particular purpose in a consumer contract, the disclaimer must be in a record, be conspicuous, and use the following language: “The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in this contract.” *Id.* A consumer contract was defined as a “contract between a merchant seller and a consumer.” AMENDED U.C.C. § 2-103(1)(d). Consumer is defined as an individual who buys or contracts to buy goods “primarily for personal, family, or household purposes.” AMENDED U.C.C. § 2-103(1)(c).

amendments would not, however, have increased or decreased the seller's responsibility.<sup>95</sup>

## vi. Remedies

The amendments made a series of changes in the remedies provisions, although none would have substantially changed the law or caused much concern to any interested parties. These changes mostly reflected the acknowledgement of current business practices<sup>96</sup> or clarifications of the existing Code.<sup>97</sup> The amendments also specify that nonconsumer parties can contract for specific performance,<sup>98</sup> but this is something that the courts have begun to acknowledge the parties could do by contract irrespective of the Code. These changes should probably be addressed now by PEB commentary.

Some of the proposals would have created a new substantive framework for damages. Amended § 2-710 provided for seller consequential damages in a nonconsumer contract. Is this a substantial change? Probably not as great as it might appear. Although courts have been inclined to read the absence of consequential damages in § 2-710 as the intent of the drafters to affirmatively exclude them,<sup>99</sup> the bulk of consequential damages that a seller would suffer is lost profits, for which § 2-708(2) already provides an adequate measure of damages.<sup>100</sup> Moreover, the courts have been apt to find what are in effect a seller's consequential damages as incidental

95. The other changes in § 2-316 were also procedural changes. They provided that "as is" or "with all faults" disclaimers in a consumer contract must be conspicuously set forth in a record if the contract is evidenced by a record, AMENDED U.C.C. § 2-316(3)(a), and they also clarified that the buyer's failure to examine goods as a basis for denying the existence of implied warranties should be based on the seller's demand that the buyer inspect the goods, AMENDED U.C.C. § 2-316(3)(b).

96. Thus, for example, the time to demand reclamation of goods under amended § 2-702 is changed from "ten days" to "a reasonable time." See AMENDED U.C.C. § 2-702(2) & cmt. 2. This provides the needed flexibility for a seller who does not discover the buyer's insolvency until after the ten-day period. The amendments also broaden the ability of a seller under § 2-705 to stop delivery by eliminating the requirement that goods be by the "carload, truckload, plane load or larger shipments of express or freight." Compare AMENDED U.C.C. § 2-705(1) with U.C.C. § 2-705(1). This change recognized the different modes of delivery that are currently used.

97. Amended § 2-702 explicitly pointed out that a good faith purchaser must give value. See AMENDED U.C.C. § 2-702(3). This simply imports the common law requirement of having to give value to have the protection of a good faith purchaser. Likewise, § 2-507(2) was rewritten to make certain what is intended in the section is a right of reclamation if the buyer does not pay for the goods. See Amended § 2-507(2). The amendments also expressly provided what was already implicit: the seller's failure to resell in accord with § 2-706 does not bar other remedies. See AMENDED U.C.C. § 2-706(7).

In one case, the amendments added language to provide for a result that should have been apparent even in its absence. See AMENDED U.C.C. § 2-708(2). The current text provides that the lost profits measure of damages is available if the measure of damages under § 2-708(1) is inadequate, but it is silent on the availability of § 2-708(2) if there has been a resell that qualifies under § 2-706. See U.C.C. § 2-708(2). The amendments expressly provided for the lost profit measure of damages under § 2-708(2) even when there has been a reselling of the goods; however, the courts knew this absent the amendments. See, e.g., *R.E. Davis Chem. Corp. v. Disonics, Inc.*, 826 F.2d 678, 683 (7th Cir. 1987).

The amendments also eliminated the language in the lost-profit measurement in § 2-708(2) for "due allowance for costs reasonably incurred" and "due credit for payments or proceeds of resale." See AMENDED U.C.C. § 2-708(2) cmt. 1(e). This language makes no sense and it has been universally ignored by the courts.

98. See AMENDED U.C.C. § 2-716(1).

99. See, e.g., *Nobs Chem., U.S.A., Inc. v. Koppers Co.*, 616 F.2d 212, 216 (5th Cir. 1980); *Petroleo Brasileiro, S.A., Petro. v. Am. Oil Corp.*, 372 F. Supp. 503, 508 (E.D.N.Y. 1974).

100. See U.C.C. § 2-708(2).

damages, and therefore have allowed these damages to sneak in the back door.<sup>101</sup> Also, since the amendments limit a seller's consequential damages to nonconsumer contracts, this provision is a risk easily eliminated by contract.

The amendments also changed § 2-713—as to the time to measure the buyer's damages—from the time the buyer learned of the breach to the time of tender.<sup>102</sup> This change reflects the recognition of the oddity of the current law.<sup>103</sup> The current standard suggests three problems. First, unlike the question of when tender was supposed to occur, determining when a buyer “learns of a breach” creates a difficult evidentiary question. Second, with no explanation, this section differs from the seller's concomitant provision, which is based on the time tender was to occur; this latter standard being consistent with the common law.<sup>104</sup> Third, the amendments properly recognize the underlying basis for measuring damages based on the time and place where the goods are to be tendered, as this reflects the *ex ante* bargain that the parties made. As a contractual purist, I think this change is an improvement in the law. The current § 2-713, however, has not really caused problems.

## vii. Statute of Limitations

The current provision on statute of limitations suffers one major drawback—it is inflexible. It attempts to handle multiple questions with what is primarily a single standard. Subject to the parties' ability to alter the limitation period either by limiting it to one year<sup>105</sup> or by extending it with the seller's promise of future performance,<sup>106</sup> the limitation period is four years from the time the goods are tendered to the buyer.<sup>107</sup> The amendments addressed some of the perceived failures of the current law by providing different limitation periods for a variety of different types of breach. Specifically, the amendments provided specific accrual rules for breach by repudiation,<sup>108</sup> breach of a remedial promise,<sup>109</sup> breach of the warranty of title and

101. See, e.g., *N. Am. Foreign Trading Corp. v. Direct Mail Specialist*, 697 F. Supp. 163, 166 n.2 (S.D.N.Y. 1988).

102. Compare U.C.C. § 2-713(1) (2003) (stating that the market price for damages is determined “when the buyer learned of the breach”), with U.C.C. § 2-713(1) (2005) (withdrawn 2011) (stating that the market price for damages is evaluated no later than at the time for tender).

103. It could well have been that the drafters of the current text assumed that by measuring damages at the time the buyer learned of the breach, the most common situation where the breach would occur is in the case of an anticipatory repudiation. If this is the case, it seems that the drafters were assuming that an anticipatory repudiation should be the default position instead of an exception to the general rule. Recognizing this, and assuming that an anticipatory repudiation is the exception and not the rule, the amendments provide a special damage rule for buyers where there is an anticipatory repudiation: measure the market price of goods in the case of an anticipatory repudiation “at the expiration of a commercially reasonable time after the buyer learned of the repudiation.” AMENDED U.C.C. § 2-713(1)(b). There was a concomitant change in the rules for sellers: damages for goods in the case of an anticipatory repudiation are measured “at the expiration of a commercially reasonable time after the seller learned of the repudiation.” AMENDED U.C.C. § 2-708(1)(b). The contrary provision in § 2-723 was deleted.

104. Compare AMENDED U.C.C. § 2-708(1)(a) (2003) (seller's damages are measured at the time of tender), with AMENDED U.C.C. § 2-713(1)(a) (buyer's damages are measured at the time buyer learns of the breach).

105. U.C.C. § 2-725(1).

106. AMENDED U.C.C. § 2-725(2)(c).

107. AMENDED U.C.C. § 2-725(1).

108. AMENDED U.C.C. § 2-725(2)(b).

109. AMENDED U.C.C. § 2-725(2)(c).



noninfringement,<sup>110</sup> and breach of a nonprivity obligation.<sup>111</sup> While all of these changes are improvements in the law, none of these specific situations have caused serious problems in the cases, with the exception of remedial promises.

The limitation period of four years from the time of tender assumes that the breach occurs when the goods are tendered. It has long been questioned whether the limitation period should begin then, even if it is unreasonable for the buyer to discover the breach at that time.<sup>112</sup> The amendments responded to this by providing that the limitation period could also be “one year after the breach was or should have been discovered, but no longer than five years after the right of action accrued.”<sup>113</sup> This is a compromise. It provides some relief for the buyer who does not discover the breach until after delivery, but also sets some limit (five years) on the amount of time a seller has to be concerned about litigation on goods after the sale. Although an improvement over existing law, the loss of this extension of the four-year period is not likely to be a source of problems in many cases.

The amendments also provided that the limitation period cannot be reduced from less than the default period of four years in a consumer contract.<sup>114</sup> This apparent consumer protection change actually would have very little practical impact on buyer’s rights, as the seller is still able to restrict the time of any express or implied warranty and therefore not increase the time risk for the goods. As with the other amendments in the limitation periods, the lack of this change is not likely to have serious consequences.

### VIII. DID THE AMENDMENTS MATTER?

I finished the drafting of the amendments 15 years ago. They languished for eight years unenacted before they were officially withdrawn. They have largely been forgotten by most of the people who were involved in their creation. I suspect that the few who remember them have long since quit caring about them.

I believe that the true importance of the amendments can be determined by the fact that they were never adopted, and the use and utility of Article 2 of the Uniform Commercial Code has continued unabated. If the amendments were necessary, we would have had a different result. The most important lesson about the amendments may be that if there is not strong support for their enactment, perhaps there is not a real need for the changes they bring about.

110. AMENDED U.C.C. § 2-725(3)(d).

111. AMENDED U.C.C. § 2-725(3)(c).

112. One analogy used is that of a products liability claim in tort. In these claims, the limitation period inevitably begins at the time the tort occurs, not at the time the goods are tendered to the buyer; *see* 63B AM. JUR. 2d Products Liability § 1452 (2018) (“The general rule for the commencement of the limitations period in a products liability tort action is that the cause of action accrues at the time of the injury and not from the time of the sale or delivery of the injury-causing product.”) (citations omitted) (footnotes omitted); *see also* Haugh v. Depuy-Motech, Inc., 2001 WL 823817 (9th Cir. 2001) (applying California Law) (stating that the underlying cause of action and the applicable statute of limitations begins to toll “on the date of the injury.”).

113. AMENDED U.C.C. § 2-725(1).

114. AMENDED U.C.C. § 2-725(1).

What opponents to the amendments discovered early on was that very little was necessary to fight the proposed legislation in the states because there was no countervailing support. As the process ground on over the years, the best that the drafters were able to achieve on the contentious provisions was a neutralization of opposition. In the end, we had a product that had very little real opposition, but no strong supporting groups that would help the amendments through the legislatures.<sup>115</sup>

What I discerned from sitting in the middle was that there never would be a workable project unless the parties approached in better faith than they did. Those who purported to represent consumer interests inevitable overplayed their hands and asked for more than they should have known they were ever likely to get or deserve. Conversely the industry groups hunkered in early and fought every proposal whether it was in their interest or not.<sup>116</sup> They were just oppositional.

As to how much is lost by nonenactment, we will never know. As I have discussed, many of the amendments simply clarify the likely result from existing law. These are provisions in the Code that the courts have generally already interpreted correctly, though, thereby diminishing the need for statutory clarification.

Where there have been inconsistent decisions, some of these could be resolved by PEB commentary. PEB commentary could also be used to suggest possible results that were addressed by the amendments but were not part of the existing Code. The fact that the PEB has to a large extent not taken up these issues suggests their lack of urgency.

Basic freedom of contract still controls Article 2. Most provisions of Article 2 can be contracted around if parties believe that the default rules do not reflect the bargain they want. This option though, is only available for true negotiated contracts. This is not a realistic option for form agreements, the bulk of consumer transactions, and other transactions where there is no real possibility or expectation of real party negotiation. Yet, in the end, most form and consumer contracts deliver reasonable goods and reasonable prices. Most parties get what they expect or deserve. Problems with failures in the market and failures in goods are not likely to be resolved by Article 2 of the Uniform Commercial Code, in its present state or as amended.

In the end, the amendments are like any other product placed in the marketplace. The marketplace chooses to buy the product or not. After eight years, there were no buyers.

115. It is easy to compare Article 2 with Articles 5 and 9. Both Articles 5 and 9 had strong support from the banking community that was able to push through the revisions to those articles. See Larry T. Garvin, *The Changed (and Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 343 (1999).

116. The Industry groups lost out on some changes that would have, at a minimum, brought clarification of their rights and obligations. For example, the clarifications of nonprivity obligations and remedial promises would have made the law uniform throughout the country, thereby allowing easier planning in terms of risk analysis and the drafting of form sales agreements. As I have already pointed out, the specific denunciation of the Denny rule favored large industry concerns, and it is unlikely that the courts would not follow the Denny line of cases in the future, to the seller's detriment.

The software industry long fought for exclusion of their products from Article 2. Whether software should come under the umbrella of Article 2 has long been questionable, as it is not clear that the average computer software transaction constitutes either a "sale" or "goods." However, courts have routinely found Article 2 applicable in software transactions and are likely to do so in the future. The amendments carved out software transactions to the benefit of these vendors, and this gain on their part has been lost. Yet it was these very interests that fought against the amendments to their own detriment.