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THE REVISION OF ARTICLE 2: ROMANCING THE PRISM

JOHN E. MURRAY, JR.*

I. INTRODUCTION

I belong to a mature¹ group of law professors who were fortunate enough to be assigned to teach commercial law early in our careers.² The vast landscape of the new Uniform Commercial Code frightened not only students but seasoned practitioners of the art.³ I was more than pleased to be among those who embraced the opportunity to explore the U.C.C. and attempt to unveil its mysteries. Even when assigned to teach the entire Code, there was a tendency to concentrate our scholarly efforts on particular articles and sections. Some became fascinated with the relatively certain, only slightly changed and necessarily rule-

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1. I use the term "mature" advisedly. When my wife's ophthalmologist had to break the news that the next prescription would be for bifocals, he explained that her eyes had become "more mature." My doctor, however, was more blunt. I changed doctors.

2. It may be desirable to explain the process of assigning courses in the "old" days. After agreeing to my first contract as a law professor, I informed the dean that I would teach antitrust law, trade regulation, and two seminars in the antitrust field, which reflected my graduate work. The dean kindly informed me that I would teach contracts and commercial law. There is much to be said for this process. Without it, some who made significant contributions to certain subjects may not have done so; Prosser, for example, who had not chosen to teach torts.

3. Law students who manifested a sound understanding of the Code would often be sought after by law firms. Even in the late 1960's and early 1970's, several of my students reported that they were not only hired, but were immediately identified as "the U.C.C. expert" in the firm. Older practitioners had mastered the intricacies of the Uniform Sales Act, where the apotheosis was "title," or the elusive and particularly non-uniform antecedents to Article 9 which emphasized conditional sales, chattel mortgages, factor's liens, and trust receipts. The thought of surrendering their vested interests to master a Code which eliminated "title" as an analytical construct and eschewed diverse forms of security to emphasize a unitary security device was anything but inviting. Notwithstanding the intricacies of this new Code, many practitioners assumed that it merely tinkered with certain provisions of the Uniform Sales Act and the other statutes it replaced—a view that, in the vernacular, caused Karl Llewellyn to go "ballistic." See *infra* note 29.

oriented Article 3 dealing with negotiable instruments (replacing "bills and notes") and its then new complement, Article 4, which provided some uniformity in the collection and payment of instruments. Others decided to focus on Article 9, which promised uniformity and stability in the highly confused and awkward law of secured transactions, with its sometimes mysterious relation to bankruptcy law. The high value of certainty in our law becomes exponential in the world of negotiable instruments, bank collections, and secured transactions. It was more than possible to pursue these efforts with little or no concern over the jurisprudence of the guru of the Code, Karl Llewellyn, who was obsessed with the idea of infusing reality into contract and sales law.

Those who decided to devote most of their creative moments to Article 2 necessarily were involved in the great adventure of exploring Llewellynesque leeways with the pervasive but pliable principle of good faith,⁴ the elusive standard of conscionability,⁵ and the central and frustrating quest to discover the factual bargain of the parties⁶—their "true understanding."⁷ If these standards seemed vague and indefinite, Llewellyn presented the even more general standard of *decency*. He aimed to create a new sales law that would fully recognize "decent" commercial practice.⁸ If a merchant operated within the parameters of "de-

4. Section 1-201(19) states the general definition of good faith as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19) (1990). Section 2-103(1)(b) adds "the observance of reasonable commercial standards of fair dealing in the trade" for "merchants," defined in § 2-104. *Id.* § 2-103(1)(b).

5. *Id.* § 2-302.

6. Section 1-201(3) defines *agreement*:

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (§§ 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (§ 1-103). (Compare "Contract.")

Id. § 1-203(3).

Section 1-201(11) defines *contract*: " 'Contract' means the total legal obligation which results from the parties' agreement as affected by this Act and other applicable rules of law. (Compare 'Agreement.')" *Id.* § 1-201(11).

7. *Id.* § 2-202 cmt. 2.

8. Llewellyn suggested that the pre-Code law worked only by being ignored by the *decent* business man. *See infra* note 29. With respect to unread fine print

cency," the merchant could do no wrong and the legal system should permit the merchant's actions.⁹

After concentrating on selected sections of the Code that troubled courts and scholars, I suggested that Article 2 was like a prism, with each section operating as a facet of the prism.¹⁰ I further asserted that it was not possible to understand and therefore operate the Article 2 machine effectively without understanding its prismatic nature. These premises led to the necessary conclusion that judicial and scholarly mistakes about Article 2 were caused by deficiencies in understanding the nature or "underlying philosophy" of Article 2 that I had described earlier as the identification of the actual or presumed assent of the parties. While providing a macro exploration of the Article 2 landscape, this summary effort¹¹ occasionally paused for micro examinations of isolated sections. These sections demonstrated what I believed to be clear and convincing evidence of the prismatic nature of Article 2, and its eternal search for the factual bargain of the parties.

Throughout these explorations, like others, I devoted considerable time and effort to the writings of Karl Llewellyn, the "fa-

(boilerplate) clauses, he argued that one should be bound "to any not unreasonable or indecent terms" on the seller's form. *See infra* note 9.

9. Karl Llewellyn suggested that "dickered terms" were terms to which the parties have consciously adverted:

The answer, I suggest, is this: Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960); *see also* U.C.C. § 2-313 cmt. 1 (1990).

10. John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 2 (1981).

11. I suggested this concept in a paper that I prepared as the 1981 Foulston-Siefkin Lecturer at Washburn University School of Law. Unfortunately, illness precluded my trip to Washburn though I sent the paper, that was published in the *Washburn Law Review*. Murray, *supra* note 10.

ther" of the Code and the principal draftsman of Article 2. The dearth of anything like genuine legislative history compelled an examination of Llewellyn's apparent intention.¹² More than that, however, I developed a fascination with the often radical views, verbal incisions, and angular writing style that this "Corbinized" American legal realist brought to monistic contract law, coupled with his obsession for the law merchant which called for a radically new paradigm in commercial transactions.

Although the judicial explorations of Article 2 rarely mentioned the views of Llewellyn directly, courts felt compelled to rely heavily upon the writings of the law professors who paid great attention, if not homage, to his myriad statements. The scholars rarely paused to inquire whether the views of Llewellyn were relevant. Even assuming we could discover with great precision what Karl Llewellyn intended to suggest in one or more sections of Article 2, should we care, or, at least, should we care very much?

The question becomes particularly important as we confront a revision of Article 2. Should we attempt a radically new design of Llewellyn's product, or should we retain the underlying philosophy that was so important to him and pursue only isolated modifications to ascertain the usual values of certainty, stability, and predictability in this quintessence of commercial law?

The Article 2 Study Project,¹³ which was a desirable forerunner to any revision, suggests no intentional change in the jurisprudence of Article 2.¹⁴ I cling to the view that the essential

12. The New York Law Revision Commission Hearings and Reports were unique sources of legislative history. Even they, however, featured Karl Llewellyn, who testified in his usual forthright (some would say "blunt") manner. See 1 STATE OF N.Y. LAW REVISION COMM'N REPORT: HEARINGS ON THE UNIFORM COMMERCIAL CODE 158-82 (reprint ed. 1980) (1954) [hereinafter N.Y. COMM'N HEARINGS].

13. The Permanent Editorial Board of the Uniform Commercial Code and the American Law Institute in conjunction with the National Conference of Commissioners on Uniform State Laws approved a study to consider whether Article 2 should be revised and, if so, to report on what revisions might be required. A nine member Study Group was appointed in March 1988, to identify "major problems of practical importance" in the interpretation and application of Article 2. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2, PRELIMINARY REPORT (1990) [hereinafter PRELIMINARY REPORT].

14. An executive summary of the *Preliminary Report* as well as revisions thereto

purpose of Article 2 is and should continue to be the fulfillment of those expectations created by the factual bargain of the parties, as best we can recreate such bargain from the language and circumstances surrounding it. I have focused on the Article 1 definitions of "agreement" and "contract" as critical foundational concepts necessary to discover the purposes of Article 2. Agreement is "the bargain of the parties in fact" as manifested by their language or other relevant circumstances including trade usage, course of dealing, and course of performance.¹⁵ "Contract," on the other hand, has been defined in terms of effect, i.e., "the total legal obligation which results from the parties' agreement."¹⁶ The "agreement" is so important that, within very broad limitations, it can even vary the effect of Code provisions. This is a principle¹⁷ of this "semi-permanent piece of legislation."¹⁸ Thus, we are supposed to attempt to discover the factual bargain (agreement) as best we can and recognize the factual bargain as the contract of the parties, within the parameters of legality and in the absence of fraud, mistake, bad faith, and unconscionability. The Code emphasizes that we should not be making contracts for the parties—a view that was espoused at common law but often smothered by technical requirements.

To attain the most precise identification of that factual bargain, the current Article 2 rejection of technical requirements¹⁹

are found in *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (1991).

15. U.C.C. § 1-201(3) (1990).

16. *Id.* § 1-201(11).

17. *See id.* § 1-102(3) & cmt. 2.

18. *Id.* § 1-102 cmt. 1.

19. Among the examples of the anti-technical nature of Article 2, the comment to § 2-101 focuses upon the contract (agreement) between the parties and rejects the technical application of the concept of "title": "The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character." *Id.* § 2-101 cmt.; *see also id.* § 2-204(3) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); *id.* § 2-206 cmt. 1 ("Formal technical rules as to acceptance . . . are rejected . . ."); *id.* § 2-209(1) ("An agreement modifying a contract within this Article needs no consideration to be binding."); *id.* § 2-209 cmt. 1 ("This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard

not only should continue but should be enhanced to remove the remaining impediments. Llewellyn removed most of them and would have removed more had he not been confronted with the diabolical necessity of pragmatic compromise. The identified factual bargain should be constrained only by the normative standards of honesty in fact, commercial reasonableness (i.e., "good faith"),²⁰ and conscionability that pervade the current Article 2. Violations of any of these standards evidence an "indecent" bargain that should not be enforced as a contract.

Those who have taught and written about Article 2 for many years have little doubt as to what is wrong with it. If we also have embraced sporadic opportunities to invade the real world of commerce and dealt not only with the lawyers but with the people who make contracts for a living, we have had the opportunity to refine our academic insights in the illumination of real people making millions of real deals every day. My perception of what is wrong with Article 2 and how it should be changed are the product of both dimensions. My views are not necessarily those of any other person or group, including but not limited to the members of the Article 2 Study Project, notwithstanding my deep respect and admiration for the insights produced by the Project.²¹ What follows, therefore, is my individual perception of various sections of Article 2 and how they should be revised. I deal only with those sections or other views of certain sections which I find quite troublesome. Some clarifications, minor language changes, or additions in other sections or their comments may also be desirable.

II. THE AGREEMENT PROCESS

The precise identification of the factual bargain of the parties is, of course, problematic. The parties to a purported contract re-

to the technicalities which at present hamper such adjustments.").

20. The "merchant" definition of "good faith" in § 2-103(1)(b) combines honesty in fact with commercial reasonableness whereas the Article 1 definition in § 1-201(19), which applies to all parties, requires only honesty—the good heart but "empty head" standard.

21. With the exception of the views in this Article that are expressly different from the views suggested in the *Preliminary Report* of the Article 2 Study Project, *supra* note 13, I am in agreement with the views of members of the Study Group.

fuse to adhere strictly to any formalities. After moving from status to contract, the history of contract in society moved even more clearly and continuously from formalisms to our present situation, where a knowing wink or less may manifest the completion of a factual bargain that should be viewed as an agreement. Lawyers and judges often are forced to distill massive amounts of data in the search for an offer and acceptance that will form a contract if they are accompanied by a proper validation device such as consideration, assuming the parties have the capacity to form a contract.

Decent merchants, however, do not speak of offer and acceptance. Their writings are not called offers or acceptances. They are called purchase orders and acknowledgment forms, delivery orders, invoices, requests for prices, quotations, letters of intent, and many other names. The parties make many oral agreements that they usually confirm with subsequent writings. The oral communication between the parties rarely is formalized in terms of offers, counteroffers, acceptances or the like. They speak of "deals" or "closed deals," "rush orders" and "prompt shipment," as well as myriad other terms that only those in the trade would understand. Their actual conversations almost never mention warranties or remedies, particularly consequential damages, or arbitration in the event of disputes. Decent merchants are anything but astute in clearly manifesting their intention to be contractually bound before or only after a formal document is to be executed.²²

For many years it has been an open secret that the innumerable prefabricated forms used to evidence a contract go unread and would not have been understood by decent and reasonable parties, including merchants, if they had been read.²³ No one

22. The largest civil judgment in American legal history was based on the jury determination of this ambiguous intention where an "agreement in principle" was found to be an intended binding agreement. Pennzoil was awarded more than \$11 billion. The appellate court affirmed but remitted \$2 billion of the \$3 billion in punitive damages awarded by the jury. *See Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987).

23. An entire body of literature on the "duty to read" clearly manifests the tension between effectuating good faith, decent and conscionable deals, and the value of stability in contracts, particularly if one or more of the unread clauses in the printed form, signed by the decent party, is a material, risk-shifting device that such a

reads the boilerplate on these forms before or after their use unless trouble occurs. When trouble occurs, we have one of those "hospital cases" to which Llewellyn referred, causing the parties and their lawyers to scurry to read the fine print for the first time in an attempt to discover a legal analysis that has, at best, a coincidental relationship to the factual bargain of the parties. The printed, standardized forms that evidence most of the contracts made daily in America are created by lawyers who, in the best summation of their effort, "tend to draft to the edge of the possible" in developing ironclad protection for their respective clients.²⁴ The situation is exacerbated where parties present their respective "Monitors" and "Merrimacs" in a sea filled with the "battle of the forms."

Our common law of contract operated on the principle that we could not only identify an offer and who made it, but, in most cases, we could determine the particular manner of acceptance demanded by the offeror (i.e., whether the acceptance was required to be by promise or by performance). Though we recognized the possibility of a doubtful offer, where the evidence would be insufficient to determine the required manner of acceptance, thereby necessitating special rules such as the presumption of a promissory acceptance, we used to be convinced that these "doubtful" offers were rare. In the real world, however, such an offer is not rare. The typical offer is the "doubtful" offer (i.e., the "indifferent" offer with respect to the manner of acceptance). In the real world, neither the typical offer nor the ordinary circumstances surrounding the offer require a particular manner of acceptance.²⁵

party would not have reasonably expected to find in such a form. See, e.g., John E. Murray, Jr., *Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 762-72 (1982).

24. "Business lawyers tend to draft to the edge of the possible." 1 N.Y. COMM'N HEARINGS, *supra* note 12, at 177 (statement of Karl N. Llewellyn); see also John E. Murray, Jr., *The Chaos of the Battle of the Forms: Solutions*, 39 VAND. L. REV. 1307, 1350-51 (1986) [hereinafter Murray, *Chaos*]; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1205 (1983).

25. This and related problems are discussed in John E. Murray, Jr., *Contracts: A New Design for the Agreement Process*, 53 CORNELL L. REV. 785 (1968) [hereinafter Murray, *A New Design*].

A more sophisticated fallacy of classical and allegedly neo-classical contract law was the notion that contracts are static (i.e., one-shot, arms-length transactions). In the real world, however, the one-shot deal is rare and the relational contract that changes over time through the performance of the parties prevails.²⁶

Traditional monistic contract law often insisted on the narrowest of interpretations of the language of the agreement, even espousing a "plain meaning" of such language and the application of the parol evidence rule, which often confused the purposes of parol evidence with the purposes of interpretation or construction. Successful distinctions between parol evidence and reformation were particularly rare.²⁷

A related fixation of monistic contract law was the requirement that the parties must include all of the material terms in their agreement if it were to be sanctioned as a contract. This approach tended to disfavor heavily used commercial agreements, such as requirements and output contracts, that merchants favored because they allowed for assured sources of supply and fixed prices in an otherwise uncertain economic future.

The "contract law" of Article 2 confronts these and other artifacts of classical contract law by creating a radically new design for the agreement process.²⁸ Early notions that Article 2 merely

26. Professor Ian Macneil has spent a large part of his career providing insights into the "relational" contract. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 71-117 (1980).

27. In *Sadowski v. General Discount Corp.*, 294 N.W. 703 (Mich. 1940), the Supreme Court of Michigan found certain language in a contract to be unambiguous and, on that footing, applied the parol evidence rule, *id.* at 704, revealing confusion between interpretation and the parol evidence rule. The plaintiff then sought reformation in a federal court and prevailed on the basis of a mistaken writing. *General Discount Corp. v. Sadowski*, 183 F.2d 542, 547 (6th Cir. 1950).

28. Perhaps the most fundamental change in the radically new design of Article 2 was the movement from a property law to a contract law orientation. Llewellyn was particularly annoyed with the property concept of "title" as an analytical device that created artificial and technical barriers to the effectuation of the factual bargain of the parties. His view is summed up nicely in a comment to § 2-101:

The arrangement of the present Article is in terms of contract for sale and the various steps in its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making

tinkered with classical contract law infuriated Llewellyn, who emphasized the radical nature of his new design. He was emphatic in his insistence that the world of sales law had to change radically, to conform to *decent* commercial practice and to make sense to those engaged in that practice.²⁹ The Llewellyn product *is* a radically new design and, for the most part, it has been an overwhelming success. Decades of experience with Article 2 have disclosed the failures and they can be remedied with relatively little effort, thereby preserving the considerable success of the essential design. It is, however, critically important that those who tinker with parts of Article 2 requiring repair be totally familiar with and committed to the essential design. As they repair a particular facet of the Article 2 prism, they must not harm materially the prism itself.

A. *The Formation Process—Sections 2-204 and 2-206*

One of the more radical changes in the contract law of Article 2 often has been overlooked. Section 2-204(1) announces the principle of this critically important change by allowing a contract for the sale of goods to be formed "in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."³⁰ This fundamental concept then is elaborated generally in section 2-206 and more specifically in section 2-207. The principle as set forth in section

practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

U.C.C. § 2-101 cmt. (1990).

29. Llewellyn was quite disturbed by suggestions that the changes he contemplated in sales law would be designed to change the existing law only in a "few particulars." He was emphatic in his prediction that Article 2 would "remake" sales law *vigorously and over the whole field*, in order that the law may be made to conform to commercial practice, and may be read and make sense The changes made are, in fact, deep, wide, vital. And they are utterly needed in order to produce intelligent and workable commercial law The present law "works" by being *ignored* by the *decent* business man.

1 N.Y. COMM'N HEARINGS, *supra* note 12, at 113.

30. U.C.C. § 2-204(1) (1990).

2-204(1) requires no modification. The elaborations, however, are marred and should be repaired.

Section 2-206 begins by preserving the classical rule that the offeror is the master of the offer,³¹ before stating the radically new design allowing the typical offer to be accepted in any reasonable manner or medium.³² The "doubtful" or "indifferent" offer would no longer be viewed as a rare offer requiring special rules. This recognition that real offerors typically do not care how their offers are accepted brought an end to much needless judicial discussion.³³ The offeror is still permitted to control the manner and medium of acceptance through unambiguous language in the offer, and unambiguous "circumstances" would also dictate a particular kind of acceptance.³⁴ But reality prevailed: offerors normally do not seek to control the manner or medium of acceptance, and "unambiguous circumstances" only rarely manifest a required kind of acceptance. Llewellyn conformed the basic law of contract formation to real commercial practice so that the law "made sense."³⁵

The first portion of section 2-206(1)(b) is a species of (1)(a), which provides elaboration of the typical order or offer to buy goods for prompt or current shipment, allowing acceptance by either a prompt promise to ship, or by prompt or current ship-

31. *Id.* § 2-206. This section begins with the negative proviso that "[u]nless otherwise unambiguously indicated by the language or the circumstances . . .," the offer may be accepted in any reasonable manner or medium. *Id.* Thus, an offer that *does* unambiguously require a particular manner or medium of acceptance necessarily controls the kind of acceptance necessary to form a contract.

32. "Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." *Id.* § 2-206(1)(a).

33. For example, in the well-known case of *Davis v. Jacoby*, 34 P.2d 1026 (Cal. 1934), the Supreme Court of California went to considerable pains to explain why a promissory acceptance was effective in response to an indifferent offer.

34. An offer to the public, for example, would not contemplate a promissory acceptance. Thus, if a particular advertisement were an unusual offer for the sale of goods to the first person to appear at a given store, the offeree would not be identified though he or she would be identifiable. The circumstances surrounding such an offer clearly indicate that only performance, not promissory acceptance, would be in order. See *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689 (Minn. 1957).

35. See *supra* note 29.

ment.³⁶ This elaboration is desirable, as is the remainder of section 2-206(1)(b), which treats the shipment of even nonconforming goods as an acceptance and simultaneous breach absent a seasonable notification that the nonconforming goods have been shipped as an accommodation to the buyer.³⁷

The idea that the shipment of nonconforming goods, absent notice of accommodation, operates as an acceptance, is rarely emphasized in discussions of section 2-206. If a seller ships goods with the manifested intention of accepting the offer, the shipment will constitute an acceptance even though it proves to be nonconforming.³⁸ Thus, even though a nonconforming shipment fails to match the terms of the offer, the sacred "matching acceptance" or "mirror image" rule of classical contract law gives way to the overriding manifestation of the parties' intention "to close the bargain."³⁹ The factual bargain of the parties, that is, the real agreement or true understanding of the parties as best we can tell from their conduct, prevails over technical rules of classical contract law. The resulting contract will be in accord with the offer which, by shipment of even nonconforming goods, the seller will be said to have accepted. Since the shipment is nonconforming, the contract is not only formed but breached by such shipment.⁴⁰ If time for performance remains under the contract, the seller will have the right to cure the nonconformity.⁴¹

The very limited case law in this area suggests no difficulty with the application of the foregoing principles. Therefore, only the comments to this portion of section 2-206 need be changed and elaborated to insure this desirable analysis. In particular, comment 4 suggests that "a notification of shipment" referring to the offer is essential to discover an acceptance of the offer by

36. U.C.C. § 2-206(1)(b) (1990).

37. *See id.* § 2-206 cmt. 4.

38. *Id.*; *id.* § 2-206(1)(b).

39. *Id.* § 2-206 cmt. 4.

40. *Id.*

41. *Id.* § 2-508(1). Under § 2-508(2), circumstances may allow a longer time for cure if the seller had reasonable grounds to believe the nonconforming tender would be acceptable with or without a money allowance and seasonably notified the buyer of his intention to cure. *Id.* § 2-508(2).

such shipment.⁴² No particular form of notification should be essential. Thus, an invoice containing a purchase order number would be a sufficient reference. Moreover, absent any notice, the circumstances may be clear that the shipment was intended to close the bargain and therefore should operate as an acceptance even though the goods are nonconforming.⁴³

The single flaw in section 2-206 requiring statutory change occurs in subsection (2), which requires notice of performance within a reasonable time where the offeree has chosen to accept by *beginning* performance.⁴⁴ While the question of notice of a performance acceptance has been bothering courts for well over a century,⁴⁵ it should have been clear by the time Article 2 was crafted that notice is not necessary in a performance acceptance unless the offeror would not become aware of the performance promptly.⁴⁶ Under no circumstances should notice be considered part of the acceptance. Rather, it is an implied condition where the offeror would not be in a position to become aware of acceptance within a reasonable time. Section 2-206(2), however, would have us believe that where the beginning of performance is a reasonable mode of acceptance, "an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance."⁴⁷ This formulation *suggests* that notice is part of the acceptance where the offeree accepts by performance.⁴⁸ Comment 3 to this section removes the last

42. See *id.* § 2-206 cmt. 4.

43. Like the Study Project, I would also add a sentence in the comments approving the "mailbox" rule. See PRELIMINARY REPORT, *supra* note 13, at 65. While § 1-103 can be viewed as the residual section for the retention of such a common law rule, it would not be harmful to remove the last scintilla of doubt.

44. U.C.C. § 2-206(2) (1990).

45. See, e.g., *City Nat'l Bank v. Phelps*, 86 N.Y. 484 (1881).

46. See, e.g., *Bishop v. Eaton*, 37 N.E. 665, 667 (Mass. 1894).

47. U.C.C. § 2-206(2) (1990).

48. Llewellyn and friends may have been unduly influenced by cases such as *Kresge Department Stores v. Young*, 37 A.2d 448, 449 (D.C. 1944) ("[N]otice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty . . ."), and *German Savings Bank v. Drake Roofing Co.*, 83 N.W. 960, 961 (Iowa 1900) ("[T]he so-called guaranty is a mere offer or proposition, and is not complete until the party making the offer is notified of its acceptance, when the minds of the parties meet, and the contract is completed."). It is, however, clear that Llewellyn did not view the notice requirement as barring revocation of the offer once performance by the offeree had begun. See *Report and Second*

scintilla of doubt by stating, "it is essential that notice follow in due course to constitute acceptance."⁴⁹

The notice requirement in section 2-206(2) applies only where "the *beginning* of a requested performance is a reasonable mode of acceptance."⁵⁰ But where a buyer of goods observes the goods being installed on its premises or the beginning of manufacture of the goods in the seller's plant, a failure to notify formally should not bar the enforcement of the contract.⁵¹ "Beginning performance" is a relatively rare mode of acceptance. The typical "beginning performance" acceptance occurs where the seller promptly ships the goods. Unfortunately, only a comment tells us that section 2-206(2) was not intended to apply to such a "shipment" acceptance.⁵² From the comment we learn that "shipment," as used in section 2-206(1)(b), is used in the same fashion as "shipment" in section 2-504, dealing with the seller's duties in the typical F.O.B. "shipment" contract.⁵³ If goods are shipped by the offeree and received by the purchaser within the time a reasonable notice would have arrived, a formal notice would not be necessary.⁵⁴ If the seller's own truck were used to

Draft: The Revised Uniform Sales Act, in 1 UNIFORM COMMERCIAL CODE DRAFTS 269, 357 (Elizabeth Slusser Kelly compiler, 1984) [hereinafter UCC DRAFTS] (including a comment to then alternative section 3-F, stating that, "[t]he giving of such notice, however, is a matter which has no need at all to coincide with the moment at which revocation is barred").

49. U.C.C. § 2-206 cmt. 3 (1990).

50. *Id.* § 2-206(2) (emphasis added).

51. *See id.* § 1-102 cmt. 1. This comment indicates that "the proper construction of the [Code] requires that its interpretation and application be limited to its reason." *Id.* This is simply a reminder of the old adage in our law that, where the reason for the rule stops, so should the rule.

52. *Id.* § 2-206 cmt. 2.

53. *Id.*; *see id.* § 2-504 cmt. 1.

54. The *Restatement (Second) of Contracts* indicates that in the normal situation of "shipment" of goods as an acceptance of an offer, notice is not necessary because the shipment acceptance "will come to the offeror's attention in normal course." *RESTATEMENT (SECOND) OF CONTRACTS* § 62 cmt. b (1979). Notwithstanding its pervasive commitment to follow the Code, the *Restatement* accepts the preferred analysis that notice is essential as a condition after a performance acceptance *only* where the former offeror will not learn of the performance acceptance promptly and with reasonable certainty. *Id.* § 54(2).

deliver the goods, however, "loading on [that] truck might be a beginning of performance under subsection (2)."⁵⁵

Section 2-504 contains its own notice requirement as one of three duties of the seller under such a contract. Such a seller must "promptly notify the buyer of the shipment."⁵⁶ That requirement, however, is severely mitigated by the last paragraph of section 2-504, which indicates that a failure to notify would be a ground for rejection of the goods "only if material delay or loss ensues."⁵⁷ Such material loss or delay also must have been *caused* by the failure to notify.⁵⁸ Where acceptance is by "shipment," the contract is formed by such shipment.⁵⁹ Thus, the notice requirement in a "shipment" contract is clearly not part of the acceptance. It is a conditioning event, and if it does not occur, the buyer has the right to reject only if the buyer has suffered material loss or delay caused by the failure to notify.

Clarifying the requirement of notice and the effect of a failure to notify corrects the flaw in section 2-206. Notice should be expressed as a condition to the duty of the buyer created when performance has occurred or begun. Where performance has *occurred* through an acceptance by shipment, a contract is formed by such shipment. Notice is a condition to the duty of the buyer only where the buyer would not become aware of such shipment promptly. Section 2-206 should expressly refer to the last paragraph of section 2-504 to indicate that the failure to notify should discharge the buyer's duty only where such failure has caused material loss or delay.

Where acceptance occurs through the *beginning* of performance, such beginning of performance should be seen as an acceptance of the offer forming a contract.⁶⁰ Indeed, section 2-

55. U.C.C. § 2-206 cmt. 2 (1990).

56. *Id.* § 2-504(c). Section 2-504 requires an F.O.B. shipment seller to (a) put the goods in the possession of a reasonable carrier and make a reasonable contract for their transportation, (b) obtain and promptly deliver or tender any necessary documents to enable the buyer to take possession of the goods, e.g., a bill of lading, and (c) promptly notify the buyer of the shipment. *Id.* § 2-504.

57. *Id.* § 2-504.

58. See *Monte Carlo Shirt, Inc. v. Daewoo Int'l (Am.) Corp.*, 707 F.2d 1054, 1058-59 (9th Cir. 1983).

59. See U.C.C. § 2-206(1)(b) (1990).

60. Under the common law, the beginning of performance in response to an offer

206(2) contemplates the beginning of performance as "a reasonable mode of acceptance."⁶¹ Notice should not preclude the enforcement of the contract where the offeror was or should have been aware that performance has begun. Again, notice is a condition that should be implied only where the offeror would be unaware of the start of performance. Even where the offeror has no basis for assuming performance has begun, it would be desirable to limit the failure of notice to situations where the offeror has suffered material loss or delay (i.e., the section 2-504 notice

that could only be accepted by performance precluded the revocation of the offer. It was often said that the "unilateral" contract would be formed only by the completion of such performance, but justice should preclude the revocation of the offer once performance had begun to enable the offeree an opportunity to complete performance. Thus, original § 45 of the *Restatement of Contracts* achieved this result by discovering a contract upon part performance, conditioning the offeror's duty upon receipt of complete performance. RESTATEMENT OF CONTRACTS § 45 (1932). Comment b to that section set forth the more desirable fiction that the original offer contained an implied promise that, if performance were begun, the offeror would not revoke the offer for a reasonable time. *Id.* § 45 cmt. b. Under the *Restatement (Second) of Contracts*, the new § 45 finds a similar implied promise that is accepted by part performance, thereby forming an option contract to make the main offer irrevocable. RESTATEMENT (SECOND) OF CONTRACTS § 45 (1979).

Comment 3 to § 2-206 states: "Nothing in this section . . . bars the possibility that under the common law performance begun may have the intermediate effect of temporarily barring revocation of the offer, or at the offeror's option, final effect in constituting acceptance." U.C.C. § 2-206 cmt. 3 (1990). This is a curious and confusing statement. If the offer is one of the rare offers that can only be accepted by performance, the beginning of performance is not an acceptance, even though it does operate to bar revocation. If the offer is the typical offer allowing acceptance by either promise or performance, the beginning of performance must operate as the acceptance, i.e., the failure to complete performance begun in response to the typical "indifferent" offer necessarily would constitute a breach. Thus, under the old and now discarded usage of "unilateral" versus "bilateral" contracts, a unilateral contract is formed only upon complete performance. At the time of formation, one right and one correlative duty exist. Such a "unilateral" contract, however, results only where the offer can only be accepted by performance. Again, the beginning of performance in such a contract does not form the contract, though it does bar revocation of the offer. Where an offer can be accepted either by promising or performing, the *beginning* of performance is an implied promise forming what used to be called a "bilateral" contract with two rights and two correlative duties. In this situation, therefore, there is no need to consider ways in which revocation of the offer may be barred since the offer already has been accepted. For further elaboration and discussion of § 2-206 and original as well as *Restatement (Second) of Contracts* provisions, see JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 45C (3d ed. 1990) [hereinafter MURRAY ON CONTRACTS].

61. U.C.C. § 2-206(2) (1990).

requirement in "shipment" contracts).⁶² This clarification not only would provide symmetry, it would also emphasize the underlying philosophy of Article 2. Requiring notice where the failure to notify would have made no difference is a technical requirement that disturbs the factual bargain of the parties.

In summary, the awkward, unclear, and analytically unsound notice requirement, with its suggestion that the offer may be viewed as having lapsed even after an acceptance of that offer, mandates revision of section 2-206. The remedial attempt to reconcile the language of section 2-206 with sound analyses in the later *Restatement (Second) of Contracts* provides ample support for such a revision.⁶³ The fact that section 2-206 does not appear to trouble courts should not be the deciding factor in making this change.⁶⁴

62. Thus, a buyer's failure to notify a seller of a used tractor that was to be retrieved from a field may cause material loss or delay to the seller, or a second buyer, if the seller sold the item to the second buyer after not receiving notice within a reasonable time that the first buyer had retrieved the tractor. See *Petersen v. Thompson*, 506 P.2d 697 (Ore. 1973).

63. Because the American Law Institute was half responsible for the U.C.C. and totally responsible for the *Restatement*, and because the U.C.C. is the enacted law with respect to contracts for the sale of goods, it is anything but remarkable that the *Restatement (Second) of Contracts* makes every effort to "follow the Code." Thus, with respect to the notice requirement, the primary analysis of the second *Restatement* calls notice a condition by indicating that the failure of notice where the offeree has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty results in the discharge of the contractual duty of the former offeror. RESTATEMENT (SECOND) OF CONTRACTS § 54(2) (1979). In what appears to be a transparent effort to reconcile this analysis with U.C.C. § 2-206(2), illustration 1 to § 54 states that, in such a situation, the offeror may treat the offer as having lapsed unless the former offeree sends notice within a reasonable time. RESTATEMENT (SECOND) OF CONTRACTS § 54(2) cmt. b, illus. 1 (1979); see Murray, *A New Design*, *supra* note 25, at 796-800; see also MURRAY ON CONTRACTS, *supra* note 60, § 46C.

64. The Article 2 Study Project recommends no change in § 2-206 because the case law evidences no great difficulty at this time. PRELIMINARY REPORT, *supra* note 13, at 64. Like physicians, however, lawyers should remove a potentially cancerous growth even though the patient is suffering no present distress.

B. The Formation Process—Section 2-207, the “Battle of the Forms”

The enormous volume of ink allocated to attempts to explain the “battle of the forms” may be per se evidence of the need for a revision of section 2-207.⁶⁵ When I review my own writings concerning the “battle,” I am sure that I began with the hope that they might contribute to a refined and sophisticated judicial understanding of what Llewellyn was trying to accomplish. Together with the product of others, my own work someday might have supported that magnificent landmark opinion that would illuminate the path to be followed in later judicial applications of section 2-207. I notice subsequent scholarly attempts that continue in that vein, if the repeated citation of my constructive criticism is any gauge of such efforts.⁶⁶

I finally concluded that my efforts had been quixotic. The courts just didn't get it and were never going to get it.⁶⁷ Some of the blame had to rest with Llewellyn and those who subsequently tinkered with that “murky bit of prose”⁶⁸ in section 2-207. A lot of the blame, however, had to be laid at the feet of courts committed to vested notions of classical contract law and with virtually no understanding of the underlying philosophy of the radically new Article 2.

Having arrived at the conclusion that Llewellyn's preferred solution through the common law tradition was not workable,⁶⁹

65. As one of the principal contributors to this deluge of ink, I feel primarily liable.

66. See, e.g., Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893 (1991).

67. See Murray, *Chaos*, *supra* note 24.

68. *Southwest Eng'g Co. v. Martin Tractor Co.*, 473 P.2d 18, 25 (Kan. 1970); see also *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962) (“The statute is not too happily drafted.”); *Ebasco Servs., Inc. v. Pennsylvania Power & Light Co.*, 460 F. Supp. 163, 205 (E.D. Pa. 1978) (calling § 2-207 “[a]n enigmatic section of the Code”).

69. Llewellyn was particularly conscious of the problems of dealing with commercial practices through statutes. “[A]n approach by statute seems to me dubious, uncertain, and likely to be both awkward in manner and deficient or spotty in scope.” KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 370 (1960) [hereinafter LLEWELLYN, *COMMON LAW*]. He wanted courts to elaborate the framework he designed in the common law tradition with particular emphasis upon the *purpose* of

I announced my surrender in a lengthy analysis that described the chaos of the "battle of the forms."⁷⁰ That analysis stopped short of presenting a suggested revision of the language of section 2-207. Not thinking it my place to suggest the precise language, I was content to set forth the pathologies of section 2-207 as then construed by the courts. My students then challenged me to create my own suggested revision. With considerable reluctance, express recognition of the immense difficulty of creating an effective revision, and emphatic disclaimers as to its finality and soundness, I presented a suggested revision as nothing more than a "working draft" or a "beginning" of the process of revising section 2-207.⁷¹ I subsequently learned another lesson in the continuing education of life: law professors ignore dis-

the statute. Article 2 is singular in its emphasis upon purposive interpretation and construction. Again, this emphasis is not remarkable in light of Llewellyn's jurisprudential proclivities. "A piece of legislation, like any other rule of law is, of course, meaningless without reason and purpose." KARL N. LLEWELLYN, *JURISPRUDENCE* 228 (1962). "[A] statute must at need be implemented to effect its purpose by going far beyond its text." Karl L. Llewellyn, *The Modern Approach to Counseling and Advocacy—Especially in Commercial Transactions*, 46 COLUM. L. REV. 167, 181 (1946). No other statute so expressly relies upon judicial elaboration, analogy, and fidelity to its underlying purposes than Article 2 of the Uniform Commercial Code. Article 2 may be viewed as a set of common law guidelines providing a context through which courts may mold and remold what a comment to Article 1 calls a "semi-permanent" piece of legislation into a body of merchant law which reacts effectively to the needs of commercial society. Article 2 can be understood only as a prism, with each section representing one facet of that prism. See Murray, *supra* note 10, at 2; see also Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 631-33 (1975) (arguing that the Code is more a method of analysis than a law); Julia B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 798 (1978) (stating that words are not like crystals, which remain unchanged).

70. See Murray, *Chaos*, *supra* note 24.

71. The introduction to my "newly designed § 2-207" states:

Discussing the design of the new § 2-207 is considerably easier than drafting it. It may be premature to suggest such a structural change and it is probably presumptuous to suggest a draft with changes of this magnitude. The importance of this change is sufficient reason for suggesting the following working draft as the beginning of the new process. I will be more than pleased to accept any suggested change that permits a more effective use of the § 2-207 concept as part of the underlying philosophy of Article 2. With that less than perfect disclaimer, the following draft is submitted.

John E. Murray, Jr., *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337, 355 (1986).

claimers printed in law journals to the same degree that merchants ignore warranty disclaimers in standardized printed forms.⁷² What follows, therefore, is not a defense of my suggested "working draft." Rather, it is an attempt to summarize my thinking about the purposes of section 2-207 and to suggest ways and means, other than precise statutory language, to effectuate those purposes in keeping with the underlying philosophy of the most precise identification of the factual bargain of the parties possible.

The purpose of section 2-207 is a paradigmatic manifestation of the purpose of Article 2: to discover the genuine factual bargain of the parties. Where parties used prefabricated forms to evidence their deal, classical contract law insisted on identifying the offer and then examining the purported acceptance to discover whether a contract had been formed. A purported acceptance containing different or additional terms was considered a conditional or qualified acceptance, which could not be an acceptance. Because it was not an acceptance and we had to call it something, we called it a counteroffer. Neither the offeror nor offeree, of course, were particularly aware of this disparity between offer and acceptance. They concentrated exclusively on the "dickered" terms of the deal, i.e., those terms to which they consciously adverted, such as the description of the goods, the quantity, the price and other terms which the decent merchant consciously would consider.⁷³ When these terms matched, the parties assumed they had a contract, but the technical barrier of the matching acceptance or "mirror image" rule insisted that no contract existed because the response to the offer contained boilerplate provisions (created by the seller's lawyer) disclaiming warranties, excluding consequential damages, or insisting on arbitration of any dispute between the parties. The response to the offer, therefore, had to be a counteroffer—not because the seller intended it to be a counteroffer, but because the seller's

72. See Daniel A. Levin & Ellen Blumberg Rubert, *Beyond U.C.C. Section 2-207: Should Professor Murray's Proposed Revision Be Adopted?*, 11 J.L. & COM. 175 (1992).

73. See *supra* note 9.

lawyer had "protected" the seller, causing the matching acceptance rule to mandate that legal conclusion.

Though no contract was formed, the seller shipped the goods. Assuming that a contract had been formed, the seller thought it had to ship. The buyer accepted the goods for the same reason. The parties thought they had a "closed deal"—their factual bargain was complete.⁷⁴ If the goods were conforming and nothing went awry, everybody was happy. Where something went wrong, however, the seller would claim for the first time that it had made a counteroffer because of the different terms in its response to the offer. Moreover, the seller would insist that the buyer had accepted these different terms by accepting the goods. That argument prevailed under the algebra of the matching acceptance rule.

Section 2-207 sought to remedy this and related problems by recognizing a definite expression of acceptance as an acceptance even though it contained undickered different or additional terms. Early on, it occurred to me that there was insufficient emphasis upon the nature of a *definite expression of acceptance* that contained different or additional terms. It was essential to understand that "acceptance" as one that would be regarded as an acceptance by a reasonable and decent offeror. The implication was clear that one reasonably could understand such a response to an offer as an acceptance because a reasonable and decent merchant-offeror would not read or understand the different or additional terms secreted in the boilerplate of the response.⁷⁵

Moreover, these additional or different terms could be, and often were, important terms—material terms—that attempted to divest the buyer of critical warranty and remedial protection or to deprive the buyer of its day in court by mandating arbitration.

74. "Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract." U.C.C. § 2-207 cmt. 2 (1990).

75. "Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction." U.C.C. § 2-207 cmt. 1 (1990).

The first major judicial attempt to apply section 2-207 was an incredulous reaction to this radical change.⁷⁶ The matching acceptance rule was so vested in the minds and hearts of those who had learned about the "matching acceptance" rule in the first month of their courses in contract law that they simply could not assimilate the incredible idea that a response to an offer containing a materially different term operated as an acceptance.⁷⁷ Subsequent courts finally managed to assimilate this iconoclastic change. While they recognized the change in the matching acceptance rule,⁷⁸ this awareness exhausted their understanding of section 2-207. The judicial "computers" simply had insufficient capacity to absorb the remaining essential analyses of section 2-207. Karl Llewellyn had not cast his pearl far enough.

As in other sections of Article 2, Llewellyn wanted to provide the necessary foundation or framework in which judicial elaboration of the modification of the matching acceptance rule would occur. Neither in section 2-207 nor in other sections did he attempt to provide a comprehensive guide. He recognized that "an approach by statute seems . . . dubious, uncertain, and likely to be both awkward in manner and deficient or spotty in scope"⁷⁹ and the underlying purpose of the entire Code was "to permit the continued expansion of commercial practices."⁸⁰ Even more important, however, was his faith in the common law tradition. He expected judges to be astute in their application and elaboration of this and other new directives in order to discover the factual bargain of the parties. Whatever may be said about the inability of the language of section 2-207 to effect the results Llewellyn intended, the fatal flaw was his gross overestimation of the ability of the collective judicial mind to achieve that goal.

76. See *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

77. *Roto-Lith* has been criticized frequently. See, e.g., *C. Itoh & Co. (Am.) v. Jordan Int'l Co.*, 552 F.2d 1228, 1235 n.5 (7th Cir. 1977); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1168 & n.5 (6th Cir. 1972); *Ebasco Servs. Inc. v. Pennsylvania Power & Light Co.*, 402 F. Supp. 421, 437-38 (E.D. Pa. 1975); *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571, 578 (Ind. Ct. App. 1978); *Steiner v. Mobil Oil Corp.*, 569 P.2d 751, 763 (Cal. 1977).

78. See *Dorton*, 453 F.2d at 1165-66.

79. LLEWELLYN, *COMMON LAW*, *supra* note 69, at 370.

80. U.C.C. § 1-102(2)(b) (1990).

The result is a judicial caricature of Llewellyn's design that is diametrically opposed to the underlying philosophy of Article 2.

Under current judicial constructions of section 2-207, where a definite expression of acceptance contains materially altering terms such as a disclaimer of warranty or exclusion of consequential damages,⁸¹ the acceptance remains effective. The additional terms, however, do not become part of the contract under section 2-207(2)(b) because they materially alter the terms of the offer. If the offeror took advantage of either section 2-207(2)(a), by expressly limiting the offer to the terms of the offer, or section 2-207(2)(c), by notifying the offeree of objection to any additional terms, the additional terms do not become part of the contract regardless of their materiality.⁸²

In the typical case where the buyer is an offeror who sent a standardized purchase order and the seller is the offeree who includes deviant terms in a printed acknowledgment form, the seller is not pleased to lose the battle of the forms. The seller's lawyer is at least as anxious about her client winning the battle as is the buyer's lawyer. The assured path to victory is to have the buyer sign the seller's form. The typical seller, however, recognizes that this might lose a sale and the marketing department will not abide this result. To continue the relationship with the buyer, the seller resorts to making a counteroffer. There are various ways in which this can be accomplished, including a blatantly clear statement that the response to the offer is a counteroffer. Again, the seller's marketing department will object to this straightforward approach. Seller's lawyer is forced to create a printed form that will insure counteroffer status in a surreptitious fashion, yet avoid the possibility that the buyer

81. *Id.* § 2-207 cmt. 4; see, e.g., *Frank M. Booth, Inc. v. Reynolds Metals Co.*, 754 F. Supp. 1441 (E.D. Cal. 1991); *Middletown Eng'g Co. v. Climate Conditioning Co.*, 810 S.W.2d 57 (Ky. Ct. App. 1991). Another typical additional or different term in the acceptance is an arbitration provision which may also materially alter the terms of the offer. *E.g.*, *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709 (7th Cir. 1987); *Dixie Aluminum Prods. Co. v. Mitsubishi Int'l Corp.*, 785 F. Supp. 157 (N.D. Ga. 1992).

82. Lawyers often take maximum advantage of these somewhat redundant provisions by drafting redundant clauses such as, "This offer expressly limits acceptance to the terms of this offer and notice is hereby given that buyer objects to any different or additional terms contained in any response to this offer."

will be alarmed and recognize that no contract exists upon receipt of the acknowledgment. With the aid of the courts, lawyers have discovered the magic formula for making such a surreptitious counteroffer that will never be read or understood by the offeror.⁸³

By inserting a printed clause that tracks the last proviso of section 2-207(1),⁸⁴ the seller's lawyer ascertains that every acknowledgment sent by her client will be construed as a counteroffer. Even though the actual parties making the deal for their respective entities will believe that they have made a contract because they have made a factual bargain, the technical barriers will prevent recognition of that factual bargain. Courts apparently feel compelled to arrive at this result because they see no escape from treating the magic formula language of the last provision of section 2-207(1) as creating a counteroffer.⁸⁵

Having created this technical monster, the courts assumed responsibility for its control. The unassailable logic of the analysis to this point would suggest that, after the formula counteroffer, the subsequent shipment and acceptance of the goods should require the court to recognize that the counteroffer, with all of its terms favoring the seller, was accepted by the purchaser through acceptance of the goods. Courts, however, recognize that the reasonable and decent buyer would not regard the response to the purchase order as a counteroffer because such a buyer would not have read or at least understood the formula language

83. For example, in *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972), the court held that the phrase, "This order is given subject to all of the terms and conditions on the face and reverse side hereof . . ." was not sufficient to constitute a § 2-207, last proviso, counteroffer. *Id.* at 1164. With this judicial guidance, it is no surprise to find different language in a later acknowledgment: "Seller's acceptance is, however, expressly conditional on Buyer's assent to the additional or different terms and conditions set forth below and printed on the reverse side." *C. Itoh & Co. (Am.) v. Jordan Int'l, Inc.*, 552 F.2d 1228, 1230 (7th Cir. 1977).

84. See U.C.C. § 2-207(1) (1990) (" . . . unless acceptance is expressly made conditional on assent to the additional or different terms.").

85. In his testimony before the New York Law Revision Commission, Professor Llewellyn explained his intention concerning the last proviso of § 2-207(1): "We were attempting to say . . . that a document which said, 'This is an acceptance only if the additional terms we state are taken by you' is not a definite and seasonable expression of acceptance but is an expression of a counter offer." 1 N.Y. COMM'N HEARINGS, *supra* note 12, at 181.

as creating a counteroffer. They expressly view the formula counteroffer as "ambiguous."⁸⁶ Then, to avoid oppression to the offeror, they control their created monster by repudiating the classical contract law concept of acceptance by conduct, which was not only unchanged by section 2-207 but emphatically reaffirmed in section 2-204(1).⁸⁷ They do so by contorting the language of the last proviso to section 2-207 to require *express* assent by the offeror to any additional terms in the acknowledgment that appear to be a definite expression of acceptance but are not, because of the technical and surreptitious counteroffer.⁸⁸ Thus, no contract exists on the seller's terms. Neither does the buyer's form control. The contract is made by *conduct* under the nefarious section 2-207(3),⁸⁹ and the terms of that contract are those on the exchanged forms that match while the nonmatching terms are excised, leaving gaps. The gaps are filled with the "supplementary" terms of Article 2, all of which favor the buyer (warranties, consequential damages, etc.). Again, the

86. In the words of one court, the seller "injected ambiguity" in its response to the offer. *Itoh*, 552 F.2d at 1238.

87. "A contract for the sale of goods may be made in any manner sufficient to show agreement, *including conduct by both parties . . .*" U.C.C. § 2-204(1) (1990) (emphasis added).

88. *See Itoh*, 552 F.2d at 1235; *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1167-68 (6th Cir. 1972).

89. In a letter to Professor Robert Summers, Professor Grant Gilmore made the following statement regarding § 2-207:

The 1952 version of 2-207 was bad enough . . . but the addition of subsection (3), without the slightest explanation of how it was supposed to mesh with (1) and (2), turned the section into a complete disaster

My principal quarrel with your discussion of 2-207—and all the other discussions I have read—is that you treat the section much too respectfully—as if it had sprung, all of the piece, like Minerva from the brow of Jove. The truth is that it was a miserable, bungled, patched-up job—both text and Comment—to which various hands—Llewellyn, Honnold, Braucher and my anonymous hack—contributed at various points, each acting independently of the others (like the blind men and the elephant). It strikes me as ludicrous to pretend that the section can, or should, be construed as an integrated whole in light of what "the draftsmen" "intended." (I might note that, when subsection (3) was added, Llewellyn had ceased to have anything to do with the project).

Letter from Professor Grant Gilmore to Professor Robert Summers, *reprinted in* RICHARD E. SPEIDEL ET AL., *COMMERCIAL AND CONSUMER LAW* 54-55 (3d ed. 1981).

buyer wins the battle of the forms, to the frustration of the seller.

The buyer *should* win the battle in this sequence, but not because of section 2-207(3). Rather, the buyer (and the seller) thought they had a closed deal via the exchange of forms. There was a factual bargain at that point because the response to the offer looked like a definite expression of acceptance, notwithstanding the formula language. But courts feel compelled to treat the formula language as a technical counteroffer while admitting that it would not be understood as a real counteroffer. Thus, they overcome this awkward analysis with another awkward analysis: they change the normal operation of counteroffers. It might be said that, if everything comes out right, why worry? Unfortunately, everything does not come out right.

Sellers will not quit. Like a frustrated cartoon character, the seller has an endless supply of thrusts. The next thrust is the ingenious one of turning its quotations or proposals into offers.⁹⁰ If the quote is an offer that contains the usual warranty disclaimer and remedy limitations, the buyer's purchase order may appear to be a definite expression of acceptance even though it expressly or impliedly contains the normal warranty and remedy protection afforded buyers by Article 2. Because the buyer's "additional" terms (the normal Code terms) "materially alter" the terms of the offer, they are excised under section 2-207(2)(b) and the seller, finally, wins the battle of the forms solely and exclusively because the seller has made the offer.⁹¹ The typical buyer, of course, has no idea that the terms of this transaction will depend upon who turns out to be the offeror. Buyers would have to go to law school to determine whether a given quote or proposal is an offer rather than an invitation to

90. One multinational corporation has chosen to stamp its quotations with a conspicuous phrase informing the buyer that its quotation is an offer. In addition to gaining the benefit of characterizing the seller as an offeror, stamping preprinted forms saves the expense of creating new forms until the old supply is exhausted.

91. See *Phillips Petroleum Co. v. Bucyrus-Erie Co.*, 373 N.W.2d 65 (Wis. Ct. App. 1985) (finding that the warranty terms of the original contract were not effective because they materially altered the terms of the contract), *rev'd on other grounds* 388 N.W.2d 584 (Wis. 1986) (finding that the original contract had been modified orally to include a warranty).

make an offer, and even then, they would not have time to analyze every quote or proposal received during the working day.

In addition to the fact that this analysis is the apotheosis of technical and artificial rules that belie the factual bargain of the parties, it supports the "evil" that section 2-207 was supposed to remove. Under the pre-Code law, the seller-offeree would win the battle through its counteroffer containing different or additional terms because the seller fired the "last shot" in the battle of the forms. Under the contorted analysis of section 2-207, the offeror wins the battle solely and exclusively because the offeror fired the "first shot" in the battle. The current judicial analysis of section 2-207 has been aptly described by one court as "Byzantine."⁹²

Another frustration of section 2-207 spawning great difficulty and endless scholarly debate is the mystery of the inclusion of "different or additional" terms in section 2-207(1), while section

92. See *Phillips Petroleum*, 388 N.W.2d at 590. There is a possible counter to this device by sellers. Because purchasing agents will not be able to determine whether a given quote is an offer or an invitation to make an offer, the purchase form could contain a clause that turns the purchase offer into a formula counteroffer where the quote is an offer. Such a clause might read as follows:

Whether construed as an offer or acceptance, this purchase order incorporates the terms of the Uniform Commercial Code protecting the buyer including but not limited to all warranties and remedies again including, without limitation, consequential damages. If this purchase order is construed to be an offer, this offer is expressly limited to the terms of this purchase order [§ 2-207(2)(a)]. Notice of objection is hereby given to any different or additional terms contained in any seller's form relating to this offer [§ 2-207(2)(c)]. If this purchase order is construed to be an acceptance, this acceptance is expressly conditioned on seller's assent to any different or additional terms contained on the front or reverse side of this purchase order.

Under the extant judicial interpretation and construction of § 2-207, this clause could be the doomsday weapon in the battle of the forms. If the purchase order would have been construed as an acceptance, the clause converts it into a formula counteroffer. There would be no contract via the exchange of forms. If the seller then ships, there would be a contract by conduct under section 2-207(3)(a) which would include matching terms from the exchanged forms (the dickered terms) while the nonmatching terms would be excised, leaving gaps. The gaps would then be filled with Article 2 "supplementary" or normal terms which favor the buyer.

If such a "doomsday" clause effectively allowed the buyer to win every time because of the technical games played by lawyers who draft such clauses, the ultimate repudiation of the underlying philosophy of Article 2 would be complete.

2-207(2) refers only to "additional" terms.⁹³ This phrasing may have been a printer's error⁹⁴ or it may have been intentional. If section 2-207(2) means to include only "additional" terms, we may deal with "different" terms in the exchanged forms through Professor White's "knockout" view,⁹⁵ which has gained a following in the courts,⁹⁶ or Professor Summers' "fallout" view,⁹⁷ which has not had such judicial success.⁹⁸ I have taken the position that "different" should be read into section 2-207(2) because it is otherwise unworkable. If section 2-207(1) recognizes a definite expression of acceptance though it contains "different or additional" terms, what does one do with the "different" terms if section 2-207(2) is relegated to "additional" terms?⁹⁹ In addition to comment support in section 2-207(2),¹⁰⁰ I have focused upon the statutory language of section 2-207(2)(b) recognizing that the "additional" terms in an acceptance can "materially alter" the terms of the offer.¹⁰¹ If a definite expression of acceptance may contain terms that "materially alter" the terms of the offer, it is difficult to understand how such terms could always be construed as only "additional" rather than "different" terms. Since Llewellyn seemed preoccupied with "material alterations" rather than the nomenclature of "different" vs. "additional,"¹⁰² and because the distinction between "different" and "additional" terms is difficult at best in many cases,¹⁰³ the prudent course is to include "different" in section 2-207(2). If nothing else is done to

93. Compare U.C.C. § 2-207(1) (1990) with *id.* § 2-207(2).

94. See John L. Utz, *More on the Battle of the Forms: The Treatment of "Different" Terms Under the Uniform Commercial Code*, 16 UCC L.J. 103, 105 (1983).

95. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1-3, at 34 (3d ed. 1988).

96. *E.g.*, *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579 (10th Cir. 1984); *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924 (9th Cir. 1979); *Owens-Corning Fiberglass Corp. v. Sonic Dev. Corp.*, 546 F. Supp. 533 (D. Kan. 1982).

97. WHITE & SUMMERS, *supra* note 95, § 1-3, at 29.

98. *E.g.*, *Phillips Petroleum Co. v. Bucyrus-Erie Co.*, 373 N.W.2d 65 (Wis. Ct. App. 1985), *rev'd on other grounds*, 388 N.W.2d 584 (Wis. 1986).

99. Murray, *Chaos*, *supra* note 24, at 1354-65.

100. See U.C.C. § 2-207 cmt. 3 (1990) (stating that § 2-207(2) covers both additional and different terms).

101. *Id.* § 2-207(2)(b).

102. See Murray, *Chaos*, *supra* note 24, at 1365 n.219 (analyzing the "different vs. additional" "puzzle").

103. *Id.* at 1363-65.

section 2-207, "different" should be added to the statutory language of section 2-207(2).

The section, however, requires more extensive revision than merely adding the term "different" to section 2-207(2). The comprehensive revision should recognize the normal terms attending the typical contract for the sale of goods. All of the warranty and remedial protections of the buyer in Article 2 are normal terms. Terms that would replace the normal terms are *deviant* terms.¹⁰⁴ The factual bargain of the parties is our goal and this objective means that we must avoid the absurdity of enforcing unread and unbargained-for surreptitious clauses that allocate risks on a technical and artificial basis. It is clear beyond peradventure that this assumption was the bedrock upon which Article 2 was created.¹⁰⁵ I once referred to this philosophy as the avoidance of "incipient unconscionability."¹⁰⁶

104. Commenting on current printed form clauses and their relation to the norms of the Code, Professor Todd Rakoff noted, "[T]he parties' contractual power is now exercised primarily in specifying deviation from the standardized plan rather than in defining the obligation *ab initio*." Rakoff, *supra* note 24, at 1182.

105. A 1941 report on an early draft of the Uniform Revised Sales Act (later to become Article 2 of the Code) contained some classic Llewellyn prose on what was then called § 1-C:

"Written" bargains, in the days when the rules about them crystallized, were bargains whose detailed terms the two parties had looked over; and the rule was proper, that a signature meant agreement. When, however, parties bargain today, they *think* and *talk* of such matters as price, credit, date of delivery, description and quantity. These are the bargained terms. The unmentioned background is assumed without mention to be the fair and balanced general law and the fair and balanced usage of the particular trade. Displacement of these balanced backgrounds is not to be assumed as intended unless deliberate intent is shown that they shall be displaced; and deliberate intent is not shown by a lop-sided form whose very content suggests that it has not been carefully read, and the circumstances of whose execution suggest that the matters under discussion and consideration were only the matters written or typed in.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, REPORT AND SECOND DRAFT OF THE REVISED UNIFORM SALES ACT 52-53 (1941), *reprinted in* 1 UCC DRAFTS, *supra* note 48, at 269.

106. In another article, I remarked:

The fundamental difference between the purpose of 2-302 and the purpose of 2-207 . . . is exposed. The former deals with nullifying terms of a contract because they unfairly surprise and oppress the party against whom they would operate. On the other hand, 2-207 presents a threshold

The simplest and clearest draft to achieve this result begins with the removal of offer and acceptance terminology from the section to avoid "first shot" or "last shot" analyses. The revision should direct courts to view a manifestation of the parties' intention to form a contract as forming a contract on the matching dickered terms¹⁰⁷ on the assumption that they also have agreed to include normal Code terms. Deviant terms that would materially alter such dickered or normal Code terms should not be operative unless the party asserting such deviant terms sustains the burden of proving manifest assent to such terms by the other party. The clearest manifestation of such assent would occur where the other party expressly has agreed to the deviant terms. That express agreement could be evidenced by a party signing the other's form containing such deviant terms.

We could stop here, of course, and insist that the normal Article 2 terms apply absent such express assent. We might go further and give effect to a clear and conspicuous seller's response to a purchase order that the seller will not be bound by the normal terms. If this response were so clear that a reasonable and decent buyer receiving such a response could not avoid understanding that the seller does not intend to be bound by the normal terms of the Code, the buyer would not be justified in understanding the creation of a factual bargain. Thus, when a purchase order initiates the transaction, an acknowledgment that clearly and conspicuously states that the seller does not accept certain U.C.C. terms but will ship the goods exclusively on its own terms, the acceptance of the goods after receipt of such a clear statement of the deal proposed by the seller would

question: What are the terms of the contract? If a party would not reasonably understand that certain terms were included in the contract *ab initio*, they will not be included, because their inclusion would unfairly surprise and oppress the party against whom they would have operated. Section 2-207, therefore, may be viewed as addressing incipient unconscionability—its philosophy is identical to 2-302's.

Murray, *Chaos*, *supra* note 24, at 1321-22 (citing John E. Murray, *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597 (1978)).

107. If the manifested dickered terms do not match, the parties have not met the threshold test to form a contract and further analysis is superfluous. See *Koehring Co. v. Glowacki*, 253 N.W.2d 64 (Wis. 1977).

form a contract on the seller's terms. This result should never occur if the acknowledgment or other form of response is in any way ambiguous or confusing to a reasonable and decent merchant buyer. Again, the burden must be on the party proposing the deviant terms to assure complete communication of such deviations and a clear manifestation of assent to them by the other party. Whether such complete communication and assent have occurred necessarily involves interpretation and construction, some uncertainty and lack of stability, and the attendant transaction costs of such an analysis. All of these consequences can be avoided by insisting that, unless one signs a form containing deviant terms, such terms will be inoperative. This proposed solution, however, is a rather draconian view. I prefer to allow an acceptance by conduct, remembering that *acceptance* requires more than mere *receipt* of the goods.¹⁰⁸

If, however, the first communication contains deviant terms, (e.g., the seller includes warranty disclaimers and the like in a quotation that might be an offer), my preference would allow such terms to be operative only if the buyer-offeree signs the seller's document containing such terms. This draconian view is based upon our experience with the fundamental distinctions between offers and mere invitations to make offers. As all present and former law students know, whether a given quotation or

108. Apparently, some commentators forget to make this distinction. In an analysis of my *Proposed Revision of Section 2-207*, *supra* note 71, one commentator worried about internal communication within a buyer's company that would result in unknowing receipt of the goods by employee X after purchasing agent or other official (Y) received a clear and understandable counteroffer from the seller. Levin & Rubert, *supra* note 72, at 196. If Y were aware of the counteroffer, as she ought to be under these facts, and did not wish to accept it, she could communicate that decision to X or X's department without difficulty. The author seems to suggest insuperable obstacles to this practice. The reason this practice is not followed at present is because buyers and their representatives are not aware that the response to their offers are counteroffers because they do not comprehend the surreptitious formula counteroffers found in so many acknowledgment forms. Moreover, even if X were unaware of the decision to reject the counteroffer when the goods first arrived, mere receipt of the goods should not constitute acceptance of the offer, just as anyone does not accept goods deposited in a mailbox or in a similar place at our homes or when a package containing unknown contents is handed to the homeowner or a member of the family. Again, there is a difference between "receipt" and "acceptance." Cf. U.C.C. § 2-201(3)(c) (1990) (stating the distinction between "receipt" and "acceptance" in the statute of frauds).

the like is an offer is a question of interpretation that can be very difficult.¹⁰⁹ Unless all buyers and their agents become sufficiently educated in the law to distinguish quote-offers from quote-invitations, it is foolish to expect a buyer to make that distinction with clarity and certainty. In a given situation, even a lawyer may have to advise that the interpretation could go either way. Article 2 protects buyers against the inadvertent creation of firm offers by requiring a separate signing.¹¹⁰ If we are so terribly concerned that a buyer may be snookered into making a firm offer, it seems at least as important to protect the buyer against material, risk-shifting clauses in documents he does not sign which would bind the buyer only because courts may construe it to be an offer. My change would eliminate the "first shot" analysis, since the sending of a typical purchase order in response to a quotation-offer that contained deviant terms, not signed by the purchaser, would preclude the deviant terms from operative effect. Again, we could go further and allow operative effect to deviant terms in an offer that is so clear and conspicuous that the other party could not reasonably misunderstand the terms upon which the offer is made. As in the analysis of counteroffers, this change would have its attendant costs.

The modified section 2-207 should contain a clear listing of typical deviant terms. While such a list can never be exhaustive, it could be sufficiently complete to avoid the overwhelming majority of potential disputes. Such a list obviously would include warranty disclaimers and limitations or exclusions of various

109. See, e.g., *Interstate Indus. v. Barclay Indus.*, 540 F.2d 868 (7th Cir. 1976) (finding that a quote was not an offer); *Maryland Supreme Corp. v. Blake Co.*, 369 A.2d 1017 (Md. 1977) (finding that a quote was an offer). In *Empire Machinery Co. v. Litton Business Telephone Systems*, 566 P.2d 1044 (Ariz. Ct. App. 1977), it is patently clear that the president of the plaintiff corporation was unaware that he had made the offer when he signed the defendant's printed form. *Id.* at 1044. In a "battle of the forms" context, it is more than questionable whether the plaintiff focused upon the defendant's proposals as offers with all of the consequences flowing therefrom in *Phillips Petroleum Co. v. Bucyrus-Erie Co.*, 373 N.W.2d 65 (Wis. Ct. App. 1985), *rev'd on other grounds*, 388 N.W.2d 584 (Wis. 1986).

110. U.C.C. § 2-205 (1990); see also *id.* § 2-209 (requiring a separate signing of a no oral modification clause by a nonmerchant where the form is supplied by a merchant).

remedies, including consequential damages. I also would include arbitration clauses which have given rise to questions of materiality.¹¹¹ If parties who deal with each other on a regular basis prefer arbitration, they can execute a separate blanket agreement manifesting their intention to arbitrate with respect to any future deal. A residual clause in section 2-207 should provide a definition of materiality to direct courts to deal with other terms not listed.

If one of the exchanged forms contains an additional immaterial term, it should be an operative term of the contract. If one form contains an immaterial term that differs from the immaterial term in the other form, neither term should be operative. The term should be supplied pursuant to the gap-fillers in Article 2, trade usage, or prior course of dealing.

The final problem in section 2-207 was central to Llewellyn's thinking about this section.¹¹² Parties commonly form contracts by telephone or in person and then confirm the deal through the exchange of their prefabricated forms, which are the same forms they would use absent any prior oral contract. Section 2-207(1) attempts a double play. "A definite . . . expression of acceptance or a written confirmation . . . operates as an acceptance . . ."¹¹³ A confirmation cannot be an acceptance because the acceptance has already occurred and a contract was formed. Section 2-207(1), however, would have us pretend that the confirmation is an acceptance. If the written confirmation is sufficient for statute of frauds purposes, the contract becomes enforceable¹¹⁴ even though the confirmation-acceptance contains different or additional terms. What to do with such terms? We simply proceed to section 2-207(2) as if the confirmation-acceptance were a

111. See *id.* § 1-205.

112. Matter number 2 is more troublesome. In [sic] deals with the now hopelessly confused situation presented when deals are made by phone or by shorthand message and "confirmations" are sent on forms which reach beyond the dickered terms; or when an "acceptance" occurs on "our standard form," and the like—often enough answered by a varying "our standard form" from the other side. The "orthodox" law of offer, counter-offer, and the like gives no satisfactory answer to this problem.

1 N.Y. COMM'N HEARINGS, *supra* note 12, at 55-56 (statement of Karl Llewellyn).

113. U.C.C. § 2-207(1) (1990) (emphasis added).

114. It becomes enforceable "between merchants" under § 2-201(2).

definite expression of acceptance. Any revision of section 2-207 should distinguish between the use of a confirmation for statute of frauds purposes (assuming the statute of frauds is not repealed in the revision) and the same confirmation as evidence of the acceptance of the offer. If the confirmation contains the magic formula language of the last proviso of section 2-207(1),¹¹⁵ it does not evidence a formed contract because the confirmation is a counteroffer rather than a definite expression of acceptance. Though most of our courts now have seen this distinction,¹¹⁶ a revision should guard against its recurrence.

It is, however, more important for a confirmation to be viewed as an acceptance, even if it contains formula counteroffer language because such language is not understood to create a counteroffer. It should not be viewed, however, as confirming an acceptance if it clearly states that it is a counteroffer, in such a fashion that a reasonable and decent merchant could not avoid understanding it as such.

Section 2-207 should be seen as an incipient part of the problem of determining the operative effect of standardized forms. If there is no battle of the forms because both parties have signed a single standardized form, the basic question of the duty to read and understand a signed document arises. I believe that parties should be bound only by what they reasonably expect to find in such forms and not by unexpected terms. I find support for this view in the *Restatement (Second) of Contracts*, though only after considerable exploration.¹¹⁷ I would like very much to see an Article 2 section dealing exclusively with this problem in juxtaposition to section 2-207. The *Restatement* attempt fails.¹¹⁸ While the *Restatement* succeeds in clarifying certain

115. *Id.* § 2-207(1) (stating that additional or different terms can still constitute an acceptance unless the party makes acceptance conditional on the assent to these terms).

116. *See, e.g., C. Itoh & Co. (Am.) v. Jordan Int'l, Inc.*, 552 F.2d 1228, 1230 (7th Cir. 1977).

117. *See* RESTATEMENT (SECOND) OF CONTRACT § 211(3) (1979) (providing that when a party believes that the contracting party would not have assented had she known of a term, that term does not become part of the contract); John E. Murray, *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982) [hereinafter Murray, *Standardized Agreement*].

118. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979); *see* Murray, *Standardized*

Article 2 sections on occasion, a revised Article 2 section on standardized forms could have a major impact in clarifying the emerging analysis of the problems in this area.¹¹⁹

C. *The Statute of Frauds—Section 2-201*

Should the statute of frauds be retained in a revised Article 2? Though the country responsible for creating the statute has repealed it except for two sections,¹²⁰ the United States is a much more litigious society and the possibility of escalating fraud and perjury is real, though a return to the practices of 1677 is not. In a complex commercial society where innumerable deals are made daily, favorable recollection is inevitable. We should retain the statute of frauds, but section 2-201 requires revision.

The first problem is how to deal with electronic message systems. While this is a major problem, it is not an insurmountable obstacle to the retention of the statute of frauds. An electronic message, regardless of form, is still a message. Usually, it is read, albeit on a screen, though in the case of a recording, it is heard. There will be a record of the transaction even in a paperless commercial society and the electronic system used will rarely be exotic. There will be "reasonable" systems used by virtually all commercial parties. A "reasonable medium," as used in section 2-206,¹²¹ should include electronic media. In the typical case, the sender will be able to prove the sending and receipt of the message more certainly and easily than they can now prove it through the U.S. Postal Service. The simple addition of "or reasonable electronic message or record" after "writing" in sections 2-201(1) and (2) may suffice to "permit the continued expansion of commercial practices" as required in section 1-102(2)(b).¹²² While this solution may appear much too simplis-

Agreement, *supra* note 117, at 760-61.

119. See Murray, *Standardized Agreement*, *supra* note 117; W. David Slawson, *The New Meaning of Contracts: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 57-60 (1984).

120. See PRELIMINARY REPORT, *supra* note 13, at 51 (noting that England repealed its statute of frauds regarding the sale of goods in 1953).

121. U.C.C. § 2-206(a) (1990).

122. *Id.* § 1-102(2)(b) (stating the expansion of commercial practices as an underly-

tic, there should be no attempt to distinguish between and among the various systems now available as well as those that are unborn.

Another major change is the necessary inclusion of reliance as an additional satisfaction device. Those who currently favor the recognition of reliance, like the majority of courts which have confronted the issue,¹²³ must ignore the opening phrase of section 2-201, "Except as otherwise provided in this section . . ." to include reliance as another way to satisfy the requirements of the statute.¹²⁴ Because clear evidence of reliance should be sufficient to allow enforcement of the contract,¹²⁵ section 2-201 requires an appropriate addition to section 2-201(3).¹²⁶ Moreover, since reliance is a factor in modifications within the statute of frauds in section 2-209,¹²⁷ it should be recognized as to the unmodified contract under section 2-201.

In recent years, there has been discussion about the necessity of the quantity term.¹²⁸ There can be serious questions about the quantity term but problems caused by its retention may be overstated. If we do not require the quantity term, may we also eliminate any requirement to identify the subject matter of the contract? Thus, would a check with a notation reading "contract" or "agreement" be sufficient? The *Preliminary Report* of the Article 2 Study Group suggests, "If it is clear from the signed writing that some contract for sale has been made, the statute of frauds is satisfied and all of the alleged terms, written or oral, may be proved in the usual way under Article 2."¹²⁹ While the reduction of formal requirements in section 2-201 over its prede-

ing purpose and policy of the Act).

123. See, e.g., *Potter v. Hatter Farms, Inc.*, 641 P.2d 628 (Or. App. 1982).

124. U.C.C. § 2-201(1) (1990).

125. See, e.g., *Potter*, 641 P.2d at 632 (finding reliance on an oral contract as an exception to the statute of frauds).

126. U.C.C. § 2-201(3) (1990) (providing three exceptions to the statute of frauds).

127. *Id.* § 2-209(5) (allowing the retraction of a waiver except when the allowance would be unjust given a material change in reliance).

128. See *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991) (finding that the lack of a definite quantity term did not violate the statute of frauds); see also Caroline N. Bruckel, *Consideration in Exclusive and Nonexclusive Open Quantity Contracts Under the U.C.C.: A Proposal for a New System of Validation*, 68 MINN. L. REV. 117 (1983).

129. PRELIMINARY REPORT, *supra* note 13, at 54.

cessor is desirable, a reduction to this level may eliminate the statute of frauds, de facto. It may be preferable to eliminate the statute de jure which is, after all, the prevailing view of the Study Group.¹³⁰

If the statute is to be retained, section 2-201(3)(b) should be clarified to allow for an admission by a former party, or even an agent or officer of the defendant, that a contract was made.¹³¹ Any confusion concerning the pleading of the statute should be eliminated by insisting that a pleading deny the making of the contract. Even then, a deposition should be permitted to allow the plaintiff an opportunity to adduce facts that a contract was, in fact, made, notwithstanding the otherwise truthful denial in the pleadings that a contract was made since the question of whether a contract was formed requires a legal conclusion.

D. Modifications and Waivers—Section 2-209

There appears to be little if any doubt that section 2-209(1) is a desirable rejection of the pre-existing duty rule with respect to modifications. Similarly, there is a consensus that the only desirable change in section 2-209(1) should be to express the implied requirement of good faith.¹³² The remainder of section 2-209, however, has been aptly called a "mess."¹³³

It has been suggested that it took me twenty pages to explain the remainder of section 2-209,¹³⁴ and it did.¹³⁵ I think it would take anybody at least twenty pages to explain it, and that alone is sufficient reason for revising sections 2-209(2), (3), (4), and (5). If the "public" statute of frauds in section 2-201 is retained, the problem of whether the *contract as modified* must meet section 2-201 standards remains. I recommend a revision

130. *Id.* at 52.

131. See *Miller v. Sirloin Stockade*, 578 P.2d 247 (Kan. 1978) (holding that an admission by a former agent or employee cannot bind the former employer without authority from the employer).

132. See PRELIMINARY REPORT, *supra* note 13, at 25.

133. Douglas K. Newell, *Cleaning up U.C.C. Section 2-209*, 27 IDAHO L. REV. 487 (1990).

134. *Id.* at 494.

135. John E. Murray, Jr., *The Modification Mystery: Section 2-209 of the Uniform Commercial Code*, 32 VILL. L. REV. 1 (1987).

that would require a new writing to evidence the contract as modified with respect *only* to terms that section 2-201 requires to be evidenced by a writing, including the identity of the parties, the subject matter and, notwithstanding quarrels about whether the quantity term must be included, I would insist that any new quantity term in a modification be evidenced by a writing.¹³⁶ In general, of course, the writing must evidence a "real transaction."¹³⁷

Because section 2-209(3) insists only that the contract as modified meet section 2-201 requirements, the contract as modified should be viewed as *the* contract for section 2-201 purposes. Thus, any device that would satisfy section 2-201 as to an original contract should satisfy the contract as modified under section 2-209(3). I would include reliance among the satisfaction devices as suggested in the earlier discussion of section 2-201.

A no oral modification or rescission clause—the "private" statute of frauds of section 2-209(2)—allows the parties to agree that any change in their deal must be evidenced by a writing. Parties, however, sometimes make changes absent a writing. If a party can demonstrate reliance, such evidence should suffice to enforce the modification. Similarly, if any of the other alternate satisfaction devices of sections 2-201(2) or 2-201(3) are met, the modification should be enforceable. For example, just as a refusal to enforce an admitted original contract would be absurd, as section 2-201(3)(b) suggests, a refusal to enforce an admitted modification similarly would undermine the factual bargain of the parties. Under one interpretation of the current law which would be confirmed pursuant to the Article 2 Study Group's proposal,¹³⁸ such an admitted modification would not be enforced because of the technical barrier created by section 2-209(2). This is a silly result which is antithetical to the factual bargain of the parties. The only reason a public statute of frauds is tolerable and, arguably, even somewhat desirable, is because it allows for those necessary exceptions that recognize the factu-

136. A modification of the contract as to price, time or place of delivery or other terms not required by § 2-201 to be evidenced by a writing in the original contract should not be required in the contract as modified under § 2-209(3).

137. See U.C.C. § 2-201 cmt. 1 (1990).

138. See PRELIMINARY REPORT, *supra* note 13, at 74.

al bargain of the parties. To suggest that a no oral modification clause should have absolute binding effect, regardless of the circumstances and in the face of a changed factual bargain, taxes credulity.

Just as an admission should satisfy the requirements of section 2-209(2), if a changed quantity of goods were received and accepted by the purchaser or if the seller received and accepted a larger payment for goods than that called for by the contract, this section 2-201(3)(c) alternate should be sufficient evidence of the modification. If a confirming memorandum of the modification between merchants was received and not objected to within ten days, as suggested by section 2-201(2), the failure of the recipient to object should not preclude enforcement of the contract as modified simply because the recipient did not sign the writing. Otherwise, we would return to the pre-Code situation where the recipient could hold the sender and signer of the memorandum to the changed deal and speculate at his expense since the recipient would not be bound. Finally, the very narrow reliance satisfaction device dealing with specially manufactured goods in section 2-201(3)(a) should also be a sufficient basis to make the contract as modified enforceable.

If these clarifications of sections 2-209(2) and 2-209(3) were effectuated in the revision of that section, sections 2-209(4) and 2-209(5) could be and should be eliminated. Section 2-209(4) contains confusing language as well as the essentially indeterminate concept of "waiver." The Study Group recommended a comprehensive definition of "waiver" in the section language or a less than comprehensive definition in the comments.¹³⁹ The short response to this recommendation is, "Good luck." Which of the many definitions of "waiver" will be preferred? The more serious answer is that the concept is totally unnecessary and any attempt to define it, comprehensively or otherwise, particularly in statutory language is, at best, counterproductive. If the expanded (reliance included) list of alternate satisfaction devices becomes operative with respect to the public and private statutes of fraud in sections 2-209(2) and 2-209(3), there is absolutely no necessity to retain subsections (4) or (5). Because sec-

139. *Id.* at 76.

tion 2-209(5) operates only to preclude retraction of a waiver because of reliance, it would be a fortiori superfluous in a section recognizing reliance as a basis for enforcing a modification without a writing.

III. WARRANTIES

A. *Express Warranties*

Section 2-313 allows express warranties to be created by statements, promises or other representations of fact, by description, or by sample or model—but only if they become “part of the basis of the bargain.”¹⁴⁰ The “basis of the bargain” requirement has been a mystery since the section was promulgated. The section and its comments have spawned various analyses by courts and scholars ranging from those who would insist upon a showing of reliance to those who reject the necessity of any showing of reliance. A recent opinion summarized the “divided” opinion about the meaning of “basis of the bargain” and concluded that a statement of fact about the product meets that standard only if the buyer had knowledge of it prior to buying or using the product. Such knowledge creates a presumption that the statement became “part of the basis of the bargain” and the presumption could be rebutted only by “clear and affirmative proof.”¹⁴¹ Comment 3 to section 2-313 adds fuel to the controversy with its statement that “no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.”¹⁴²

I suggest that reliance should not be necessary at all. I believe that several courts have misinterpreted “basis of the bargain” by resorting to classical contract notions of “bargained-for-exchange” and offer and acceptance while, in fact, the “bargain” to which section 2-313 refers is a continuum that does not begin and end with draconian notions of offer and acceptance.¹⁴³ The

140. U.C.C. § 2-313 (1990).

141. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), *rev'd in part on other grounds*, 112 S. Ct. 2606 (1992). The “clear affirmative proof” language is found in comment 3 to § 2-313(1).

142. U.C.C. § 2-313 cmt. 3 (1990).

143. See John E. Murray, Jr., “Basis of the Bargain”: *Transcending Classical Con-*

"bargain" of Article 2 is the factual bargain of the parties, unhampered by the technical constraints of classical contract law. Comment 7 to section 2-313 aids this analysis by insisting that, "The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract."¹⁴⁴ The comment goes on to suggest the enforceability of a post-formation express warranty which can be viewed as a good faith modification needing no consideration to be binding under section 2-209(1). Such a post-formation warranty does not fit classical notions of "bargain." Nor does it fit the sacred rule that an offeree must be aware of the offer before it can be accepted.

To understand the thrust of section 2-313, I urged (and continue to urge) a "reasonable expectation" test that would eschew any requirement of reliance.¹⁴⁵ I was concerned about the common experience of the modern buyer of goods, consumer or merchant, who purchases a product without full awareness of all of the features of that product as advertised by the seller. It is not uncommon for a purchaser of a computer, automobile, vacuum cleaner, or other product to be unaware of certain features at the time of purchase.¹⁴⁶ If such a buyer later would become

cepts, 66 MINN. L. REV. 283 (1982).

144. U.C.C. § 2-313 cmt. 7 (1990).

145. More recently, Professor Charles Heckman has clearly demonstrated Karl Llewellyn's intention that reliance should not be necessary under § 2-313. See Charles Heckman, "Reliance" or "Common Honesty of Speech": The History and Interpretation of Section 2-313 of the Uniform Commercial Code, 38 CASE W. RES. L. REV. 1 (1988) (expressing agreement with my analysis but disagreeing with my proposed "reasonable expectation" test on the footing that this test unwittingly revives the reliance requirement). My "reasonable expectation" test, however, does not even indirectly require any showing of reliance. Rather, as I am about to restate in the text of this Article, it presumes certain "reasonable expectations" on the part of any buyer of goods as to features of the goods of which the buyer was unaware at the time of purchase.

146. See JOHN E. MURRAY, JR. & H. FLECHTNER, SALES AND LEASES 80 (1993). Problem 28 of this casebook deals with a buyer of a new automobile which is admired by a friend who buys an identical model. The friend's car came with a remote control that permits the opening and locking of doors and the trunk. The buyer did not receive that device with his identical car. He discovers certain seller's literature advertising the device as a standard feature on this model and further discovers that he is the only buyer of that car in the world who lacks this device. Though he

aware of such advertised features and discover that the same product in the hands of other buyers has that standard feature while her product lacks that feature, such a buyer appropriately would be disappointed. Such a buyer reasonably expected to own a product that contained all of the features that such products were advertised to contain, even if she had no knowledge of a particular advertisement concerning that feature prior to the purchase. These reasonable expectations were certainly part of the basis of her bargain.

Comment 4 to section 2-313 states the "principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell"¹⁴⁷ To allow a seller to say, "Yes, I did agree to sell a product with these features, but unless you can prove that you were aware of my statement to this effect prior to buying it, you are not entitled to these features," undermines the whole purpose of warranty law. Section 2-313 should be clarified to remove the last scintilla of a reliance test and to allow the buyer to enforce express warranties even though the buyer was unaware of such warranties at the time of purchase. To avoid further confusion, it would be desirable to remove the "basis of the bargain" phrase entirely since the phrase invites memories and understanding of the classical contract concept of "bargained-for-exchange."

B. Exclusion or Modifications of Warranties

1. Express Warranties

The 1952 version of section 2-316(1) stated simply: "If the agreement creates an express warranty, words disclaiming it are inoperative." Apparently, this appeared too radical for its time. The Llewellyn recreation in the present section 2-316(1) is a study in obfuscation.¹⁴⁸ The first sentence appears to be an in-

did not rely upon that device in deciding to purchase the car, he reasonably expected to receive all advertised standard features. Under a reliance test or a "presumption" test that requires knowledge of such a feature prior to purchase, the buyer would not be entitled to that feature.

147. U.C.C. § 2-313 cmt. 4 (1990).

148. Section 2-316(1) reads as follows:

nocuous rule of construction, suggesting that courts should try to reconcile manifestations of express warranties with words or conduct that "limit warranty," if such a construction is reasonable.¹⁴⁹ It does not say "limit *express* warranties" because that is impossible. This is followed by a reference to the parol evidence rule of section 2-202 and a statement that the only reason section 2-316(1) exists is to make a disclaimer ineffective if there is language of express warranty and inconsistent language disclaiming an express warranty. Thus, the present section 2-316(1), albeit requiring some interpretation, clearly means just what Llewellyn said originally: "If the agreement creates an express warranty, words disclaiming it are inoperative."¹⁵⁰ The convoluted language of the present section 2-316(1) apparently succeeded in satisfying the critics of the original draft, but that was its only success. It is the kind of change that may have prompted some snickering between Karl and his wife, Soia.

Why the reference to the parol evidence rule? At best, it is a reminder that one could lose an express warranty that was made prior to the execution of an integrated writing that did not mention it. But the parol evidence rule has nothing to do with written disclaimers or exclusions. It precludes the admissibility of *any* prior agreement that "would certainly" have been included in a given type of writing by reasonable parties.¹⁵¹ Suggest-

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

Id. § 2-316(1).

149. *Id.*

150. U.C.C. § 2-316(1) (1952).

151. U.C.C. § 2-202 cmt. 3 (1990). I agree with the Article 2 Study Project concern about the parol evidence rule. The fact that one has to find the U.C.C. parol evidence test (a modified Williston test) in a comment to the section on parol evidence is a defect in an otherwise excellent statement of the "rule" which should be remedied. The modified Williston test is a better modern test and it should be found in the statutory language. I also agree with the concern over printed, standardized merger clauses, i.e., "integration" or "zipper" clauses that would attempt to bar any prior or "contemporaneous" agreement of the parties. Such clauses should be inoperative unless separately signed by the party against whom they would otherwise operate. Parties who make deals believe that their factual bargain includes such agree-

ing that the exclusion of disclaimer of warranties is "subject to" the parol evidence rule simply adds another confusing element to this convoluted section.¹⁵² It is time to remove the "covert tools"¹⁵³ from section 2-316(1) and simply announce that it is impossible to disclaim express warranties. In the words of a comment to the express warranty section, section 2-313,

In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation.¹⁵⁴

2. Implied Warranties

The exclusion of implied warranties is currently found in sections 2-316(2) and 2-316(3). Sections 2-316(2) and 2-316(3)(a) provide rules for such exclusions based upon the statements of the parties, oral or written, whereas subsections (3)(b) and (3)(c) deal with exclusions of implied warranties by conduct. The section would be improved by incorporating the disclaimers by statements in subsection (2) and the conduct exclusions in subsection (3).

ments. The parol evidence rule should not operate as a technical bar unless the parties clearly intended to be bound only by the final and complete statement of their agreement in their integrated writing. I would also suggest that the revisers think about deleting "contemporaneous." Like Corbin, I believe that the extrinsic matter sought to be introduced occurred either before or after the writing. "Contemporaneous" is a weasel word that should be expunged. For more on the parol evidence concept of the U.C.C., see John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342 (1975). See also MURRAY ON CONTRACTS, *supra* note 60, § 84C.5.

152. I discuss the absurdity of courts finding disclaimers of express warranties to be operative only after deciding that no express warranty exists in John E. Murray, Jr., *Basis of the Bargain: Transcending Classical Concepts*, 66 MINN. L. REV. 283, 303 (1982).

153. One of the well-known Llewellynisms is that, "Covert tools are never reliable tools." Karl N. Llewellyn, O. Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700, 703 (1939) (book review).

154. U.C.C. § 2-313 cmt. 4 (1990).

In my revised section 2-316(2), I would require all disclaimers to be evidenced by a writing and I would also require all disclaimers to be conspicuous. Implied warranty protection is so basic and important to a buyer of goods that the buyer should not be said to have surrendered that protection absent a clear and conspicuous statement to that effect. The present section 2-316(1) allows a disclaimer to be oral but adds that it "must mention" merchantability. It then suggests that if the disclaimer is in writing, it "must be conspicuous." Apparently, it need not be "conspicuous" if it is oral, so that one would not have to shout that the implied warranty is being disclaimed. The "as is" or "with all faults" (or other language) disclaimer of implied warranties in the current section 2-316(3)(a) need not be conspicuous. Again, my revision would incorporate all of these methods of disclaimer in section 2-316(2) and require all of them to be conspicuously set forth in writing. I would still require the word "merchantability" to be used and I would not allow "other language" to be used, as is currently permitted under section 2-316(3)(a).¹⁵⁵ Under my suggestion, a revised section 2-316(3) should combine the disclaimers currently found in subsections (3)(b) and (3)(c).

3. *Consumer and Warranty Disclaimers*

The revised Article 2 could strike a major blow in favor of consumers by precluding any disclaimer of any implied warranty or any limitation on its duration with respect to a consumer buyer. Though the Magnuson-Moss Act¹⁵⁶ precludes disclaimers of the implied warranty of merchantability in consumer goods, the duration of such warranties may be limited to the duration of the express warranty.¹⁵⁷ In this sense, Magnuson-

155. "Transaction costs" arise in allowing "other language" to be used. I was particularly troubled by the transaction costs that would attend the recommendation of the *Preliminary Report* of the Article 2 Study Group that, if the buyer has knowledge of the disclaimer, such disclaimer should be effective even if it is not "conspicuous." PRELIMINARY REPORT, *supra* note 13, at 106. The Study Group later retreated from this position with respect to disclaimers of the implied warranty of merchantability affecting consumers. *See infra* note 158.

156. Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1988).

157. *Id.* § 2308.

Moss is a snare and a delusion.¹⁵⁸ Because of the four-year statute of limitations in U.C.C. section 2-725, the duration of the implied warranty protection of consumers would be limited to four years from the time the goods are delivered to the original buyer.

I fully recognize the major impact of this suggestion, but it does seem that we finally should admit that consumers have no idea of what they are doing with respect to warranty protection. Statutes requiring disclosure and various conspicuous statements have failed. The complexity of different lemon laws leaves the consumer confused and often unprotected. Without removing any consumer protection in terms of remedy, the preclusion of any disclaimer or limitation on duration of implied warranties would provide a sound basis for an effective, uniform consumer protection concept. A revised Article 2 need not develop a comprehensive consumer protection maze. This change, alone, would do more for consumer protection than all extant efforts to assure the consumer that the goods she purchases are genuinely merchantable and, where she has relied upon the seller's skill and judgment in selecting the goods for a known purpose, that they are fit for that purpose.

C. Cumulation and Conflict of Warranties

Here, I content myself with the suggestion that section 2-317(c), which provides that "[e]xpress warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose"¹⁵⁹ should be left alone. The Article 2 Study Group disagreed as to whether an inconsistent express warranty should displace both types of implied warran-

158. The Article 2 Study Group added two recommendations to its earlier recommendations on warranty disclaimers, both involving consumer protection: (1) the implied warranty should not be disclaimable where the seller makes a written warranty that is subject to the Magnuson-Moss Warranty Act; (2) if a written warranty subject to the Magnuson-Moss Warranty Act is made, Article 2 should require the same disclosure as that required by federal law. The Study Group "retreated" from its earlier position that a disclaimer should be effective if the buyer had actual knowledge of the disclaimer. See PRELIMINARY REPORT, *supra* note 13, at 105-08.

159. U.C.C. § 2-317(c) (1990).

ty.¹⁶⁰ There is a clear distinction between express warranties where reliance should not be a factor and implied warranties of fitness for a particular purpose where reliance, along with other elements, is necessary. Section 2-317(c) recognizes this distinction and it is sound.¹⁶¹

D. Privity—Third Party Beneficiaries—Products Liability

The Article 2 Study Project aptly calls the present version of section 2-318 an "anachronism"¹⁶² and correctly calls the caption, "third party beneficiaries" a "fiction."¹⁶³ There was express or implied unanimous agreement among the members of the Committee that a buyer could bring an action against a remote seller, typically a manufacturer, if the action was based on express warranty but not on an implied warranty of fitness for a particular purpose. Absent direct dealing with a seller, there would appear to be no basis for discovering the elements of section 2-315, upon which a fitness warranty for a particular purpose could be based.

The disagreement among the Committee was centered on an action against a remote seller for breach of the implied warranty of merchantability where the goods were unmerchantable when they left the remote seller's possession.¹⁶⁴ One view suggests that where the action is based on breach of the implied warranty of merchantability, vertical privity should be restored to section 2-318. Vertical privity would be restored whether the plaintiff was a commercial or consumer buyer, thereby precluding a recovery against a remote manufacturer, regardless of the nature of the loss. Moreover, the Committee recommended that the remote seller should be able to exclude or limit liability to the dealer through an appropriate clause, regardless of the type of injury suffered by the ultimate purchaser. The Committee would permit express exceptions for express warranties or situations in

160. PRELIMINARY REPORT, *supra* note 13, at 109.

161. See *The Singer Co. v. E.I. DuPont De Nemours Co.*, 579 F.2d 433 (8th Cir. 1978).

162. PRELIMINARY REPORT, *supra* note 13, at 109.

163. *Id.* at 110.

164. *Id.* at 111.

which the plaintiff is an assignee of a warranty made by the seller to the plaintiff's assignor.¹⁶⁵ Another view suggests

that the privity requirement imposes unrealistic and unfair limitations upon a manufacturer's responsibility for unmerchantable goods. When these limitations are combined with the judicial refusal to impose tort liability [involving] only economic loss, there is less incentive for [the manufacturer] to improve product quality and buyers are left to the vagaries of the contracting process and the risk that their seller will be insolvent or out of business.¹⁶⁶

I suggest that a buyer reasonably expects to receive merchantable goods from a manufacturer or other remote seller. In terms of technical barriers and the recognition of the factual bargain of the parties, the dealer from whom a branded product is purchased is often irrelevant in the mind of the buyer. The manufacturer may avoid any express warranty by restricting its advertising statements to commendation, value or other "puff." To leave the buyer with goods that were unmerchantable when they left the factory is the ultimate recognition of form over substance. Section 2-318 should expressly abolish vertical and horizontal privity. We continue to forget that "privity," itself, is an anachronism. It is merely the name of a legal relation arising from right and obligation.¹⁶⁷ If we decide that right and obligation exist, the party is "in privity" and the converse is true. Privity is a legal conclusion which, by itself, is meaningless. Whatever the policy decision concerning an action against a remote manufacturer, it would be highly desirable to rid section 2-318 of any notion that "privity" is something more than it is.

There is the matter of dealing with bodily injury and injury to property under section 2-318, now that section 402A of the *Restatement (Second) of Torts* is widely recognized. It has long been an open secret that Llewellyn had precociously created a com-

165. *Id.* at 111-12.

166. *Id.* at 112 (citing Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void*, 67 B.U. L. REV. 9, 35-37 (1987)).

167. See the memorable statement of Justice Stone in *La Mourea v. Rhude*, 295 N.W. 304 (Minn. 1940): "Privity, in the law of contracts, is merely the name for a legal relation arising from right and obligation." *Id.* at 307.

prehensive products liability concept in a very early draft, which he proffered as part of his new Code, only to be told that he should keep tort law out of a sales statute.¹⁶⁸ More than two decades later, Professor Prosser and friends finally promulgated *Restatement* section 402A. In the meantime, because warranty theory had developed as a strict liability standard, Llewellyn felt compelled to include something in Article 2 to reflect that reality. Article 2, therefore, mentions "injury to person or property proximately resulting from any breach of warranty"¹⁶⁹ as one of the definitions of consequential damages in section 2-715(2)(b). It had to be snuck in the back door. The central question is, now that we have two mutually exclusive theories, how should we achieve symmetry?

Some time ago, Pennsylvania seemed to be moving in the direction of complete symmetry by suggesting that the caption atop the complaint should make no difference.¹⁷⁰ If actions for either breach of warranty or violations of section 402A are recognized for injury to the person or damage to property, there should be complete symmetry. This would require the abolition of privity and any remaining notice requirement under U.C.C. section 2-607(3)(a) that would not be required under 402A of the *Restatement*.¹⁷¹ The U.C.C. statute of limitations in section 2-725 should be emphatically restricted to contracts cases, i.e., loss of bargain cases.¹⁷² The notion that a party may still bring a

168. For an appreciation of Llewellyn's precocious efforts in this area, see John B. Clutterbuck, Note, *Karl Llewellyn and the Intellectual Foundations of Enterprise Liability Theory*, 97 YALE L.J. 1131 (1988).

169. U.C.C. § 2-715(2)(b) (1990).

170. See John E. Murray, Jr., *Products Liability—Another Word*, 35 U. PITT. L. REV. 255, 256 (1973); see also *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095 (3d Cir. 1980) (relying upon the Murray analysis), *cert. denied*, 450 U.S. 981 (1981).

171. Comment 5 to § 2-607 indicates that various beneficiaries do not fall within the reason of the section concerning discovery of defects and the giving of notice within a reasonable time after acceptance of the goods. Such beneficiaries have nothing to do with acceptance of the goods. The comment goes on to suggest that even such beneficiaries, however, must notify the seller that an injury has occurred. U.C.C. § 2-607 cmt. 5 (1990).

172. I prefer the more specific description, "loss of bargain" to the more general "economic loss." This is not to suggest that such language changes, alone, will be sufficient to provide absolute clarity to courts faced with the difficult problem of deciding whether a particular loss is essentially contractual or tortious in nature. See, e.g., *Northridge Co. v. W.R. Grace & Co.*, 471 N.W.2d 179 (Wis. 1991).

warranty action after section 402A's shorter torts statute of limitations has run is absurd.¹⁷³ The sheer coincidence that the goods were delivered to the buyer within four years of the filing of the action should not permit a party to circumvent section 402A's statute of limitations. It is equally absurd to preclude an action by a party sustaining bodily injury because the goods were delivered more than four years prior to the injury and the caption atop the plaintiff's complaint called the action one for breach of warranty.¹⁷⁴ If the action is for bodily injury or property damage, the torts (discovery) statute of limitations should apply. If the action is for economic loss in the form of a lost bargain, the present section 2-725 four year limitation from the time of tender of delivery should apply. The courts could have settled this matter.¹⁷⁵ Again, Llewellyn overestimated them. Finally, section 2-725 should remove the last scintilla of argument concerning the application of section 402A to loss of bargain claims. The U.C.C. must have exclusive application to such claims.

IV. UNCONSCIONABILITY

Some may be thrilled to learn that U.C.C. section 2-302 on unconscionability is now understood as part of general contract law, as evidenced by a replication of section 2-302 in the *Restatement (Second) of Contracts*, section 208, and, therefore, requires

173. See *Williams v. West Penn Power Co.*, 467 A.2d 811 (Pa. 1983).

174. Prior to the adoption of § 402A in New York, such a holding was countenanced in *Mendel v. Pittsburgh Plate Glass Co.*, 291 N.Y.S.2d 94 (Sup. Ct. 1967), *aff'd*, 253 N.E.2d 207 (N.Y. 1969).

175. In *Williams*, the lower court concluded that the four year statute of limitations in § 2-725 should not be read to apply to third-party beneficiaries injured by the product because it has nothing to do with such parties, *Williams*, 467 A.2d at 817-18, just as notice of breach after acceptance of goods under § 2-607(3)(a) has nothing to do with such third-party beneficiaries. See *supra* note 171. A third-party beneficiary is not an "aggrieved party" under § 2-725(2) until such party is "entitled to resort to a remedy," i.e., until she is injured. U.C.C. § 1-201(2) (1990). A buyer, however, is an "aggrieved party" from the time of the tender of delivery of the goods, "regardless of the aggrieved party's lack of knowledge of the breach." *Id.* § 2-725(2). The court could not discover a way to exclude a buyer from § 2-725. Thus, to be "fair," it held that § 2-725 had to apply to both buyers and third parties. In this, of course, the court failed to consider the purpose of § 2-725, which has nothing to do with injury to person or damage to property.

no revision.¹⁷⁶ Others may be startled to learn that section 2-302, which Arthur Leff once called "an emotionally satisfying incantation" demonstrating that "it is easy to say nothing with words" requires no revision.¹⁷⁷ The statutory language is devoid of any test to determine what is and what is not unconscionable. Leff was correct. It is emotionally satisfying, but that's it. If it is desirable to state a relatively clear parol evidence test in the statutory language rather than in the comments to section 2-202, as the Study Project Committee suggests,¹⁷⁸ it certainly seems desirable to state the basic unconscionability tests in section 2-302. Notwithstanding the substantial drafting challenge, the basic concepts of unfair surprise and oppression could be stated as the fundamental concepts of unconscionability. The comments then could elaborate and illustrate these concepts to further explain the unexpected and adhesive forms of unconscionability. If the basic tests were set forth in the revised section, the application of unconscionability could be elaborated in the comments. Certainly, the application of the doctrine to merchant contracts should be clarified, and I believe expanded, at least in the comments.¹⁷⁹ The argument that adherence to the formulas required to disclaim implied warranties precludes unconscionability should be expressly rejected with clear state-

176. This is the view of the Article 2 Study Project. PRELIMINARY REPORT, *supra* note 13, at 79-80. The Committee does recommend, however, substantial revisions in the comments to § 2-302 to clarify certain matters the Committee addresses on pages 80 and 81.

177. See Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 558-59 (1967). It should be noted that the Study Group does recommend changes in the comments to § 2-302 to clarify, *inter alia*, the scope and content of the standard.

178. See *supra* note 151.

179. The basic distinction between a party who meets the broad definition of a "merchant" in 2-104(1) but who otherwise would not have reasonably understood the fine print provided by a party with superior skill and bargaining power should be emphasized. See *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich. 1976). I would also like to see a new direction concerning merchants who do or should understand the fine print or other materially risk-shifting provisions that are thrust upon them, allowing such merchants to pursue a "no choice" (adhesive) unconscionability argument more effectively. For example, in *K & C, Inc. v. Westinghouse Electric Corp.*, 263 A.2d 390 (Pa. 1970), the court focused exclusively upon what the sophisticated plaintiffs should know and ignored the possibility of a severe lack of choice. *Id.* at 393.

ments that such adherence merely meets the threshold standards for recognition of such disclaimers.

There is a serious question as to whether consumers should be bound by material risk-shifting clauses which they would have little if any opportunity to understand. For example, where a preprinted form contains an exclusion of consequential damages, it may be desirable to view such a clause as *prima facie* unconscionable with respect to a consumer buyer.¹⁸⁰ The Study Group, however, has recommended the deletion of language in section 2-719(3) that declares a limitation on consequential damages in the case of consumer goods *prima facie* unconscionable where there is injury to the person. This is consistent with the Study Group's earlier recommendation that privity be reincarnated in section 2-318, even in cases involving injury to the person. Under my recommendation, the implied warranty of merchantability should not be disclaimable with respect to a consumer. Consumer buyers should never lose that warranty.

If consumers retained the implied warranty of merchantability without limitation and if limitations on consequential damages were *prima facie* unconscionable as to consumers, that protection, along with remedial assistance such as that already afforded by other state and federal legislation, finally would provide a level of protection consonant with a consumer's reasonable expectations and inability to understand or bargain out of material risk-shifting clauses. The reactions to such changes from some manufacturers would range from alarm to hysteria. Such reactions would be baseless.

We have moved from the ninety day and (later) one-year and 12,000 mile warranty on new automobiles to three-year "bump-to-bumper" express warranties and even longer express warranties against specified defects. The total consumer protection legislation in America has not caused this change. The cause was something called competition—essentially competition from

180. In *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634 (Tenn. Ct. App. 1987), the court held such a clause unenforceable even as to an automobile wholesaler without relying upon unconscionability. The court, instead, found no assent to such a clause by the plaintiff and applied a "circle of assent" analysis suggested by the author in an earlier edition of *Murray on Contracts*. *Id.* at 638; see JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* § 352 (2d rev. ed. 1974).

the Japanese. The quality of American automobiles has improved substantially because of this competition and not because of our legislation. We continue to live with ridiculously poor warranty protection with respect to electronic devices because Americans do not manufacture these products and there is no competition with the Japanese and Pacific Rim manufacturers.

American business is now consumed with a "total quality" concept to ascertain global competitiveness. Precluding disclaimers of implied warranties or exclusions of consequential damages at least in consumer products would further fuel the incentive to American corporations to create total quality products for sale throughout America and the world.

V. CURE, REJECTION, REVOCATION OF ACCEPTANCE, AND PERFECT TENDER

As the Study Project Committee recommends, section 2-508 should be revised to permit cure where the buyer justifiably has revoked acceptance of the goods.¹⁸¹ If a buyer accepts the goods and "contract time" remains, there is no satisfactory reason to preclude the seller's right to cure. The obstacle is the current section 2-508, which expressly contemplates only rejection. If, however, a buyer accepts goods and contract time remains, should a seller be precluded from its right to cure simply because the buyer has accepted the goods under one of the three methods of acceptance in section 2-606(1)? Refusing the seller's attempt at cure under these circumstances augurs bad faith.

Where contract time has expired, this rationale disappears. Section 2-508(2), however, does allow cure even where time has expired if the seller has reasonable grounds to believe its tender would be acceptable with or without a money allowance. It is interesting to consider the statement of the Article 2 Study Group concerning section 2-508(2):

The Study Group disagreed on whether a "cure" should be permitted after acceptance and after the time for performance had passed, even though the acceptance had been rightfully revoked under section 2-608(1). Resolution of this

181. PRELIMINARY REPORT, *supra* note 13, at 140-41.

issue is left for the Drafting Committee and, in any event, depends upon whether the "perfect" tender rule in section 2-601 is retained or rejected.¹⁸²

Under the current section 2-508(2) which begins with the phrase, "Where the buyer rejects a non-conforming tender . . .,"¹⁸³ cure after acceptance would be impossible. "Acceptance" may occur in three ways under section 2-606(1): (a) the buyer signifies that the goods are conforming or that he will take them in spite of their non-conformity; (b) the buyer fails to make an effective rejection after a reasonable opportunity to inspect, or (c) the buyer does any act inconsistent with the seller's ownership of the goods.¹⁸⁴ The current section 2-508(2) contemplates none of these methods of acceptance for the obvious reason that its operative effect is expressly conditioned upon the buyer's rejection. If the goods have been accepted in any of these three ways, the buyer cannot reject. Thus, section 2-508(2) currently is predicated upon the fact that there is still time to reject and the buyer, in fact, rejects the goods. Acceptance thereafter in any form is not contemplated by section 2-508(2).¹⁸⁵

If section 2-508 is revised to allow cure after revocation of acceptance,¹⁸⁶ the question is whether a seller who has reasonable grounds to believe such a tender would be acceptable may still cure. Because revocation of acceptance can only occur where there is substantial impairment of the value of the goods to the buyer and at least one of two other conditions have been met,¹⁸⁷ it may be difficult for a seller to prove that it had rea-

182. *Id.* at 143.

183. U.C.C. § 2-508(2) (1990).

184. *Id.* § 2-606(1)(a)-(c).

185. Even if the buyer, after rejecting, would perform an act inconsistent with the seller's ownership of the goods which would be wrongful against the seller, such an act would constitute acceptance of the goods only if the seller ratified such act as an acceptance. *Id.* § 2-606(1)(c).

186. This modification easily could be inserted in § 2-508(2) as follows: "Where the buyer rejects or revokes acceptance of a non-conforming tender"

187. Section 2-608(1) requires not only substantial impairment of the value to the buyer but one of two other conditions: (a) the buyer accepted the goods on the reasonable assumption that the nonconformity would be cured and it has not been cured, or (b) the buyer did not discover the nonconformity in time to reject because of the difficulty of discovering a latent defect or the seller had assured the buyer that no such defect existed. U.C.C. § 2-608(1)(a)-(b) (1990).

sonable grounds to believe that such a nonconforming tender would be acceptable. Such a situation, however, is not inconceivable. If a seller can establish such reasonable grounds, a buyer's rejection or revocation of acceptance under these circumstances is necessarily unreasonable. Why, then, should such a seller be deprived of "a further reasonable time to substitute a conforming tender"¹⁸⁸ simply because the buyer has revoked his acceptance rather than rejected the goods? The distinction appears to be technical and artificial. I would recommend, therefore, that both sections 2-508(1) and 2-508(2) be revised to contemplate revocation of acceptance as well as rejection.

A related concern is whether the "perfect tender" rule of section 2-601 should be retained. A majority of the Study Group recommends its retention with the addition of an express "good faith" requirement.¹⁸⁹ Expressing that which is necessarily implied to alert sellers that they cannot get away with technical rejections is not a bad idea. If that is all that the revisers are willing to do, I certainly agree. But what does it really do? It directs courts to preside over litigation that will focus upon the extent of the nonconformity and whether the buyer was apparently rejecting not because of the nonconformity but for other reasons, such as a falling market price. Under this test, a rejection could be in good faith even though there is no substantial impairment of the value of the goods to the buyer. Yet, where there is no such substantial impairment, the suspicion of a rejection for reasons unrelated to the nonconformity will be present. Because the present "perfect tender" rule is anything but absolute¹⁹⁰ and there is a dearth of case law on bad faith rejections (which might change with an express good faith requirement), it is time to change to a substantial impairment of value test. Whether a given nonconformity substantially impairs the value of goods will spawn a certain amount of litigation. But that

188. *Id.* § 2-508(2).

189. PRELIMINARY REPORT, *supra* note 13, at 157-59.

190. The present rule is subject to the parties' agreement to the contrary, § 2-601, an implied good faith limitation, the seller's right to cure, § 2-508, the loss of the right to reject upon the occurrence of any of the three methods of acceptance in § 2-606(1), and the application of the substantial impairment of value test in installment contracts, § 2-612.

question is essentially one of whether the breach is material—a concept which is familiar to courts. The new test avoids any necessity of dealing with questions of good faith in relation to an immaterial breach, as it much more forcefully and clearly tells buyers that they had better have a sound reason for rejection.

VI. NOTICE UNDER SECTION 2-607(3)(A)

Like the Study Group, I recommend a change in the notice test of section 2-607(3)(a) which emanates from curious language in current comment 4. The comment begins by saying that notice of breach with respect to accepted goods under section 2-607(3)(a) need only indicate that the transaction is still troublesome, i.e., it would not be necessary to expressly inform the seller that the buyer is treating the contract as breached. Later in the same comment, however, there is a statement that the seller must be informed “that the transaction is claimed to involve a breach”¹⁹¹ Where a buyer is cajoling a seller to perform, a notice that informs the seller that upon completion of performance the buyer intends to sue the seller is counterproductive to maintaining the contract and furthering complete performance, which is presumably the intention of the section 2-607(3)(a) notice requirement.¹⁹² The statutory language should contain the notice test and it should not require notice of express claim of breach.

VII. THE “SUBJECTIVE” TEST OF SECTION 2-608

A revision should clarify the “subjective” test of section 2-608(1): “The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him”¹⁹³ Any remaining doubt about the test is removed by a comment which makes it clear the test is whether the nonconformity will, in fact, cause a substantial impairment

191. U.C.C. § 2-607 cmt. 4 (1990).

192. Though the court in *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976), seemed to appreciate this fact, it still suggested a notice that would inform the seller that the buyer is treating delays in delivery as breaches. *Id.* at 973.

193. U.C.C. § 2-608(1) (1990).

to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.¹⁹⁴ Because our courts are surrounded by objective tests, they have not been entirely comfortable with this subjective test and have largely concluded that the test is "subjective" in that substantial impairment is determined as to the actual buyer with his idiosyncracies rather than a reasonable buyer.¹⁹⁵ Thus, whether there was substantial impairment "to him" depends objectively on whether the value of the goods would be substantially impaired to someone "like him." This is a reasonable clarification that should be more clearly manifested in the section or, at least, in the comments.

VIII. REMEDIES

The product of the Article 2 Study Project dealing with buyer and seller remedies may be the single most important contribution made by the Study Group.¹⁹⁶ It is extremely important to begin the section on remedies in section 2-701 with a general restatement of the protection of the expectation interest and recognition of the reliance and restitution interests. The general principles of mitigation should pervade the entire remedial context, include a general principle that remedies are cumulative, and should reject any artificial doctrine of election of remedies.¹⁹⁷ I have no disagreement with the specific recommendations of the Study Group in any remedial section. I am in emphatic agreement that section 2-718(1) should be revised to reaffirm the purpose of liquidated damages clauses as good faith forecasts of likely damages at the time the contract is formed with no concern for actual damages. The present section 2-718(1) allows for the enforcement of clauses intended to be penalties at the time of contract formation only because actual unforeseeable damages occur.¹⁹⁸ It is unfortunate that the *Restatement* (Sec-

194. *Id.* § 2-608 cmt. 2.

195. *See, e.g.,* *Jensen v. Seigel Mobile Homes Group*, 668 P.2d 65 (Idaho 1983); *Asciolla v. Manter Oldsmobile-Pontiac, Inc.*, 370 A.2d 270 (N.H. 1977).

196. PRELIMINARY REPORT, *supra* note 13, at 193-247.

197. *Id.* at 194-96.

198. *See* MURRAY ON CONTRACTS, *supra* note 60, § 125B.3.

ond) of *Contracts* drafters felt compelled to "follow the Code" by replicating this faulty analysis.¹⁹⁹

IX. FAILURE OF ESSENTIAL PURPOSE

In light of the confusion in the case law and commentary concerning "failure of essential purpose" in section 2-719(2), that section requires considerable clarification.²⁰⁰ Section 2-719(1) allows the parties to agree upon different remedies, including limitations upon normal Article 2 remedies such as repayment of the purchase price or repair or replacement of nonconforming goods. If a buyer agrees to a remedy such as repair and replacement of nonconforming goods and that remedy fails of its essential purpose under section 2-719(2) (the seller cannot or will not cure), what is the buyer's replacement remedy? Certainly the buyer should be able to effectuate cure through another source (i.e., either repair or replacement of the nonconforming goods). This would provide the buyer with direct damages. The recurring problem, however, is whether the buyer is entitled to normal consequential damages under circumstances where the contract expresses an exclusion of these damages.

Parties can agree, of course, that consequential damages will be excluded regardless of the failure of a sole and exclusive remedy, so long as "minimum adequate remedies" or "a fair quantum of remedy" are available.²⁰¹ The problem is whether they, in fact, so agreed. Again, we inquire into their true understanding or the genuine factual bargain of the parties. Careful drafting can emphasize the "sole and exclusive" nature of the limited remedy and it can separate the exclusion of the consequential damages clause from the substituted repair or replacement warranty to emphasize its independent exclusion, regardless of what occurs with respect to the sole and exclusive limited remedy. It may even go so far as to state expressly the consequences of the failure of essential purpose of the limited remedy

199. See RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1979).

200. For an analysis of the different judicial approaches at this time, see *Cooley v. Big Horn Harvestore Sys., Inc.*, 813 P.2d 736 (Colo. 1991).

201. U.C.C. § 2-719 cmt. 1 (1990). The Study Group suggests that "fair quantum" may be more precisely stated. See PRELIMINARY REPORT, *supra* note 13, at 237.

(e.g., restitution of the purchase price in exchange for the goods) with an intention to exclude consequential damages.²⁰² The question then arises whether such a clause may be unconscionable.

As suggested earlier, the judicial reaction to an unconscionability argument between merchants has not been favorable. If consequential damages are to be excluded even where the limited remedy has failed of its essential purpose, section 2-719 should be revised in the section language and/or the comments to police against any unfair surprise or oppression with respect to even carefully drafted clauses. The most certain method would require separate authentication of such a clause by the purchaser. Short of that, section 2-719 should indicate that the exclusion of consequential damages where the remedy has failed of its essential purpose is *prima facie* unconscionable. At a minimum, the comments to section 2-719 should encourage an expanded concept of unconscionability under such circumstances.²⁰³

Finally, the comments to section 2-719 might address the problem of the situation where repair or replacement occurs but the cure takes longer than either buyer or seller would have anticipated. To take a paradigmatic situation, a new generator is defective and the manufacturer-seller spends a great deal of time and effort repairing the sophisticated defect. While the buyer is pleased with the repair effort, it has been forced to purchase substitute power over several months at great cost. The buyer signed a contract excluding consequential damages, but, *quaere*, should the entire risk of unanticipated consequentials fall upon the buyer? Remembering that it was the seller's defective product that caused the loss, it may be desirable to allow courts to allocate the consequentials between the parties in a fair fashion to ascertain decent commercial practice in accordance with the underlying philosophy of Article 2. Though I recognize that such a new design may appear quite

202. See *Moscatiello v. Pittsburgh Contractors Equip. Co.*, 595 A.2d 1190 (Pa. Super. Ct. 1991).

203. *Id.* at 1195-96. In this case, the court affirms an analysis of unconscionability to which I am particularly partial. It had been adopted previously in *Germanatown Manufacturing Co. v. Rawlinson*, 491 A.2d 138, 146 (Pa. Super. Ct. 1985).

radical in our "all-or-nothing" remedial system, if Article 2 is to promote decency in commercial relationships, the new Article 2 should foster that purpose.²⁰⁴

X. CONCLUSION

It is difficult to ponder a revision of Article 2 without wondering what Karl Llewellyn would have recommended in light of four decades of experience. I believe he would not only have kept the Article 2 prism intact but would have used all of his creative energy to deepen its underlying philosophy. He would have warred against technical and artificial barriers that were not destroyed at the outset as well as those "covert tools" that have since been developed by courts and others. I believe that he would have focused even more intensely on the factual bargain of the parties as the central theme in Article 2. I can see Llewellyn with shirt sleeves rolled up, hands stuffed in hip pockets, standing before a group of the most learned and telling them in no uncertain terms how they got it wrong and how it must be changed. He would provide them with demonstrations of decency in myriad commercial relationships to illustrate any needed changes. He would ask all of us to assume certain risks to ascertain that such decency prevails and that the last lawyer's trick is abandoned.

It is time to assume those risks. It is time to recognize the monumental contribution of Karl Llewellyn and the fact that his basic purpose was good and true. It is time to reaffirm that pur-

204. Comment 6 to § 2-615 (the commercial impracticability section) suggests the use of "equitable principles in furtherance of commercial standards and good faith" where "neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or 'no excuse.'" Unfortunately, this invitation has seen preciously little judicial application. For a rare suggestion of its desirability, see the concurring opinion in *McGinnis v. D. B. Cayton*, 312 S.E.2d 765, 779 (W. Va. 1984). See also Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1 (discussing the limited but effective applicability of judicial modification of contracts); M.N. Kniffin, *A Newly Identified Contract Unconscionability: Unconscionability of Remedy*, 63 NOTRE DAME L. REV. 247 (1988) (discussing the innovativeness and practical applicability of § 351(3) of the *Restatement (Second) of Contracts* on the unconscionability of remedy).

pose and to create a new Article 2 that he would view as the perfection of his earlier work. All of this is necessary because Karl Llewellyn was not only precocious, he was right.