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Article 2

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## Introduction to The Revision of Article 2 of the Uniform Commercial Code Symposium

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## THE REVISION OF ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE

### INTRODUCTION

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For many who have studied and practiced commercial law, Karl Llewellyn's vision of what a statute can accomplish has defined the limits of the Uniform Commercial Code's logic. Quite simply, Article 2 of the U.C.C., "Sales," is, more than any other article of the Code, Llewellyn's Llaw.<sup>1</sup> As originally promulgated, Article 2 captures as much of Llewellyn's legal realism as he could get past the New York Law Revision Commission and, until recently, the uniform sales law has remained essentially intact, notwithstanding the many slings and arrows thrown its way. Maybe something special about Article 2, or Llewellyn's relation to it, has insulated the sales law from the wholesale revision process that Articles 3, 4, 5, 6, 8, and 9 have endured.

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1. Llewellyn, however, did not have his way completely: "I am ashamed of [the Code] in some ways; there are so many pieces that I could make a little better; there are so many beautiful ideas that I tried to get in that would have been good for the law, but I was voted down." Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 784 (1953).

The promulgation of Article 2A, "Leases," signalled the imminent revision of Article 2. The drafters of the Lease article relied on Article 2 analogues, departing from the Sales formulation of a rule only when it caused them to "gag."<sup>2</sup> The careful study of Article 2, which began in earnest with the promulgation of Article 2A, assured the prompt revision of the Sales article itself. The appointment of a Study Committee certainly sealed Article 2's fate.

Now that revision of the Sales article is well underway, the *William and Mary Law Review* has assembled this Symposium Issue to alert the legal community to the premises of the Article 2 revision effort and to bring together a group of scholars to reflect on the plans for the Sales article and comment on some of the particular revision decisions already made. While this Symposium certainly will not be the last word on the Article 2 revision initiative, the contributors hope to inform the debate and develop in the readers of this Issue an appreciation of the interests to be balanced.

Professor Richard Speidel, of the Northwestern University School of Law and the Reporter for the revision of Article 2, begins this Symposium Issue with his article concerning *Contract Formation and Modification Under Revised Article 2*.<sup>3</sup> He describes the Revision Committee's work as it relates to Part 2 of Article 2: the locus of the statute of frauds, parol evidence, and infamous "battle of the forms" rules. Part 2 may be the most Llewellynesque portion of the Sales article, drawing as it does on fundamental conceptions of the legal realists. What the Drafting Committee ultimately does in its adjustment and refinement of the contract formation rules will go a long way toward determining the relationship of a revised Article 2 to the original. Professor Speidel details the evolving structure of Part

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2. See Amelia H. Boss, *The History of Article 2A: A Lesson for Practitioner and Scholar Alike*, 39 ALA. L. REV. 575, 600 (1988) ("Not only did the drafters use Article 2 as the statutory analogue, they also used the existing Code provisions found in Article 2 unless they were clearly inappropriate in the context of a leasing transaction, again in order to encourage uniformity and to minimize line drawing.")

3. Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305 (1994).

2 and reveals the drafters' predisposition toward the contract formation dynamic.

In the second article of the Symposium, Professor and Acting Dean Raymond Nimmer, of the University of Houston Law Center and the Reporter for Technology Issues in the revision, describes the "hub and spoke" approach to the codification of the law of commercial contracts, including transfers of intellectual property interests.<sup>4</sup> The Article 2 revision, he suggests, should accommodate a much broader scope of transactions than the current sale of goods. Professor Nimmer argues in favor of a hub and spoke revision of Article 2 by explaining the differences between the sale of goods and other transfers of valuable, but less tangible, property interests.

In our contribution to the Symposium, Professor Marion Benfield, of the Wake Forest University School of Law, and I detail our reservations about the hub and spoke approach. Such an approach, we argue, ignores practices fundamental to the commercial and contract law world and, if adopted, would inhibit expansion of commercial practices. We see no good purpose to be served by "reinventing the wheel."<sup>5</sup>

John Murray, President of Duquense University and one of the leading commercial law scholars in the country, has contributed an article that surveys several provisions of the original Article 2 and describes how to adjust them in order to better realize Llewellyn's ambitions for the uniform sales law.<sup>6</sup> President Murray's observations reveal the dissonance between the theory and practice of commercial law.

Associate Dean and Professor Robert Hillman, of the Cornell University School of Law, offers "principles of revision" that, he argues, should inform the revision process.<sup>7</sup> In order to make more concrete his recommendations, he focuses particularly on

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4. Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes and Reinventing Article 2*, 35 WM. & MARY L. REV. 1337 (1994).

5. Marion W. Benfield, Jr. & Peter A. Alces, *Reinventing the Wheel*, 35 WM. & MARY L. REV. 1405 (1994).

6. John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447 (1994).

7. Robert A. Hillman, *Standards for Revising Article 2 of the U.C.C.: The NOM Clause Model*, 35 WM. & MARY L. REV. 1509 (1994).

the Sales article's treatment of "no oral modification," or "NOM" clauses.

Professor Steven Burton, of the University of Iowa College of Law, concentrates on the U.C.C. Article 1 and 2 conceptions of "good faith."<sup>8</sup> He criticizes the current formulations of the "good faith" standards and suggests revision in order to articulate the "practice view" of good faith. His argument is provocative and strikes at the very core of our commercial law jurisprudence.

Professor Frederick Miller, of the University of Oklahoma School of Law, is the Executive Director of the National Conference of Commissioners on Uniform State Laws. It is difficult to think of anyone who has contributed more to the uniform commercial law movement in the last quarter century than Professor Miller. His contribution to the Symposium considers the Article 2 revision's treatment of consumer issues.<sup>9</sup> Llewellyn recognized that varying levels of commercial sophistication must be within the contemplation of comprehensive commercial legislation. Professor Miller's article describes the revised Article 2's sensitivity to the special needs of consumers. Ms. Yvonne Rosmarin, attorney and consumer advocate of the National Consumer Law Center, responds to Professor Miller's conclusions in terms that emphasize issues of fundamental fairness to consumers.<sup>10</sup> She provides the framework to come to terms with the vindication of consumer interests in the uniform legislation process.

Professor William Lawrence, of the University of Kansas School of Law, discusses a vexing issue in the commercial sales law: the tender requirement.<sup>11</sup> Does (or should) the buyer have the right to reject goods that do not conform perfectly to the terms of the sales contract? While Llewellyn would have pre-

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8. Steven J. Burton, *Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View*, 35 WM. & MARY L. REV. 1533 (1994).

9. Fred H. Miller, *Consumer Issues and the Revision of U.C.C. Article 2*, 35 WM. & MARY L. REV. 1565 (1994).

10. Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593 (1994).

11. William H. Lawrence, *Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller*, 35 WM. & MARY L. REV. 1635 (1994).

ferred a pervasive substantial performance rule,<sup>12</sup> the general rule is "perfect tender."<sup>13</sup> Professor Lawrence considers as well the buyer's right to revoke acceptance and the seller's right to cure a nonconforming tender.

Finally, and following the order of most sales casebooks, the contribution of Professor David Frisch, of the Widener University School of Law, focuses on fundamental property rights conceptions insofar as remedies for the breach of sales contract are concerned, specifically, the right of specific performance.<sup>14</sup> Professor Frisch recognizes that the available remedies define the substance of property interests in terms that are considerate of Llewellyn's jurisprudence.

Debate about Article 2 of the U.C.C. serves the evolution of commercial law well, both the commercial law in this country and internationally.<sup>15</sup> Clearly, the fundamental property conceptions animating the hub and spoke issues will have an impact on our jurisprudence beyond the matter of whether and how computer diskettes are subject to uniform legislation. A revised Article 2 will be a jurisprudential statement, just as Llewellyn's original article was (and still is). It is, therefore, crucial that those who have thought a great deal about the original Article 2 bring to the table their impressions of the revision initiative. We hope that this Symposium contributes to the dialogue, a continuing dialogue.

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12. See U.C.C. § 2-612 (1990) (installment contracts).

13. *Id.* § 2-601.

14. David Frisch, *Remedies as Property: A Different Perspective on Specific Performance Clauses*, 35 WM. & MARY L. REV. 1691 (1994).

15. See United Nations Convention on Contracts for the International Sale of Goods, Final Act, Apr. 10, 1980, U.N. Doc. A/Conf. 97/18, 19 I.L.M. 668.