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THE REVISION OF ARTICLE 2: COMMERCIAL SELLERS VS. CONSUMER BUYERS

James J. White*

Consumer protection law is a periodic but persistent rash on the skin of commercial law. Like such a rash, consumer protection law occasionally flares up but then goes back into remission, yet the virus that causes it is never extinguished. We currently have a blossoming of the rash in the form of anti-arbitration (really pro-class action) and similar rules from the Consumer Finance Protection Bureau¹ (CFPB) and more extensive rules from the American Law Institute (ALI) in the form of a Restatement of the Law of Consumer Contracts.²

The current actions by the ALI and the CFPB were preceded by the Uniform Consumer Credit Code (UCCC), promulgated by the Uniform Law Commission³ (the “Commission”) in 1968.⁴ The UCCC was not successful; it was adopted by only eleven states and was itself overshadowed by an unauthorized and more radical draft issued by the National Consumer Law Center at Boston College.⁵ The dismal showing of the UCCC — thought to be too tame by the consumer advocates and too radical by the Uniform Law Commissioners — diminished the Commission’s taste for consumer legislation.

Since 1968 the Commission has never intentionally stepped between the consumer advocates and their commercial critics. The story I tell here is the Commission’s *unintentional* stumble into the fight between consumers and commercial sellers from 1988 to 2011 when it was trying to revise Article 2 of the Uniform Commercial Code (UCC). Understand how the Commission differs from the CFPB and the ALI. It is only a modest exaggeration to say that the CFPB answers to no one. Wishing the CFPB to be free to promulgate rules that would anger the constituents of conservative and moderate members of Congress, the liberal drafters of the law that governs the CFPB took pains to immunize the CFPB from congressional control.

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1. 12 CFR § 1040.4. (2017), *repealed by* Consumer Financial Protection Bureau, 82 Fed. Reg. 55,500 (Nov. 22, 2017) (to be codified at 12 C.F.R. pt. 1040) (the CFPB’s anti-arbitration regulation for consumer financial products and services has been nullified by Public Law No: 115-74 (passed 11/01/2017)).

2. To the uninitiated, the battle will appear to be over arbitration clauses, for the commercial sellers attempt to bar class actions by requiring that claims be asserted in individual arbitrations, but these clauses do not arise from sellers’ affection for arbitration; they come in that form only because requiring individual arbitration is the most convenient way to prohibit class actions. See RESTATEMENT OF THE LAW, CONSUMER CONTRACTS (AM. LAW INST. (2017)).

3. Also known as the National Conference of Commissioners on Uniform State Law (NCCUSL). See *About the ULC*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Apr. 8, 2018).

4. Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 125 (1993).

5. *Id.* at 125 n.193.

First, its director holds his position, not at the sufferance of the President of the United States or any other official, but as long as he does not give cause for removal.⁶ Second, the CFPB's funds do not come through the regular appropriation process but through the Federal Reserve; therefore, angry congressmen and senators cannot turn off the flow.⁷ And, finally, the Director does not face the inconvenience that other agencies do where there are several commissioners and a requirement that each political party have some representation.⁸

The ALI is also beyond the reach of Congress and the executive branch of government; the ALI answers only to itself. The existing members appoint new members without any influence from outside.⁹ Its principal product is Restatements of the Law. The Restatements are not submitted for adoption by either the Congress or the state legislatures. They achieve whatever power and influence they enjoy from their citation in judicial opinions, and, to a lesser extent, by citation in scholarly writing.¹⁰ The Restatement (Second) of Contracts, for example, has achieved wide influence, but it is the exception, for most Restatements have failed to catch the eye of the courts or the interest of the academics.

Unlike the CFPB (where the reign of the first King, Richard Cordray, just ended with his abdication) or the ALI, the Commission is a democratic organization. First, its members are chosen by state governors or by some other state body.¹¹ Second, the Commission's product is uniform laws that are intended to be adopted by state legislatures.¹² Most of the uniform laws proposed by the Commission have not been enacted by even half the states,¹³ so the legislatures are not just a rubber stamp. The Commission must always keep the state legislative preferences in mind.

ARTICLE 2 REVISION 1988–2003

The Article 2 project started with the appointment of a “study group” to determine the need for a revision.¹⁴ That group of nine members¹⁵ published its Preliminary Report on March 1, 1990.¹⁶ The Report discusses unconscionability and other issues thought to impinge on consumers' issues, but finding Article 2 to be “primarily, a commercial statute,” it “endorsed” a “relatively neutral approach to consumer

6. 12 U.S.C. § 5491(c)(3) (2012).

7. 12 U.S.C. § 5497(a)(1) (2012).

8. *See, e.g.*, 15 U.S.C. § 78d(a) (2012) (requiring that no more than three of the five members of the Securities and Exchange Commission may be members of the same political party).

9. Allen Schwartz & Robert E. Scott, *The Political Economy of Private Legislation*, 143 U. PA. L. REV. 595, 600 (1995).

10. *See id.* (“Promulgation is a recommendation to courts to adopt sections of the restatement in the process of common-law adjudication.”).

11. James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RESOL. 795, 797 (1998).

12. *Id.* at 796-97, 799.

13. Schwartz & Scott, *supra* note 9, at 602.

14. *See* Richard E. Speidel, *Symposium on Revised Article 1 and Proposed Revised Article 2 of the Uniform Commercial Code: Introduction to Symposium on Proposed Revised Article 2*, 54 S.M.U. L. REV. 787, 789 (2001).

15. Of which I was a member. *PEB Study Group Uniform Commercial Code Article 2 Preliminary Report*, Permanent Editorial Bd. For the Unif. Commercial Code, (1990) [hereinafter *Preliminary Report*].

16. *Id.* at Introduction.

protection.”¹⁷ It worried that “a more inclusive approach” (i.e., more statutory text) “would impair the chances for approval.”¹⁸ The Preliminary Report “recommends no change in the text of § 2–302 on unconscionability.”¹⁹ In March of 1991, one year after the Preliminary Report was published, the Executive Summary to the Report was published which noted that “[t]he Preliminary Report was criticized for its . . . essentially neutral position on consumer protection.”²⁰ The Summary states the study group “adheres to its original position, but does not foreclose the possibility of expanded coverage [of consumer matters].”²¹ The Executive Summary was drafted by Dick Speidel who became the reporter for the Drafting Committee when it was established in 1991.²²

The study group had a strong advocate for commercial manufacturers who sell to consumers, namely Robert Weeks, general counsel for Deere & Co.,²³ but the Drafting Committee had no such advocate. The Drafting Committee had at least one strong consumer advocate, Amy Boss, an ALI appointee and a member of Temple Law faculty.²⁴ The Chairman, Larry Bugge, turned out to be Amy’s fellow traveler. It is hard to know who on the Drafting Committee regularly attended its meetings and even harder to determine who argued forcefully for what positions, but it appears that commercial displeasure with the Drafting Committee’s positions on the statute of frauds, unconscionability, and a few other issues was not brought home to the members of the Drafting Committee. Amy and others welcomed Dick Speidel’s coming out as the flag bearer for the consumer’s cause. I had edited several casebooks with Dick and, regarding him as a conservative and right-thinking Midwesterner, I enthusiastically recommended him as the reporter to my colleague Bill Pierce, the Commission’s executive director.

The Drafting Committee either forgot or abandoned the study group’s stance on consumer issues. More charitably, perhaps the Drafting Committee failed to perceive how toxic some of the “consumer issues” were for commercial parties who sold to consumers. For example, the 1991 Executive Summary discusses the statute of frauds and its possible repeal. The Summary notes dryly that the statute had been abandoned by the British and was omitted from the CISG.²⁵ It also repeats a familiar law school argument against the statute of frauds, namely that it might stimulate, “rather than deter[] fraud.”²⁶ There was no apparent understanding that some commercial sellers might put the statute of frauds on a pedestal next to God.

17. *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869, 1876 (1991) [hereinafter *Executive Summary*].

18. *Id.* at 1876.

19. *Preliminary Report*, *supra* note 15, at 79.

20. *Executive Summary*, *supra* note 17, at 1878.

21. *Executive Summary*, *supra* note 17, at 1878.

22. Speidel, *supra* note 14, at 789.

23. *Executive Summary*, *supra* note 17, at 1870 n.2.

24. *Executive Summary*, *supra* note 17, at 1870 n.2.

25. United Nations Convention on Contracts for the International Sale of Goods; *see Executive Summary*, *supra* note 17, at 1874.

26. *Executive Summary*, *supra* note 17, at 1874.

THE STATUTE OF FRAUDS

Through January 1993, the drafts retained a statute of frauds nearly identical to the one in the 1990 version of Article 2 for consumers,²⁷ but contracts for non-consumer goods were enforceable whether or not there was a writing.²⁸ The January 1993 draft had no comments and I have found no explanation why consumer good sales required a writing but commercial contracts did not.

By July 1994, the draft of § 2–201 read as follows:

NO FORMAL REQUIREMENTS. A contract . . . is enforceable, whether or not there is a writing signed or a record authenticated by a party against whom enforcement is sought, even if the contract . . . is not capable of performance within one year after its making.²⁹

In case that statement was not clear enough, or its meaning not sufficiently offensive to those who regarded the statute as their friend, the comment seems calculated to annoy: “The statute of frauds for contracts . . . for the sale of goods is repealed.”³⁰

It is interesting to speculate on the true concerns of commercial sellers. The statute had long been condemned in academic circles as a device that could and would be used to defeat legitimate oral deals.³¹ That view also discounted any claim that consumer buyers would falsely assert that deals had been made when they had not.³² Dick Speidel surely believed that the statute’s repeal would favor consumers,³³ but it is not clear that the consumer advocates were pushing for the statute’s repeal.

Since the parol evidence rule in § 2–202 was apparently never challenged in the early drafting process, it is unclear why the conservatives were so eager to keep the statute of frauds. The parol evidence rule would protect sellers from claims of oral side deals allegedly made after the commercial seller had made a sale that was invariably accompanied by a signed writing. Certainly the sellers wanted a swift and inexpensive escape from such a buyer’s claims of oral deals, but they did not need the statute of frauds for that outcome, they needed only the parol evidence rule to protect the terms on the seller’s form.

27. Compare U.C.C. § 2-201 (AM. LAW INST. & NAT’L CONFERENCE COMM’RS UNIF. STATE LAWS 1990), with U.C.C. § 2-201 (Revision Draft January 1993).

28. U.C.C. § 2-201 (Revision Draft January 1993).

29. U.C.C. § 2-201 (Revision Draft July 1994).

30. *Id.* at cmt. 1.

31. See generally Richard E. Speidel, *Symposium: The Revision of Article 2 of the Uniform Commercial Code, Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305 (1994).

32. Jeffery Kagan, *The Indelibility of Invisible Ink: A Critical Survey of Enforcement of Oral Contracts Without the Statute of Frauds Under the U.C.C.*, 19 WHITTIER L. REV. 423, 445 (1997) (“The modern fact-finding process all but eliminates the risk of fraud . . .”).

33. *Uniform Commercial Code Revised Article 2, Sales: Proceedings in the Comm. of the Whole of the Nat’l Conference of Comm’rs on Unif. State Laws*, 5th Sess. 101 (1995) (“[C]onsumers . . . would prefer not to have a statute of frauds because they think there is a better chance to prove an actual agreement, some oral agreements that otherwise would be barred by the statute.”).

Perhaps sellers imagined cases where the deal did not start from a seller's form or where the form would not constitute an integration. In such cases a seller would need the statute of frauds to make summary judgment available and so to avoid an expensive trial, a quarrel over the facts or a perilous exposure to a jury's whim. Dick Speidel and the Drafting Committee were still not convinced of the merit of the statute of frauds.³⁴

I am certain that many conservative members of the Commission were passionately opposed to the repeal of the statute.³⁵ According to Henry Gabriel, one member of the Texas delegation claimed that, irrespective of all imaginable virtues a final draft might contain, all of the Texas delegation would vote against the draft if it repealed the statute of frauds. Perhaps the other consumer advocates did not share Dick Speidel's aversion, yet the conservatives were affronted by the symbolism of the repeal of such a longstanding contract doctrine which they perceived to be important even though more careful study would have shown its lack of importance. (If he merrily attacks such a pillar of traditional contract law, what else will he do?)

The 1994 repeal of the statute also appears in the draft of 1996,³⁶ but it disappears from the July 1999 draft.³⁷ That draft, sporting a relatively conventional statute of frauds, was presented to the Commission in its 1999 Annual Meeting, but the draft was withdrawn without a vote.³⁸

Since the Drafting Committee retreated to a conventional statute of frauds in 1999, the attempt to repeal the statute cannot be directly blamed for the failure of the revision process. But in retrospect the attempt at repeal of the statute may have undermined the Commission's faith in the judgment of the Reporter and the Drafting Committee. At minimum the proposal to repeal § 2-201 rubbed the fur of the conservative members of the Commission the wrong way.

EXPRESS WARRANTIES TO THE PUBLIC

The basic rules on express warranties between a seller and a buyer who deal directly with one another face-to-face, by writing, email or any other mode, were well handled by the 1990 Article 2 and needed little or no modification. Even "pass-through" warranties by a manufacturer through a dealer to a buyer were not troublesome. Warranties to the "public" by advertising were another matter. Most sellers probably believed that there was no need for rules with respect to advertising because advertisements were only "puffing" and therefore not warranties at all. The Drafting Committee thought otherwise.

34. See, e.g., Kagan, *supra* note 32, at 444.

35. Kagan, *supra* note 32, at 444.

36. U.C.C. § 2-201 (Revision Draft July 1996).

37. U.C.C. § 2-201 (Revision Draft July 1999).

38. Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 611 (2001).

The draft of January 1993 covered “affirmations of fact or promise made by the seller to the buyer or to the public.”³⁹ That affirmations to the “public” could only mean advertisements was not lost on commercial sellers.

Worse, the burden of moving an affirmation from the realm of warranty to the realm of puffing was on the seller and, worse yet, the seller had to prove puffing by “clear and affirmative evidence that the buyer was unreasonable in concluding that the affirmation, promise, description or sample was part of the bargain.”⁴⁰ Exactly what “clear and affirmative” evidence meant was not clear, but it surely called for more and better evidence than the usual “more probable than not” standard. It is not enough that a reasonable person would have regarded the affirmation as puffing; the seller had to prove that the buyer himself was “unreasonable” in concluding that the affirmation was part of the bargain.

The 1994 draft made the seller’s burden no easier. In that version, § 2–313(c) states that an affirmation made to the public “*presumptively* creates an express warranty” which “the buyer may enforce . . . directly against the seller.”⁴¹ Subsection (d) stated three conditions under which a seller’s affirmation would not become a warranty:⁴² an affirmation in an advertisement published a year ago would not carry forward to the next year’s sales; advertisements to New Yorkers would not bind Iowans; and sellers who make “mistaken” advertisements on which the buyer did not rely are also free of warranty liability.

The “Reporter’s Note” adds a final insult to the sellers. Under that note, buyers had the benefit of the advertisement “whether they were aware of the warranty or not.”⁴³ That note removed the last remnant of the reliance requirement that had resided in the notion that any warranty had to be part of the “basis of the bargain.”

Partly in response to the American Bar Association’s study,⁴⁴ and presumably, to the dissatisfaction with the 1994 draft, the 1996 draft removed the adverb “presumptively” from modifying the process through which a seller’s representation becomes part of the agreement and left it to the buyer-plaintiff to prove that certain affirmations or promises become part of the agreement and so create an express warranty.⁴⁵ Under that formulation the buyer would have to prove that the term became part of the bargain: no presumption supports the buyer’s case.

39. U.C.C. § 2-313 (Revision Draft January 1993).

40. *Id.*

41. U.C.C. § 2-313 (Revision Draft July 1994) (emphasis added).

42. Subsection (d) read as follows:

(d) An express warranty is not created under subsection (c) if the seller establishes that the description, affirmation of fact, or promise:

(1) was made more than a reasonable time before or after the sale;
 (2) was made to a segment of the public of which the buyer was not a part; or
 (3) resulted from a mistake upon which the buyer did not reasonably rely.

Id.

43. *Id.*

44. Task Force of the A.B.A., Committee on the Uniform Commercial Code, *An Appraisal of the March 1, 1990 Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1090 (1991).

45. Compare U.C.C. § 2-313(c) (Revision Draft July 1996), with U.C.C. § 2-313(c) (Revision Draft July 1994).

The 1996 draft lightens the seller's burden in establishing that the affirmation was merely puffing. The seller escapes if it "establishes that a reasonable person in the position of the immediate buyer would either believe otherwise or believe that any affirmation . . . was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods."⁴⁶ Gone is the 1994 requirement of "clear and convincing" evidence and 1993's "clear and affirmative." Also, the seller need only prove what a reasonable person would have thought, not what this idiosyncratic plaintiff actually thought.

Finally, in the 1996 draft the remote buyer had to show that he "knew of and was reasonable in believing that the goods . . . would conform to the . . . description made by the [original] seller."⁴⁷ So if the advertisement was played on a San Antonio radio station, a buyer from Sault Sainte Marie, being ignorant of the advertisement, would not enjoy its benefit.

In the July 1999 draft an entire new section deals with pass-through warranties and warranties by advertising. The classic pass-through warranties are those that come in a pamphlet that accompanies a new automobile or that are in a document in the box with an electronic device such as a laptop. Comment 3 makes clear that the remote buyer need not know of a pass-through warranty (made by the manufacturer to the remote buyer who purchases from the manufacturer's buyer) at the time of purchase, but § 2-408(c) requires a remote buyer who wishes to sue on a statement made in an advertisement, to purchase "in the normal chain of distribution with knowledge of the representation and with the expectation that the goods will conform to the representation."⁴⁸

The July 1999 provision retained some of the conditions from the 1996 draft, namely that "a reasonable person in the position of the remote buyer . . . with knowledge of the representation would expect the goods to conform. . . ."⁴⁹ Also, the representation could not be "merely of the value of the goods" and could not purport to be "merely the seller's opinion or commendation of the goods."⁵⁰

With respect to express warranties between parties in privity, the traditional "basis of the bargain" term appears in § 2-403(c).⁵¹ Section 2-403(c) restricts "basis of the bargain" to cases where the immediate buyer did not know that the representation was untrue, or a reasonable person in the buyer's position would not have believed that the representation was part of the bargain, or if in advertising, the immediate buyer did not know of the statement at the time of sale.⁵² The "basis of the bargain" was already a pretty weak reed to support a reliance requirement, and the language in § 2-403(c) weakened it further. Under the heading "Temporal [I]ssues," Comment 5 reminds the reader that a post agreement representation can become part of the bargain already concluded if it is an effective modification.⁵³

46. U.C.C. § 2-313(c) (Revision Draft July 1996).

47. U.C.C. § 2-313(d)(1) (Revision Draft July 1996).

48. U.C.C. § 2-408(c) (Revision Draft July 1999).

49. U.C.C. § 2-408(c)(2) (Revision Draft July 1999).

50. U.C.C. § 2-408(c)(3) (Revision Draft July 1999).

51. U.C.C. § 2-403(c) (Revision Draft July 1999).

52. *Id.*

53. U.C.C. § 2-403 cmt. 5 (Revision Draft July 1999).

While commercial sellers would never welcome a statute that identified advertisements as warranties, the July 1999 draft gave little to complain of beyond that. The presumptions were gone, the need to prove the actual buyer's state of mind was gone, as was potential liability for a warranty in advertising to a remote buyer who was ignorant of the representation when he purchased. Also gone were the requirements of a higher bar of proof for the seller to escape liability such as "clear and convincing."

DISCLAIMERS OF WARRANTY

In the 1993 draft, § 2-316(b)(2), offered three alternatives for disclaimers of the implied warranty of merchantability in consumer contracts:

(2) In contracts for the sale of consumer goods:

[Alt. A] Any agreement disclaiming or limiting the implied warranty of merchantability is inoperative.

[Alt. B] If the Magnuson–Moss Warranty Act applies, any agreement disclaiming or limiting the implied warranty of merchantability is inoperative.

[Alt. C] Any agreement disclaiming or limiting the implied warranty of merchantability is inoperative, unless the seller proves by clear and convincing evidence that the buyer was aware of and understood the clause.⁵⁴

Only the first alternative (making all such disclaimers "inoperative") was necessary, for, in practice, the two other alternatives would come to the same result. For a seller to prove, "by clear and convincing evidence that the buyer was aware of and understood the clause," would be less likely than for a camel to pass through the eye of a needle.

Because § 2-316(b)(2) was limited to consumer goods, it would have done little more than the Magnuson–Moss Act. Currently the Magnuson–Moss Act prohibits disclaimers of the warranty of merchantability but permits a seller to limit the duration of any implied warranty to one year.⁵⁵ Alternative B of the 1993 draft prohibits not only disclaimers of warranty, but also any "limiting" of warranties; so it would bar any time duration on the warranty and so prohibit what § 108(b) of the Magnuson–Moss Act allows.

In the 1994 draft, the Drafting Committee adopted Alternative C from § 2-316(b) of the 1993 draft.⁵⁶ In the 1994 draft, § 2-316(e) rendered any disclaimer in a consumer contract "inoperative" unless the seller "proves by clear and convincing

54. U.C.C. § 2-316 (Revision Draft January 1993).

55. 15 U.S.C. § 2301 et seq.

56. U.C.C. § 2-316 (Revision Draft July 1994).

evidence that the buyer understood and expressly agreed to the term.”⁵⁷ As I suggest above, the sentence might just as well have had a period after the word “inoperative” since few sellers would be able to scale the barriers put up in the “unless” clause.

In the 1995 annual meeting the Commission voted to delete the words that would make the clause “inoperative unless the seller proves” that the buyer understood and agreed to the term.⁵⁸ Despite that rather unusual event,⁵⁹ Dick Speidel put a slightly modified version of the sentence back in the 1996 draft with a comment explaining that he had “restored it with some modifications for further discussion.”⁶⁰ Some members doubtless regarded his behavior to be insubordinate and it may have been one of the things that led to his resignation in 1999.

UNCONSCIONABILITY

Consistent with the study group’s proposal that the statutory text not be changed, the 1994 and 1996 drafts track the original § 2–302 and add only the phrase: “or was induced by unconscionable conduct.”⁶¹ The new language was taken from § 2A–108.⁶²

The December 1993 draft makes significant, but not dramatic, changes to the text, but does make dramatic changes to the comments. The text expands to include unconscionability “in the collection of a claim” and it allows the recovery of lawyer’s fees in consumer contracts.⁶³ The later provision allows not only consumer buyers to recover fees, but also sellers if the consumer asserts a claim that “was known to be groundless.”⁶⁴ I suspect that the sellers were not interested in the meagre bone that was thrown to them and that they correctly regarded the lawyer’s fees to be a practical benefit only to the consumer buyer.

The extensive additions to the 1993 comment to § 2–302 are nearly four pages long, single-spaced. Comment 2 states:

[T]his section regulates other abuse in the agreement process, especially where a party has unilaterally drafted a contract containing

57. *Id.*

58. *Uniform Commercial Code Revised Article 2, Sales: Proceedings in the Comm. of the Whole of the Nat’l Conference of Comm’rs on Unif. State Laws*, 7th Sess. 466 (1995).

59. Terms proposed by a drafting committee are seldom deleted from a committee draft by a vote of the commissioners during the annual meeting.

60. U.C.C. § 2-316, n.3 (Revision Draft July 1996).

61. The section reads:

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

(b) Before making a finding of unconscionability under subsection (a), the court, on motion of a party or its own motion, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the contract or clause thereof or of the conduct.

U.C.C. § 2-105 (Revision Draft July 1996).

62. *Id.* at n.1.

63. U.C.C. § 2-302 (Revision Draft December 1993).

64. *Id.*

terms favorable to the drafter and obtains apparent assent from another who has either not read or understood the terms or who understands the terms but agrees to take them because there is no other realistic choice.⁶⁵

That sentence, of course, describes the model form contract that you and I sign when we rent a car or buy a lawnmower or a computer. That contract is written to favor the seller; we know that other sellers of the same product will have similar terms and we do not read the contract because knowledge of the terms will merely disclose our sad state and its immutability. If the comment means what I suggest, this version of § 2–302 renders nearly every consumer purchase contract ineffective to protect the seller from any of the multiple claims that a disappointed buyer can make.

The examples in the comment that follow the part quoted above do not make life easier. They identify “poorly drafted” or “fine print” terms as targets of unconscionability claims.⁶⁶ The disclaimers that follow later in the comment—e.g., “[t]his Section does not empower a court to rewrite the terms of the contract based upon its notions of fairness”⁶⁷—are not convincing in the face of the bold specificity of the preceding denunciations of sellers’ contract practices.

The comments are concluded by nearly a page of citations to cases that strike down terms in contracts.⁶⁸ Of course, this is not a random sample of cases in which a contract is challenged. The cases have been chosen for their outcomes, and incidentally, to show that courts sometimes strike down parts of contracts even without the help of an unconscionability rule.

The 1993 text, and particularly the comments,⁶⁹ must have singed the hair of the Drafting Committee because the July 1994 draft returns to the old text with only the “inducement” term added.⁷⁰ That draft has no comments,⁷¹ the 1996 draft has the same text (moved to § 2–105) and has innocuous “notes” but no “comments.”⁷²

By July 1999 Dick Spidel was flying high again. The 1999 draft that was to go to the Commission for final approval, continues to condemn any term that was “induced by unconscionable conduct.”⁷³ A provision targeting any unconscionable conduct that “has occurred in the collection of a claim arising from a consumer contract” was resurrected from the February 1993 draft.⁷⁴

65. *Id.* at cmt. 2.

66. U.C.C. § 2-302 (Revision Draft December 1993).

67. *Id.*

68. *Id.*

69. For example, one of the “scenarios for potential abuse” provided by the comments:

... Buyer is aware of the clause and its meaning but Seller refuses to negotiate over or to delete it. Seller says “take it or leave it” and Buyer, who needs the goods and has no other realistic choice, assents. The buyer’s limited range of choice creates the risk of “oppression.”

Id.

70. *See* U.C.C. § 2-302 (Revision Draft July 1994).

71. *Id.*

72. *See* U.C.C. § 2-105 (Revision Draft July 1996).

73. *See* U.C.C. § 2-105 (Revision Draft July 1999).

74. *Id.*

More worrisome, there was a new subsection (b) to § 2–105:

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

- (1) eliminates the essential purpose of the contract;
- (2) subject to Section 2–202, conflicts with other material terms to which the parties have expressly agreed, or
- (3) imposes manifestly unreasonable risk or cost on the consumer in the circumstances.⁷⁵

Subsection 2–105(b) is what was left of a separate § 2–206 that appeared only in the 1995 and 1996 drafts. In 1996 it was titled “Standard Form Records.” It was described as a “particularized application of the general unconscionability doctrine.”⁷⁶

Comment 3 to the July 1999 draft gives three illustrations to show the operation of § 2–105(b).⁷⁷ Each of the examples was sensible and not threatening, but many members of the Commission apparently concluded that mere “illustrations” in a comment would not cabin the imaginations of plaintiffs or of judges who favored plaintiffs. If the courts found that the three illustrations did not exhaust the possibilities of cases where § 2–105(b) could be employed, it took no imagination to think

^{75.} *Id.*

^{76.} Section 2-206 in the 1996 draft reads:

(a) If all of the terms of a contract are contained in a record which is a standard form or contains standard terms and the party who did not prepare the record manifests assent to it by a signature or other conduct, that party adopts all terms contained in a record as part of the contract except those terms that are unconscionable.

(b) A term in a record which is a standard form or which contains standard terms to which a consumer has manifested assent by a signature or other conduct is not part of the contract if the consumer could not reasonably have expected it unless the consumer expressly agrees to the term. In determining whether a term is part of the contract, the court shall consider the content, language, and presentation of the standard form or standard term.

(c) A term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form record, whether or not the party read the form.

U.C.C. § 2-206 (Revision Draft July 1996).

^{77.} Comment 3 to 2-105 provides:

Illustration #1. Consumer buys a ladder described as a “10’ ladder” with 12 rungs. Consumer later discovers a term in the standard form that states: “Warning, do not stand on any of the top six rungs.” This is far more restrictive than the usual warning not to stand on the top rung. If the restrictive label, a non-negotiated term, eliminates the essential purpose of the contract to sell and buy a 10 foot ladder, it is not enforceable. As such, the ladder probably does not conform to the representation that it was a “10 foot ladder.”

Illustration #2. Consumer buys a coat for his son, who is not along. He is assured by the sales person that the coat can be exchanged within 10 days if it does not fit. The standard form sales slip, however, provides that “all sales are final.” The coat does not fit. Assuming that the parole evidence rule is inapplicable, the non-negotiated term is not enforceable because it conflicts the sales person’s representation, a material term to which the parties have expressly agreed.

Illustration #3. Consumer in California buys a new stove and in the standard form covering the purchase there is a non-negotiated term requiring that any litigation regarding defects in the stove must be litigated in Georgia, the location of the seller’s home office. If this imposes a manifestly unreasonable cost in the circumstances, the term is not enforceable.

U.C.C. § 2-105 cmt. 3 (Revision Draft July 1999).

of cases where the “essential purpose” of the contract was frustrated or where a term favored by a seller might be found to “conflict” with other material terms. Additionally, the “unreasonable risk or cost” standard is hardly self-limiting. So the section introduced a flock of words (“essential purpose,” “material terms,” and “manifestly unreasonable”) that had little history in the UCC and that previously had never been part of the unconscionability rule.

This language had a troubled history. In May of 1999 the ALI had retained the language by voting down a motion to remove it.⁷⁸ There also was a rumor that the Drafting Committee, or some members of it, had asked Dick to remove it, but that he had disregarded that request.

BEHIND THE SCENES IN 1999

In the spring of 1999, before the Commission’s annual meeting, leaders of the Commission had arranged a meeting in Emeryville, California, of the principal spokesman for the auto manufacturers, Andy Koblenz, and the leading consumer spokesperson, Gail Hillebrand. For several years Andy had been the leader of the commercial sellers’ opposition. In Emeryville he provided 19 points that represented the commercial negotiators’ “bottom line.” In his March 10, 1999 memorandum to the Drafting Committee, Chairman Bugge describes these 19 points and adds his and the reporters’ reaction to most of them.⁷⁹

After the Emeryville meeting there appear to have been seven unresolved issues. Note that there were four negotiation groups with slightly different views: the members of the Drafting Committee, the consumers, the commercial sellers and the two reporters who refused to agree to some of the things that the members of the Drafting Committee would accept. In the memorandum of March 10, Chairman Bugge summarizes the various parties’ positions. The following were still troublesome:⁸⁰

(1) Statute of frauds § 2–201. Chairman Bugge (apparently stating the Drafting Committee’s probable conclusion) believed that § 2–201 should be changed so that admission by a party would satisfy the statute only if the person making the admission “admitted the formation of a contract.” That change was not favored by the sellers;

(2) Parol evidence § 2–202. The sellers wanted to go back to the original § 2–202. That would authorize the “consistent additional terms” in some circumstances in place of the addition of “non-contradictory terms.” There was also disagreement about the statement that a final expression is not “conclusive evidence of intent” in a consumer contract. This language would give the consumers a weapon to attack “merger” clauses;

78. *Proceedings of the American Law Institute 76th Annual Meeting*, Wednesday, Afternoon Session, 76 A.L.I. 310 (1999).

79. Memorandum from Larry Bugge to Article 2 Drafting Comm. (Mar. 10, 1999) (on file with author).

80. *Id.*

(3) Section 2–206 that rendered form contracts unenforceable in certain circumstances even without a finding of unconscionability was the major sticking point for the sellers. As a result of the negotiations, § 2–206 was removed, but parts of it were added as subsection (b) to § 2–105 on unconscionability. That provision in § 2–105 read as follows:

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

- (1) eliminates the essential purpose of the contract;
- (2) subject to Section 2–202, conflicts with other material terms to which the parties have expressly agreed; or
- (3) imposes manifestly unreasonable risk or cost on the consumer in the circumstances.⁸¹

Here, Chairman Bugge was willing to have the substance of § 2–105(b) in the comments, but the reporters disagreed and subsection (b) remained in the text in the 1999 annual meeting draft. Apparently the Drafting Committee agreed with the reporters, not with the Chairman.

For reasons that I do not understand, this language became critical for the sellers and was the language that withstood a motion from the floor to remove it. The failure of that motion caused the Commission leaders to pull the draft from consideration at the 1999 meeting. The leaders believed that the revised article could not be widely enacted if subsection (b) was retained;

(4) The 1999 draft overrides the rule in *Hill v. Gateway 2000*, which had held that a buyer agrees to unread terms in the box if he retains the goods beyond a date set by the seller. Also, the sellers wanted approval of their position that no additional or different terms could be added to the contract in a battle of the forms if the seller’s form specified that no such terms sent after the seller’s form was sent could become part of the contract;

(5) Express warranties § 2–403. The 1999 draft states that a representation becomes part of the basis of the bargain “unless” one of three conditions occurs (under that formulation, a representation became a warranty even if none of the conditions is satisfied); the sellers wanted the conjunction changed to “if” so that at least one of

81. See U.C.C. § 2-105 (Revision Draft December 1999).

the three conditions had to occur to make the representation a warranty,⁸²

(6) Disclaimers § 2-407. The ALI voted that there should be some implied warranty of merchantability in all consumer contracts; apparently ten states already had such law. During the drafting process the disclaimers went through many changes. One draft would have required the seller to denigrate its merchandise; others had various alternatives that would reduce the power of a seller to disclaim the warranty of merchantability. While it is unclear where each of the four parties stood on disclaimers, the section was still a running sore in 1999;

(7) The sellers repeatedly complained that the drafters were doing “needless tinkering” in many parts of each draft. It does not appear that this was a critical sticking point with the sellers but it was never resolved and perhaps never could be since language changes were necessary in many places. It appears that the reporters and perhaps the Drafting Committee regarded these as “needed” changes. Exactly how this issue was going to be worked out was not clear from Chairman Bugge’s memorandum.

In a February 1999 letter from the American Automobile Manufacturers Alliance (Alliance), it listed three reasons why they “cannot support the adoption” of the 1999 draft:

- First, many substantive provisions in the draft are not fair and balanced.
- Second, the draft still contains needless and unjustified alterations of existing law, consisting either of non-substantive language changes or of substantive changes that do not address real problems in existing Article 2 or do not reflect new technologies and methods.
- Third, many revised sections, which have not been studied for several years, contain coordination, clarity, and conceptual problems, and therefore are not ready for adoption.⁸³

82. Under the sellers’ formulation, the representation would be regarded as a warranty only if (to comply with subsection (c)(2)), the buyer could show that a reasonable person would have believed that the representation was part of the agreement. So, under the draft, the representation is treated as a warranty in the absence of any proof that shows otherwise. Whereas in the sellers’ proposal, the plaintiff would have to prove a condition, such as buyer’s knowledge, in order to make the representation a warranty.

83. Letter from Automobile Manufacturer’s Alliance (AAMA) to Larry Bugge (February 4, 1999) (on file with author).

Because it flatly states that the Alliance “cannot support the adoption of the draft,”⁸⁴ the letter’s message is ominous, but their position may have changed after negotiation in Emeryville and later.

At the Conference’s annual meeting in 1999, in the middle of the debate concerning the draft, there was a motion to remove § 2-105(b); the motion failed and (b) stayed in.⁸⁵ Later that day the leaders of the Commission reported that the revision of Article 2 had been withdrawn from consideration at the 1999 meeting because there was not “sufficient time” to complete the consideration of the draft.⁸⁶ The claim of insufficient time was widely viewed as false; most believed that the draft was pulled after the failure of the motion because the leaders believed that the language of § 2-105(b) would forestall wide enactment by the state legislatures.⁸⁷

At the close of the last meeting session dealing with Article 2, Dick Speidel made a dramatic nonverbal resignation; as he and others left the dais, Dick gave the finger to the assembled members. We did not know it at the time, but the inclusion of subsection (b) was probably the end of the revision process.

After the 1999 meeting the Commission leaders reorganized the Drafting Committee to move it to the right toward the sellers’ position and away from the consumers’ position. Messrs. Bugge, Reitz and Langrock, all consumer advocates, were removed; Dick Speidel and Linda Rusch resigned;⁸⁸ Henry Gabriel was made the Reporter; Bill Henning was made the chairman,⁸⁹ and Neil Cohen of Brooklyn Law School and I were added.⁹⁰

The first draft of the new reporter was issued in December 1999. Section 2-201, the statute of frauds, returns nearly to its 1990 form, but now excludes sales up to \$5,000 rather than \$500 that had appeared in 1990.⁹¹ Section 2-202 also returns to its 1990 form but now includes a subsection (b) that merely elaborates on a former comment and makes clear what § 2-202 had always meant.⁹² Section 2-207 continues the attempt to get the battle of forms right by expanding the section to apply to terms of all contracts as well as making revisions for clarity.⁹³ Unconscionability returns to § 2-302 and generally assumes its 1990 form.⁹⁴ Gone from it and the comments is

84. *Id.*

85. *Uniform Commercial Code Revised Article 2, Sales: Proceedings in the Comm. of the Whole of the Nat’l Conference of Comm’rs on Unif. State Laws*, 4th Sess. 82 (1999).

86. *See* Speidel, *supra* note 38, at 611 n.17.

87. Speidel, *supra* note 38, at 611 n.17.

88. Speidel, *supra* note 38, at 611–12 (discussing resignation of Speidel & Rusch and reconstitution of drafting committee). *See also* Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of A Search for Balance*, 52 SMU L. REV. 1683, 1715 n. a1 (1999).

89. Press Release, NCCUSL and ALI, ALI and NCCUSL Announce New Drafting Committee for UCC Articles 2 and 2A (Aug. 18, 1999) (available at www.uniformlaws.org/Shared/pressreleases/ucc2a2.pdf) (announcing new drafting committee members).

90. *Id.*

91. *See* U.C.C. § 2-201 (Revision Draft December 1999).

92. *See* U.C.C. § 2-202 (Revision Draft December 1999).

93. *See* U.C.C. § 2-207 (Revision Draft December 1999).

94. *See* U.C.C. § 2-302 (Revision Draft December 1999).

even a whisper of the troublesome § 2-105(b)–(c) from the unconscionability rule in the summer 1999 draft.⁹⁵

If the draft, which had already been approved by the ALI,⁹⁶ had not been pulled from the Commission's agenda in July 1999, and had been approved by the Commission, what would have happened? It seems likely that the sellers and their fellow travelers (e.g., General Electric and the National Association of Manufacturers) would have opposed the adoption in the state legislatures. That draft would still have contained the noxious § 2–105(b), and it would have also contained other irritants in the form of “needless tinkering” and the sellers’ seven points on which there had been no conclusive deal.

THE LAME DUCKS OF THE POST 1999 ERA

With the appointment of two new more conservative members and the removal of Dick Speidel and four others thought to favor the consumers’ position, the leaders of the Commission thought that finally they had a Drafting Committee and a reporter that would produce a draft that could earn the approval of the state legislatures. They were mistaken. Although the new Drafting Committee produced a final draft in 2003 and successfully procured the approval of the ALI and the Commission, it was never adopted by a single state.⁹⁷ In 2011, the Commission withdrew the Revision from the list of active bills.⁹⁸ After nearly 23 years, the project was dead.

During the Article 2 revision process, a special committee had been assigned to identify areas that should be modified in Articles 2 and 2A in order to address computer software transactions.⁹⁹ In 1999, it was announced that computer software transactions would not be covered by the UCC, and the Commission “instead would promulgate a freestanding Uniform Computer Information Transactions Act (UCITA).”¹⁰⁰ Although UCITA was approved by the Commission in 1999 (and updated in 2002), it faced heavy criticism from many sides and was ultimately adopted by only two states.¹⁰¹ The uncertainty and controversy surrounding UCITA increased concerns about whether information transactions would fall within the scope of Article 2, and revised Article 2 failed to provide a solution.¹⁰²

95. *Id.*; see also U.C.C. § 2-105(b), (c) (Revision Draft July 1999).

96. See Speidel, *supra* note 38, at 611.

97. Memorandum from the Permanent Editorial Bd. for the Unif. Commercial Code to the Uniform Law Commission and American Law Institute (May 16, 2011) (available at <http://entrepreneur.typepad.com/files/article-2-and-2a-memo.pdf>) (Recommendation to Withdraw the 2003 Amendments to UCC Articles 2 and 2A from the Official Text of the Uniform Commercial Code).

98. *Id.*

99. William H. Henning, *Amended Article 2: What Went Wrong*, 11 DUQ. BUS. L.J. 131, 134 (2009).

100. *Id.* at 135.

101. Michael L. Rustad & Maria Vittoria Onufrio, *The Exportability of the Principles of Software: Lost in Translation?*, 2 HASTINGS SCI. & TECH. L.J. 25, 37–39 (2010); see also Nim Razook, *The Politics and Promise of UCITA*, 36 CREIGHTON L. REV. 643, 656 (2003).

102. See, e.g., Henning, *supra* note 99, at 138 (“the failure to resolve the issues made amended Article 2 unacceptable”). See also David Frisch, *Amended U.C.C. Article 2 as Code Commentary*, 11 DUQ. BUS. L.J. 175, 185 n.4 (2009) (“...it is not surprising that states already weary from their recent battles with UCITA’s supporters and detractors, would hesitate to once again confront the issues generated by new economy products.”).

Why was the unadorned 2003 version not enactable? First, its only remaining advocates were a small coterie of law professors. Outside the walls of law schools, law professors have vanishing small influence. Second, all of the other early actors—the OEM manufacturers, the car dealers, the consumer advocates, and others including Microsoft (worried about “information” being swept into Article 2) and librarians—were exhausted, indifferent or angry over events leading up to 1999 or over post 1999 revanchist moves. Third, stripped of the fighting issues such as unconscionability, parol evidence, and warranties, the 2003 version seemed to make little change to the 1990 version; Revised Article 2 had become small potatoes. So the final score was commercial sellers 0 and consumer buyers 0.