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## The Revision Of Article 2: Commercial Sellers Vs. Consumer Buyers Appendix

James J. White

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## **APPENDIX**

This appendix contains: (1) a compilation of the relevant text from the UCC drafts referenced in the article; (2) an excerpt from the February 1999 AAMA letter to Chairman Bugge; and (3) the full text of the March 1999 memo from Chairman Bugge to the Article 2 drafting committee.

**STATUTE OF FRAUDS**

**Section 2-201, January 1993 Draft**

**SECTION 2-201. FORMAL REQUIREMENTS; STATUTE OF FRAUDS  
FOR CONSUMER CONTRACTS.**

(a) A contract or modification thereof under this Article, other than one for consumer goods, is enforceable whether or not there is a writing signed or a symbol authenticated by a party against whom enforcement is sought or the contract or modification is not capable of performance within one year of its making.

(b) A contract for the sale of consumer goods for the price of \$50 or more is not enforceable by way of action or defense unless there is a writing or symbol that is sufficient to indicate that a contract for sale has been made between the parties, that describes the goods sold and that is signed or authenticated by the party against whom enforcement is sought . . .

**SECTION 2-201, JULY 1994 DRAFT**

**SECTION 2-201. 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.

**WARRANTIES**

**Section 2-313, January 1993 Draft**

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

(a) Subject to subsection (b), any affirmation of fact or promise made by the seller to the buyer or to the public that relates to the goods, or any description or any sample or model of the goods of which the buyer has knowledge at the time of contracting or thereafter, becomes part of the bargain and creates an express warranty that the goods shall conform to the affirmation or promise or the description, sample or model.

(b) If the seller proves by clear and affirmative evidence that the buyer was unreasonable in concluding that the affirmation, promise, description or sample was part of the bargain, no express warranty is made.

(c) To create an express warranty under subsection (a), it is not necessary that the seller use formal words, such as “warrant” or “guarantee”, or have a specific intention to make a warranty. However, an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

**Section 2-313, July 1994 Draft**

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

...

(c) Except as otherwise provided in subsection (d), a description, affirmation of fact, or promise made by a seller, including a manufacturer, to the public which relates to goods to be sold presumptively creates an express warranty to any buyer that the goods will conform to the description, affirmation, or promise. Subject to Section 2-318, the buyer may enforce the express warranty directly against the seller, whether or not the express warranty is part of the contract with the buyer's immediate seller.

(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.

**Section 2-313, July 1996 Draft**

**SECTION 2-313. EXPRESS WARRANTIES.**

...

(c) Any affirmation of fact, promise, description, sample or model made or provided under subsection (b) becomes part of the agreement unless the seller establishes that a reasonable person in the position of the immediate buyer would either believe otherwise or believe that any affirmation, promise, or statement made was merely of the value of the goods or purported to be merely the seller's opinion or commendation of the goods.

(d) If the seller makes an affirmation of fact or promise relating to or a description of goods to a remote buyer or lessee through an authorized dealer or other intermediary of the seller or through any medium of communication to the public, including advertising, the following rules apply:

(1) An obligation is created if the remote buyer or lessee establishes that it knew of and was reasonable in believing that the goods purchased from another seller or lessor in the distributive chain would conform to the affirmation of fact, promise or description made by the seller;

(2) The obligation may be enforced by the remote buyer or lessee as an express warranty directly against the seller under this [article] . . . .

**Section 2-403, July 1999 Draft**

**SECTION 2-403. EXPRESS WARRANTY TO IMMEDIATE BUYER.**

(a) Any representation made by the seller to the immediate buyer . . . which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the representation or, with respect to a sample or model, that the whole of the goods will conform to the sample or model.

. . .

(c) A representation under subsection (a) becomes part of the basis of the bargain unless:

(1) the immediate buyer knew that the representation was not true;

(2) a reasonable person in the position of the immediate buyer would not believe that the representation was part of the agreement; or

(3) in the case of a representation made in any medium of communication to the public, including advertising, the immediate buyer did not know of the representation at the time of the sale.



**DISCLAIMER OF WARRANTIES**

**Section 2-316(b)(2), January 1993 Draft**

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

...

(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.

**Section 2-316(e), July 1994 Draft**

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

...

(e) In a consumer contract, terms disclaiming or limiting the implied warranty of merchantability or the implied warranty of fitness for particular purpose must be in a writing or record. The terms are inoperative unless the seller proves by clear and convincing evidence that the buyer understood and expressly agreed to the term.

**Section 2-316(b)(2), July 1996 Draft**

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

...  
(e) Terms in a consumer contract excluding or modifying the implied warranty of merchantability or the implied warranty of fitness for particular purpose must be contained in a record and be conspicuous. **[The terms are inoperative unless the seller establishes by clear and affirmative evidence that the buyer expressly agreed to them.]**

## UNCONSCIONABILITY

### Section 2-105, January 1993 Draft

#### § 2-302. Unconscionable Contract or Clause.

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

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

...

(d) In an action in which a party claims unconscionability with respect to a consumer contract:

(1) If the court finds unconscionability under subsection (a) or (b), the court shall award reasonable attorney's fees to the consumer.

(2) If the court does not find unconscionability and the consumer claiming unconscionability has brought or maintained an action known to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(3) In determining attorney's fees, the amount of recovery on behalf of the claimant under subsections (a) and (b) is not controlling.

**Section 2-302, December 1994 Draft**

**SECTION 2-302. UNCONSCIONABLE CONTRACT OR CLAUSE.**

(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.

**Section 2-105, July 1999 Draft**

**SECTION 2-105. UNCONSCIONABLE CONTRACT OR TERM.**

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

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

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

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

**EXCERPT FROM AAMA LETTER TO LARRY BUGGE (FEBRUARY 4, 1999)**

The revision of Article 2 should be fair and balanced – it should both protect parties from unfair surprise and unreasonable terms and facilitate commerce and safeguard the sanctity of contract. The revision also should clarify points of contention in current law and address new technologies and methods of doing business. Unfortunately, although the drafting committee has been hard at work for well over six years and some progress toward these goals has been made, current Article 2 is still the superior product. We therefore oppose the Article 2 revision in its current form and urge the drafting committee and the Conference to reconsider their goal of completing the project this spring.

We cannot support the adoption of draft Article 2 for several reasons:

- 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.
- Fourth, the reporters have only recently introduced embryonic drafts of official comments that will play a crucial role in the judicial development of the revised sales law. These early efforts are not encouraging; the draft comments sometimes obfuscate or fail to reflect written rules and, at other times, appear to retract painstaking compromises made at drafting committee meetings. This much is clear -- much work remains to be done.
- Finally, revised Article 2 is still far from achieving coordination with other NCCUSL drafting projects. For example, the drafters have indicated that many sections of the Article 2 draft “will follow” proposed UCC Article 2B. Revised Article 2 should not be adopted until the drafters determine what Article 2B ultimately will look like.

**TEXT OF MEMORANDUM FROM LARRY BUGGE TO ARTICLE 2 DRAFTING  
COMMITTEE**

**Memorandum**

**To: Article 2 Drafting Committee**

**CC: Reporters**

**From: Lawrence J. Bugge**

**Date: March 10, 1999**

**Re: Executive Session Agenda**

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As you know from the meeting materials you have or soon will receive, I have scheduled an executive session of the Committee, without observers, for 7:45 am on Friday March 5. A continental breakfast will be available. This memo is intended to explain the reason and agenda for that meeting.

This is the last scheduled meeting of the Drafting Committee. We are scheduled to present a final draft for approval by the ALI at its meeting in May, and to the Conference in July. As all of us are keenly aware, there is still a great deal of controversy and opposition to some of the provisions of the draft among industry observers and the organizations they represent. It appears unlikely that we can convert these interested parties to supporters of the project, but it may be possible to reduce or even to neutralize their opposition by making some changes in the draft. Without some movement in that direction, many major industries will actively oppose enactment of revised Article 2, which will likely prevent wholesale or at least uniform adoption of the Article, since unlike Article 2B, it has few if any strong supporters.

During the last Drafting Committee meeting, and since, and with my knowledge and encouragement, two members of our Committee, Boris Auerbach and Bill Henning, had some informal discussions with several of the observers who represent industries that have been our most consistent critics. The observers participating were Andy Koblenz, Charlie Keeton, and Bob Hillman. The purpose of the discussions was to try to determine what further changes in the draft would be necessary and sufficient for their clients to withdraw active opposition to enactment of revised Article 2 in the legislatures. A list of issues was developed and presented to Boris and Bill and passed on to me, the Conference leadership and the Reporters. All of these issues are also presented in Keeton's latest letter to the Committee dated March 8, a copy of which you have or will soon receive. The letter makes no reference to the discussions mentioned above.

I initiated a conference call today with Koblenz, Keeton, and Hillman to review their objections and to confirm that these issues represented their clients' "bottom



line.” They assured me that if all (and probably if most) of these objections are resolved, their clients would take a neutral position on enactment. They also acknowledged that opposition from other allied quarters, especially NAM, had been “influenced” by their clients’ positions, and would likely also be neutralized if their clients’ concerns are addressed.

I have listed below, in no particular order, the issues that we discussed and the changes industry wants. In most cases, I have also indicated my own reaction and recommendation, and in some cases<sup>O</sup> [sic] the position of the Reporters. Some of the changes requested have already been addressed in the March 1 draft.

1. 2-201 Statute of Frauds — return to existing law: part performance should satisfy the statute only to the extent of goods delivered and accepted. Admissions satisfy the statute only if the formation of a contract is admitted, not if just facts from which a contract may be found. I would support the first change but not the second.
2. 2-202 Parol Evidence — they would prefer present law and at least use of “consistent additional terms” rather than “non-contradictory” terms as the draft provides, and restoring the comments we brought up into the statute back in comments. I am rather indifferent to these changes, and I don’t think these are one of their major issues.
3. Electronic contracting — while earlier indicating that they preferred the “minimalist” approach the committee adopted at its last meeting, GE at least now supports following Art. 2B on these provisions. See Keeton letter, p. 6. At last week’s conformity meeting the recommendation of the group including me and our reporters is that Art. 2 do just that. While these provisions may ultimately be placed in Art. 1, they now must appear separately in each of the 2’s because they will be adopted at different times.
4. 2-206 Unenforceable terms in Consumer Contracts — they prefer elimination of this provision in the text and at most treating it in a comment to the Unconscionability Section 2-105. The ALI ad hoc committee chaired by Justice Peters also seems to favor relocation of this issue to 2-105, but probably in the text rather than a comment. As to this and the following one, I think a comment would suffice, along the lines of Fred Miller’s suggested draft, attached. The reporters disagree.
5. 2-207(d) Gateway Problem — they would prefer to leave this problem to the courts, but I sense this is not a major issue for these observers and their clients. It is for Gateway itself, however, as the parade of contract professor condemnations they elicited attests. I

think this too could be better, and less controversially, addressed in a comment to 2-105. The reporters disagree.

6. 2-207 (a)-(c) Battle of the Forms — as I understand their position, they would like to give effect to “additional terms” that appear in a form containing a “my way or the highway” clause when the other party’s form is silent as to the additional terms and does not contain its own “highway” clause. In such circumstances, the second party’s silence would not operate as a knockout, leaving the parties to gap-fillers. I and the reporters oppose this change because it would reward the sophisticated and punish the party whose form was incorrectly drafted.

7. 2-209 Modification — they want to eliminate the ban on NOM clauses in consumer contracts and restore the application of the Statute of Frauds if the modification takes the contract over the \$5,000 threshold. The reporters, Ellen Peters, and I do not oppose these changes.

8. 2-403 Express Warranties — they want the “basis of the bargain” language to read “if” rather than its present formulation that representations become part of the “basis of the bargain” unless certain conditions are met. The reporters, Fred Miller and I would oppose this change. They also wanted a comment to make that the creation of express warranties is subject to the Parole Evidence Rule. Such a comment has been added in Comment 2. Finally, they appear to want some indication in the text that “basis of the bargain” implies that some reliance must be found before representations made through advertising rise to the level of an express warranty. I would oppose such an addition.

9. 2-404 Denny case comment — they would like the lead-in language to the comment we negotiated with the ALI to be clarified. This has been done.

10. 2-406 Ban on Disclaimer of Merchantability in Consumer Contracts — Alternative B to (c)(1) is language for the 10 states or so that currently preclude such disclaimers. The observers don’t want to highlight this option by showing it in the text; as in Article 9 we could show the suggested [sic] language in an appendix or at most in a comment. I have no objection to either approach, but it should be noted that at its October meeting the ALI Council voted 34-3 in a sense of the house motion that there should be some implied warranties of merchantability and fitness that should not be disclaimable.

11. 2-407(3) Conflict of Warranties — this section provides that “except in a consumer contract” express warranties displace implied warranties. They object to the quoted language which the committee removed in Dallas, but which was restored at the request of Prof. Elizabeth Warren of the ALI Council. The reporters and I would not object to the deletion of the exception, especially since Magnuson-Moss probably precludes the disclaimer effect anyway.

12. 2-408 Pass through warranty to remote buyers — they want a clarification in text or comment that “good sold as new goods” would not cover goods sold by discounters or in a gray market outside the normal chain of distribution. This is not objectionable, and Comment 2 to the section may already sufficiently address this issue. They also want to clarify that an intermediate commercial buyer, such as a distributor, does not get the pass-through warranty intended for the ultimate user.

13. 2-409 Horizontal extension of warranties — Sub (a) precludes the disclaimer or limitation of this warranty for non-personal injury damages, “unless the seller has a substantial interest” in limiting the warranty to the immediate buyer. They object to this limitation in property damage situations. The reporters and I have no objection to its deletion.

14. 2-102(23) Remedial Promise — they want it made clear that the term does not apply to service contracts, that it essentially refers to a “repair, replace or refund” alternate remedy, and the language referring to the obligation to act arising on the “happening of a specified future event” be clarified or eliminated. They also want it made clear that breach of a remedial promise to repair does not revive an expired statute of limitations that bars an action for breach of the contract. The reporters and I do not object.

15. 2-704 Buyer’ use of properly rejected goods — If the buyer is forced to use non-conforming goods in order to mitigate damages, they believe he should also be liable not only for the value of the use, but also for the “capital loss” arising from the fact that the seller can no longer resell them as “new” goods. This is a difficult issue to capture legislatively, and perhaps it could be addressed in a comment.

16. 2-103 Scope and exclusion of software — the concern is that Art. 2 should not apply to software, unless it is imbedded software included with the sale of the goods. The revised section worked out with the 2B people last weekend probably answers their concerns.

17. 2-402 Warranty of title and against infringement — the general 14-year statute of limitations does not begin to run on this warranty until discovery of the breach. They have no problem with this result in the case of title (because of the common law rule on stolen goods), but are concerned with its application to infringement claims which could extend indefinitely. They did not have a specific suggestion except for the usual 4-year statute.

18. 2-606(a) Tender of delivery and installation — they suggest that the last sentence in the section regarding assembly and installation of the goods confuses the formerly simple default rule that tender of payment and delivery of the goods had to be simultaneous. Perhaps a comment would clarify the perceived ambiguity.

19. “Needless Tinkering” they insist that their frequently expressed concern about deviation from current Art. 2 language is genuine, and they seek to meet with the reporters and chair to resolve non-substantive departures from existing text. I have no objection, but probably such a meeting could not occur until after the ALI meeting.

I propose to discuss these matters in our executive session, but to take no votes there. I will then assign them to the agenda to be taken up in open session and vote on, probably on Saturday. so that the committee members will have time to discuss and debate these issues with each other and such observers as will listen.