AN APPRAISAL OF THE MARCH 1, 1990, PRELIMINARY REPORT OF THE UNIFORM COMMERCIAL CODE
ARTICLE 2 STUDY GROUP

PREPARED BY A TASK FORCE OF THE A.B.A.
SUBCOMMITTEE ON GENERAL PROVISIONS, SALES,
BULK TRANSFERS, AND DOCUMENTS OF TITLE,
COMMITTEE ON THE UNIFORM COMMERCIAL CODE*

TABLE OF CONTENTS**

Page
Preface ................................................................. 984
Revision or Clarification Through the Use of Code Comments ... 996

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* The members of the Task Force who participated in the preparation of this Appraisal were Roy Ryden Anderson, Roger D. Billings, Jr., Donald F. Clifford, Jr., David Frisch, Henry Gabriel, Gregory Gelfand, Mark E. Roszkowski, Peter Winship, and John Wladis. As a member of the Task Force, Professor Winship prepared a memorandum on the relevance of the U.N. Convention on Contracts for the International Sale of Goods, for the revision of Article 2. This memorandum is not reproduced here.

This article represents a consolidation of the Article 2 Study Group's Preliminary Report and the A.B.A. Task Force's Appraisal of the Study Group's Preliminary Report.

The Study Group's Preliminary Report and the appendices to the Task Force's Appraisal are unedited and reprinted in full. The Study Group's Preliminary Report is presented in italics, and bold typeface is used to emphasize the Study Group's recommendations.

The Study Group’s remarks concerning each U.C.C. section are followed by the corresponding remarks from the Task Force's Appraisal. Each part of the Study Group's Preliminary Report contains an independent series of footnotes commencing with the number "1." The Task Force's Appraisal contains one continuous series of footnotes.

Please note that the Study Group is occasionally referred to as the "Study Committee" in the Study Group's Preliminary Report.

** Table of Contents references are to the A.B.A. Task Force's Appraisal. U.C.C. sections italicized in the Table of Contents are exclusively discussed in the Study Group's Preliminary Report, and the corresponding page numbers refer to the Preliminary Report.

981
The Substantive Coverage of Article 2 ............................... 997
Consumer Considerations ............................................... 1000
Article 1—Part 1 ............................................................ 1010
  1-103 ........................................................................ 1010
  1-105 ........................................................................ 1013
  1-106 ........................................................................ 1014
  1-201(9) ..................................................................... 1015
  1-203 ........................................................................ 1016
  1-205 ........................................................................ 1019
  1-206 - 1-207 .......................................................... 1019-1020
Article 2—Part 1 ............................................................ 1021
  2-101 ........................................................................ 1021
  2-102 ........................................................................ 1025
  2-103 ........................................................................ 1029
  2-104 ........................................................................ 1030
  2-105 ........................................................................ 1031
  2-106 ........................................................................ 1031
  2-107 ........................................................................ 1032
Article 2—Part 2 ............................................................ 1038
  2-201 ........................................................................ 1038
  2-202 ........................................................................ 1045
  2-203 ........................................................................ 1050
  2-204 ........................................................................ 1050
  2-205 ........................................................................ 1051
  2-206 ........................................................................ 1053
  2-207 ........................................................................ 1057
  2-208 ........................................................................ 1067
  2-209 ........................................................................ 1070
  2-210 ........................................................................ 1073
Article 2—Part 3 ............................................................ 1084
  2-301 - 2-312 .............................................................. 1073-1081
Warranties - General ....................................................... 1084
  2-313 ........................................................................ 1089
  2-314 - 2-315 .............................................................. 1105-1106
  2-316 ........................................................................ 1108
  2-317 - 2-328 .............................................................. 1112-1121
Article 2—Part 4 ............................................................ 1121
  2-401 - 2-402 .............................................................. 1121-1122
  2-403 ........................................................................ 1125
Article 2—Part 5 ............................................................ 1128
  2-501 ........................................................................ 1128
  2-502 ........................................................................ 1129
2-503 ........................................................................ 1131
2-504 - 2-506 ............................................................... 1132-1133
2-507 ........................................................................ 1135
2-508 ........................................................................ 1138
2-509 ........................................................................ 1152
2-510 ........................................................................ 1154
2-511 - 2-515 ............................................................... 1155-1157

Article 2—Part 6 .............................................................. 1159
2-601 ........................................................................ 1159
2-602 - 2-606 ............................................................... 1160-1163
2-607 ........................................................................ 1165
2-608 ........................................................................ 1168
2-609 ........................................................................ 1170
2-610 - 2-611 ............................................................... 1171-1173
2-612 ........................................................................ 1175
2-613 ........................................................................ 1192
2-614 ........................................................................ 1194
2-615 ........................................................................ 1198
2-616 ........................................................................ 1203

Article 2—Part 7 .............................................................. 1205
2-701 ........................................................................ 1205
2-702 ........................................................................ 1210
2-703 ........................................................................ 1211
2-704 ........................................................................ 1212
2-705 ........................................................................ 1213
2-706 ........................................................................ 1215
2-707 ........................................................................ 1216
2-708 ........................................................................ 1222
2-709 ........................................................................ 1226
2-710 ........................................................................ 1227
2-711 ........................................................................ 1228
2-712 ........................................................................ 1228
2-713 ........................................................................ 1231
2-714 ........................................................................ 1233
2-715 ........................................................................ 1234
2-716 ........................................................................ 1236
2-717 ........................................................................ 1237
2-718 ........................................................................ 1239
2-719 ........................................................................ 1243
2-720 ........................................................................ 1244
2-721 ........................................................................ 1244
2-722 ........................................................................ 1245
PREFACE

In the spring of 1988, the Permanent Editorial Board for the Uniform Commercial Code, with the approval of the National Conference of Commissioners on Uniform State Laws and the American Law Institute, began a formal study of Article 2 with the goal of reaching a decision as to whether the text should be revised. To this end, a Study Group was appointed, and Professor Richard E. Speidel of Northwestern University was selected to serve as Project Director. On March 1, 1990, after two years of study, the Study Group issued a 245-page preliminary report for general public discussion and consideration. 2

The Business Law Section of the American Bar Association has long played an important role in the evolutionary development of the Uniform Commercial Code. Since 1947 it has, through its divisions and committees, carefully studied each draft as it was produced, ex-

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1 See Speidel, Committee Studies Revising U.C.C. Article 2, 8 Bus. Law. Update 3 (1988) (No. 6) (discussing the Article 2 Study).
2 An Executive Summary was issued by the Study Group on March 1, 1991. On August 6, 1991, the National Conference of Commissioners on Uniform State Laws authorized the creation of an Article 2 Drafting Committee and the appointment of a Reporter.
pressed opinions on policy matters, and made suggestions for improvements. Continuing this tradition of participation, the Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title of the Committee on the Uniform Commercial Code undertook the task of formulating conclusions with respect to the Preliminary Report. The work of the Subcommittee began in May 1990 with the assembling of a ten-member Task Force. What follows is the report of that task force.

In the preparation of its report, the Task Force sought to consider not only the substantive content of the Study Group’s section-by-section recommendations, but also more pervasive matters such as the scope and approach of the Preliminary Report. Although not all members of the Task Force share the Study Group’s implicit viewpoint that revision is due for Article 2, the prevalent opinion is that the bulk of the Study Group’s recommendations are sound and that revision is desirable. Other subcommittees of the Uniform Commercial Code Committee of the American Bar Association have also conducted studies of the Preliminary Report, and their reports should be looked to for more particularized views of the Preliminary Report.

David Frisch, Chair
Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title

NOTE: The opinions and conclusions expressed in the Task Force Report were not submitted to any body for approval. The Report does not necessarily reflect the opinion of the full Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, the Uniform Commercial Code Committee, the Business Law Section, or the American Bar Association.
[PRELIMINARY REPORT - INTRODUCTION]

ARTICLE 2, SALES:
HISTORY, DRAFTING AND BASIC POLICIES

A. A BRIEF LEGISLATIVE HISTORY OF ARTICLE 2.

The British Sale of Goods Act, enacted by Parliament in 1893, was used by Professor Samuel Williston as a model for the Uniform Sales Act (USA), which was promulgated in 1906. The USA was ultimately enacted in 34 states, the last enactment occurring in 1941. Grant Gilmore, writing in 1948, described the USA as a "scholarly reconstruction of 19th Century law" which, in 1906, "failed to move the law much closer to us than 1850." It was, in short, a prime example of what he and others have called "classical" contract law.

In 1937, the Federal Sales Bill (The Chandler Bill), which was sponsored by the New York City Merchant's Association and other commercial groups, was drafted. The Bill, which was based on the USA, was introduced in Congress in 1937 but never enacted. The first drafts of a revised Uniform Sales Act were completed in 1940. These early efforts culminated in 1944 with a proposed Uniform Revised Sales Act. The 1944 Draft was a joint project of the National Conference of Commissioners on Uniform State Laws (NCGUSL) and the American Law Institute. Karl N. Llewellyn was the Reporter and Soia Mentschikoff

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1. Discussions of English sales law prior to 1893 are found in Llewellyn, Across Sales on Horseback, 52 Harv. L. Rev. 725 (1939); Stone, The Origins of the Law of Sales, 29 L.Q. Rev. 442 (1913).


5. See I Kelly at 174-260.

6. The 1944 Draft with extensive commentary is reprinted in II Kelly 1-79, 80-278.
was the Associate Reporter for the 1944 draft and for much of the work that followed.

By 1949, there was a first draft of a proposed Uniform Commercial Code with comments. In the 1949 Draft, Article 2, Sales, was a further revision of the Uniform Revised Sales Act. In May, 1950, a “Final Draft” of the UCC, with Text and Comments, was proposed. But in September, 1950, further revisions in Article 2 were recommended and the work continued. A Proposed “text only” Final Draft #2 was then issued in the Spring of 1951 and an Official Draft with Comments was issued later that year. Text changes in this draft were proposed by the recently created Editorial Board for the UCC (EB), and the 1952 Official Draft, with changes, was finally promulgated as the 1953 Official Text. The 1953 Official Text of the UCC was enacted by Pennsylvania in April 1953, effective on July 1, 1954. In response to a recommendation by the Association of the Bar of the City of New York, the New York Law Revision Commission held extensive hearings on the UCC in 1954. A detailed report of their analysis and conclusions was issued in 1955, and a condensed report and recommendation was submitted to the New York General Assembly in 1956. The conclusions were critical of the 1953 Official Draft of the UCC, including Article 2. The New York Report prompted the EB to review earlier

7. See VI Kelly 47-263.
8. Article 2 of that Draft is reprinted in X Kelly 351-55. The proposed drafts of Article 2 in 1949 and 1950 were the subject of Professor Williston’s famous attack, Williston, The Law of Sales in the Proposed Uniform Commercial Code, 63 Harv. L. Rev. 561 (1950), and Professor Corbin’s spirited defense, Corbin, The Uniform Commercial Code-Sales: Should it be Enacted?, 59 Yale L.J. 821 (1950).
10. XIV Kelly 43-174.
11. XVI Kelly 55-264.
13. XV Kelly 307-42.
15. Two conclusions of the Report were that the UCC was “not satisfactory in its present form” and that it “cannot be made satisfactory without comprehensive re-examination and revision in the light of all critical comment obtainable.” Report of the Law Revision Commission to the Legislature Relating to the Uniform Commercial Code, Leg. Doc. 65A, 57-8 (1956). See also, Braucher, Legislative History at 803-04.
16. See Report of the Law Revision Commission to the Legislature at 40-46. According to William Schnader, the Commission discussed 40 of Article 2’s 102 sections. Of these 22 were approved, 13 were criticized but none was disapproved. More importantly, the Commission approved the five main features of Article 2, namely: (1) Abandonment of title as a test for determining legal obligations; (2) The distinction between merchant and non-merchant sellers and buyers; (3) Relaxation of the statute of frauds; (4) New provisions dealing with rules of construction or the implication of particular terms; and (5) Significant
recommendations for change in the 1953 Text of Article 2\textsuperscript{17} and to recommend further revisions in 1956.\textsuperscript{18} These second thoughts lead to the promulgation of the 1958 Official Text with Comments\textsuperscript{19} and the ultimate enactment of the complete UCC by every state except Louisiana.\textsuperscript{20}

Although other Articles of the UCC have been revised since 1958\textsuperscript{21} and a new Article 2A, Article 4A and Article 6 have been promulgated, the Official Text of Article 2 remains fundamentally the same.\textsuperscript{22} In the Spring of 1988, however, the Permanent Editorial Board\textsuperscript{23} 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. The charge to the Study Group was to identify "major problems of practical importance" in the interpretation and application of Article 2.\textsuperscript{24} The Study also provides an opportunity to consider whether Article 2 is drafted as a coherent whole and contains the internal unity necessary to support its underlying policies and to achieve harmony with other Articles in the UCC.\textsuperscript{25}

B. DRAFTING ARTICLE 2: UNDERLYING POLICIES.

1. Drafting Dilemmas.

Grant Gilmore argued that the purpose of general commercial legislation should be to "clarify the law about business transactions rather than change changes in remedies. See Symposium, Panel Discussion of the UCC-Report of the New York Law Revision Commission-Areas of Agreement and Disagreement, 12 Bus. Law. 49, 51 (1956). For a more focused discussion of the Commission's conclusions on Article 2, see Pasley, Id. at 59-60.

17. These recommendations, proposed in 1955, are reprinted in XVII Kelly 323-32. See also, Id. at 414-25.

18. XVIII Kelly 43-110.

19. XX Kelly 346 et seq.

20. Louisiana has now enacted all of the UCC except Articles 2, 2A and 6.

21. The main revisions were of Article 9 in 1972 and Article 8 in 1978. A revision of Articles 3 and 4 is scheduled for completion in 1990.

22. In 1966, § 2-702(3) was revised to delete the phrase "or lien creditor." In 1972, § 2-107(1) was revised to include "oil and gas" within the definition of minerals and § 2-107(2) was revised to add the phrase "or of timber to be cut." More recently, the PEB has published "commentary" on particular provisions, which is designed to clarify recurring disputes over proper interpretation.

23. The Editorial Board of the Uniform Commercial Code became the Permanent Editorial Board (PEB) in 1961.

24. For an excellent analysis, see Leary & Frisch, Is Revision Due for Article 2, 31 Vill. L. Rev. 399 (1986)(hereinafter Revision).

the habits of the business community'" and that the principal object of a draftsman is to be "accurate and not to be original."26 Let us accept this as a working principle, even though we may deviate upon occasion. Since clarification and accuracy presuppose some knowledge about business "habits," two important dilemmas were posed for the drafters of Article 2.

First, it is hard to be accurate without knowledge of relevant practices. At the inception of Article 2 there was no fund of data systematically gathered to inform the drafters. Moreover, access to such data is complicated by the variety of contexts within which goods are sold and the different functions performed by sellers and buyers. One could expect different habits depending on whether the goods sold are race horses or computer software or natural gas or clothing or new automobiles or factory equipment or whether the seller is a jobber rather than a manufacturer or whether the buyer purchases for commercial consumption or resale or consumer consumption. In these overlapping contexts, actual business practices are difficult to identify and quantify, much less to evaluate.

Second, there are some "habits" of the business community that may need changing. Granted, the law of crimes, torts, antitrust, unfair competition and fraud is there to deter and punish egregious misconduct. Should, then, a commercial statute be concerned about bad habits that fall between the cracks and, if so, how does one determine what is bad and what remedies are appropriate? The question has particular relevance for disputes where the buyer is a consumer, i.e., an individual who purchases for personal, family or household purposes.

In the paragraphs to follow, we will briefly (1) examine how these drafting dilemmas were resolved in the 1958 Official Text of Article 2 and (2) recommend how a Drafting Committee might proceed in the revision of Article 2.

2. Underlying Policies.

Article 2, Sales, deals primarily with contracts for the sale of goods. Article 2 may cover other transactions in goods, either directly or by analogy, but the primary transaction is the sale.27

Within this transactional limitation, Article 2, aided by the general definitions and provisions of Article 1, avoids the first drafting dilemma by utilizing flexible standards, such as commercial reasonableness and good

27. See § 2-106(1), which states that in Article 2 "unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods."
faith, rather than rules that purport to capture and solidify prevailing practices and norms. Each dispute between a seller and buyer is placed in its functional setting where the parties are expected to find and prove relevant "habits," i.e., trade usage or practices, as part of the agreement. 28 Under these standards, the court is given flexibility (at some cost to certainty and administrability) to resolve the new or unique dispute. Moreover, standards are thought to reduce the gap between law and practice and to inscribe that decisions are practical and responsive to the needs, proven in the particular case, of the parties and the relevant business community. 29

In addition to this emphasis upon standards and the rejection of "title" as a problem solving concept, 30 several other basic policies underlie the drafting approach in Article 2.

(a) Broad Scope and Effect of Agreement.

An underlying purpose of the UCC is to "permit the continued expansion of commercial practices through custom, usage and agreement of the parties..." § 1-102(2)(b). This purpose 31 is implemented, in part, by a broad definition of agreement in § 1-201(3), and the delegation to the parties of power, albeit limited, to choose which state's version of Article 2 applies, § 1-105(1), and to vary "the effect of provisions of this Act...by agreement..." § 1-102(3).

These provisions, supplemented by § 1-205, entitled "Course of Dealing and Usage of Trade," are relevant to a wide range of issues of liability and remedy arising under Article 2. 32 Thus, under Article 2, the expansible

28. See § 1-201(3). Peters states, for example, that the performance obligation is stated in "terms of operative facts rather than legal conclusions." The emphasis is upon actual, provable circumstances within the control of the parties rather than upon rules within the control of the courts. Roadmap at 202.

29. Cf. Eisenberg, The Responsive Model of Contract Law, 36 Stan. L. Rev. 1107, 1109 (1984), who asserts that "law is...a purposive institution whose principles and theories are normative and prescriptive...[and that] contract is a social institution before it is a legal institution, and the rules of contract law must respond to the social institution, not to autonomous legal conventions."

30. § 2-401.

31. Section 1-102(1) provides that this "Act shall be liberally construed and applied to promote its underlying purposes and policies" and then, in § 1-102(2), states what those purposes and policies are.

32. Whether the agreement of the parties is in law a contract for sale is a separate question. See § 1-201(11), where "contract" is defined to mean the "total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." Cf. § 2-106(1)(defining the scope of the phrase "contract for sale").
agreement of the parties, i.e., the "bargain in fact," rather than the promise provides the foundation stone of the transaction.33

One important consequence of this approach is that values and norms which are "imminent" in the relevant context may be extracted and applied by the court, whether they emerge in determining the agreement in fact of the parties or in filling "gaps" in that agreement.34 In theory, at least, differences created by the types of goods sold and the economic roles played by the seller and buyer should emerge in the litigation process.

(b) Application of Standards in the Absence of Agreement: "Gap" Filling.

Article 2 may impose obligations on parties whose agreement is incomplete or omits material terms. There are no rules of offer and acceptance that state how much agreement must be reached before a contract exists. Rather, Article 2 provides flexible standards that depend upon (a) what the parties intended or (b) what they would have intended if they had considered it (the so-called "hypothetical" bargain.)

The "intention" test is illustrated by § 2-204(3), which provides that "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." Conduct by both parties which "recognizes the existence of such a contract" is the best evidence of intention. § 2-204(1). See § 2-207(3). If the requisite intention to conclude the bargain is not present, however, no contract is formed. Compare § 2-305(2). If the requisite intention is present, enforceability depends upon the certainty of the agreement. This, in turn, depends upon relevant facts derived from the commercial context.

The "hypothetical" bargain is illustrated by the provisions in Article 2, Part 3.35 If the parties have intended to contract but have not agreed upon a particular term, the court is invited to supply a "reasonable" term to fill the "gap." Thus, if the price was not agreed, the parties are bound by a "reasonable price at the time for delivery." § 2-305(1).36 The


35. See also § 1-204, which concerns the requirement of "reasonable" time.

36. If a reasonable price is not established, the contract fails for indefiniteness. § 2-204(3).
assumption here is that the appropriate norms, i.e., the "situation sense," can be derived from the surrounding commercial context. Consistency with a consent based theory is maintained by assuming that the "off the rack" terms would have been agreed to if considered by the parties.

(c) The "Merchant" Standards.

With few exceptions, Article 2 does not differentiate between sellers and buyers, whether they are in commercial or consumer transactions. That exception concerns transactions involving or "between" merchants, as that person is defined in § 2-104(1). In these situations, different or higher standards bind the merchant than those applicable to others. For example, only a merchant seller can make a firm offer, § 2-205, or an implied warranty of merchantability, § 2-314(1). In addition, merchants have a higher duty of good faith, § 2-103(1)(b), and greater power to pass good title § 2-403(2), and may ignore certain writings at their peril, §§ 2-201(2) & 2-207(2).

The "merchant" standards, which are limited to Article 2, have been subjected to extensive analysis and evaluation. Despite questions about their origins and effect, they reflect a common sense judgment about the responsibilities of persons involved in commerce. As one commentator put it, "it may be said that what's good for businessmen in Article 2 is good for the rest of us." Nevertheless, one can question whether this endorsement should apply to consumers or whether the "merchant" standards should be applied to other articles of the UCC.

37. See Gedid, supra Note 34 at 361-71, discussing Llewellyn's approach to commercial law. See also, Restatement, Second, Contracts § 204 which provides: "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."
39. See § 2-104(3).
40. See, e.g., Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 Harv. L. Rev. 465 (1987)(arguing that because Llewellyn did not accomplish all that he intended in the drafting process, the "merchant" rules in Article 2 emerged in a patchwork and sometimes incoherent fashion).
(d) Legal Controls on the Agreement: Unconscionability and Good Faith.

Two important limitations upon the "bargain in fact" are the requirement that a contract or clause not be unconscionable "at the time it was made," § 2-302(1), and the imposition of an obligation of good faith on the "performance or enforcement" of every contract or duty with the UCC. § 1-203.

The unconscionability requirement is imposed by and apparently limited to Article 2. It operates, primarily, at the time of contracting\(^{42}\) to protect one party from bargaining abuses that are not otherwise regulated by the doctrines of fraud, duress or mistake. Despite early criticism of § 2-302,\(^{43}\) the courts have exercised restraint in identifying what has been called "procedural" unconscionability\(^{44}\) in both consumer and commercial transactions.\(^{45}\)

The duty of good faith is imposed in Article 1, see § 1-203, and is elaborated in Article 2 through a higher, objective standard of good faith for merchants. § 2-103(1)(b). It operates, primarily, after the contract has been formed. Despite acceptance of the duty in general contract law,\(^{46}\) there is continuing disagreement about such questions as the scope of duty, what conduct constitutes bad faith and the remedies that are available when bad faith is established.\(^{47}\)

Despite their statutory origins, both limitations now find wide acceptance in general contract law.

Rec. Int. (1)

The Study Group endorses the drafting style utilized in Article 2 and recommends that the general sales policies, discussed above,


\(^{44}\) See Epstein, Unconscionability: A Critical Reappraisal, 18 J. Law & Econ. 293, 315 (1975)(distinguishing between defects in the process of contract formation ("procedural") and complaints about the substance of the terms included in the apparent bargain ("substantive").

\(^{45}\) See Mallor, Unconscionability in Contracts Between Merchants, 40 Sw. L.J. 1065 (1986).

\(^{46}\) See Restatement, Second, Contracts § 205.

\(^{47}\) An important article is Summers, Good Faith in General Contract Law and the Sales Provisions of the UCC, 54 Va. L. Rev. 195 (1968). For a recent application, see Andersen, Good Faith in the Enforcement of Contracts, 73 Iowa L. Rev. 299 (1988).
be retained. There is little evidence that these policies have interfered with commerce by creating an unacceptable level of uncertainty for the parties or administrative costs for the courts. Rather, the policies appear to establish a commendable balance between facilitation (efficiency) and regulation (fairness) in contracts for sale where neither party is a consumer. Above all, they delegate power to the parties to fashion their own agreement.

We recommend that the Drafting Committee consider ways beyond those recommended by the Study Group to articulate these policies and to improve their implementation. The objective is to achieve a more complete utilization of them by the parties and the courts in the resolution of commercial disputes.

C. CONSUMER PROTECTION.

A second drafting dilemma concerns the extent to which a commercial statute should attempt to deter or alter the conduct of persons engaged in a trade or of parties to the contract for sale. The Article 2 solution is to invoke general standards to reject commercially unreasonable practices, avoid unconscionable contracts or clauses and treat bad faith performance or enforcement as a breach of contract regardless of who the parties are. Beyond that, Article 2 is neutral when direct issues of regulation are posed. There are no special provisions designed to provide protection to a consumer buyer in transactions with a merchant seller. Rather, § 2-102 simply provides that Article 2 does not impair or repeal "any statute regulating sales to consumers, farmers or other specified classes of buyers."

Since the 1958 Official Text was approved, there have been numerous important developments in consumer protection on both the federal and state level. They include the increased regulation of both credit and sales practices, as well as the content of the consumer contract for sale and the growth of state "little" FTC Acts which are invoked in both consumer and commercial transactions. There are, however, noticeable gaps in coverage where Congress


49. § 2-103(3) incorporates for Article 2 the definition of "consumer goods" found in § 9-109(1). § 2-719(3), dealing with the validity of clauses limiting consequential damages "for injury to the person in the case of consumer goods," is the only substantive section of Article 2 that mentions consumer goods.

or the FTC has failed to go far enough and other state legislation is incomplete or non-existent. For example, many states either have failed to enact comprehensive consumer protection legislation or have enacted legislation, such as the "lemon" laws, that does not fill the gaps in coverage under the Magnuson-Moss Warranty Act. This result has been criticised by some commentators.\footnote{See generally, Rice, Product Quality Laws and the Economics of Federalism, 65 B.U.L. Rev. 1 (1985).}

Rec. Int. (2)

Despite these gaps in coverage and the decision in Article 2A to provide special protection in some cases to consumer lessees,\footnote{See Miller, Consumer Leases Under Uniform Commercial Code Article 2A, 39 Ala. L. Rev. 957 (1988). Article 2A contains a "limited" number of express consumer protection provisions. Id. at 964-74.} the Study Group makes the following recommendations to the Drafting Committee:

(A) The revised Article 2 should neither incorporate more comprehensive consumer protection legislation than already enacted apart from the UCC nor contain new sections specially drafted to fill apparent gaps. The responsibility for enacting comprehensive consumer protection legislation should be located outside of the scope of general commercial legislation;

(B) The Drafting Committee should consider whether the limited, special consumer protection provisions in Article 2A are appropriate for inclusion in a revised Article 2;

(C) The Study Group, in the Report to follow, will consider whether limited affirmative rules for consumers are appropriate in certain areas now covered by Article 2, e.g., the scope of warranties, disclaimers and limited remedies or the content of unconscionability and good faith, and make recommendations to the Drafting Committee;

(D) Section 2-102 should be revised to state that subject to any statute or decision which establishes a different rule for seller or
buyers of consumer goods, the provisions of Article 2 shall apply.53

[TASK FORCE - INTRODUCTION]

I. Revision or Clarification Through the Use of Code Comments

The Preliminary Report is replete with instances where revision or clarification of Uniform Commercial Code ("Code") Comments is the recommended method for solving a particular Code problem. The Task Force strongly believes that an attempt must be made to formulate and apply a workable standard for determining when it is appropriate to proceed by redrafting the commentary and when the revision or clarification should be reflected in the language of the statute itself. Admittedly, the formulation of the requisite standard is not an easy matter.

The function of the Comments as conceived by Professor Llewellyn was to assist the courts in their application of the Code by providing an authoritative guide to the purposes and reasons for each section. To what extent the Comments have, in fact, influenced decision-making is far from clear. Part of the difficulty stems from the divergent opinions surrounding their use and authoritativeness. Despite the frequently encountered view that the Comments are persuasive but not binding,1 it is not unusual to find that they were not followed in a case either because it was thought that their application would lead to an inappropriate result,2 or would effectively vary the plain language of the statute.3 Consider also the situation in Colorado where a statute provides that "[t]he inclusion of said nonstatutory matter [the Comments] shall be for the purpose of information and no implication or presumption of legislative intent shall be drawn therefrom."4

A further complication results from the failure of many courts to state with a sufficient degree of clarity why a particular Comment is or is not being followed. Consequently, it may be difficult to

53. Cf. § 2A-104, which states to types of statutes to which a lease might be subject and provides a rule to determine which statute controls in the event of conflict.
2 See, e.g., Consolidated Film Indus. v. United States, 547 F. 2d 533, 536-37 (10th Cir. 1977).
tell how that very same court will treat the Comments in the future.

Accordingly, legislation by comment may or may not bring about the changes and clarifications recommended by the Study Group. The indiscriminate use of the Comments as a tool of change militates against uniformity and therefore should be abandoned. In his fine article on the Comments, Professor Skilton observed that they may be "(1) expository—seeking to describe the meaning and application of a section of the Code and its relationship with other sections, (2) gap-filling—seeking to suggest answers to questions not precisely covered by the text, or (3) promotional and argumentative—seeking to 'sell' a controversial section."

It is the second mentioned function of the Comments which has the potential to cause the most difficulty. To borrow again from Professor Skilton, "[w]e cannot ask the comments to do the work that should be done by the text." It seems that if disagreement on a particular point would be harmful to the uniform application of the Code, that point should be dealt with in the text. It makes no sense, for example, to define a term in the Comments if, as a result, that definition is ignored or modified by the courts.

At least one Task Force member believes that nothing should be done by way of comment unless the accompanying text is also being changed. As he sees it, comments clarify the author's meaning in the accompanying text; consequently, it is not proper to write any comments at this time to explain which text is not also being modified. Thus, the key is not to find a workable distinction between "clarifications" and "substantive changes," presumably allowing the former to be done by new comments on the old text. Such a distinction will prove elusive at best. However, where new statutory text is being added, clarifications of the new parts may be made by comment.

For these reasons, the Task Force strongly believes that a more cautious approach to the Comments is needed.

II. THE SUBSTANTIVE COVERAGE OF ARTICLE 2

The need to reconsider the scope of Article 2 is a theme that has pervaded the dialogue of revision. In particular, with the

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5 Skilton, Some Comments on the Comments to the Uniform Commercial Code, 1966 Wis. L. Rev. 597, 608.
6 Id. at 614.
promulgation of Article 2A, the common perception of the scope problem now centers around the extent to which Article 2 should apply to contracts with a service component.\(^7\)

The Study Group apparently includes in that category the incredible panoply of problems flowing from the explosion of computer technology, but leaves the distinct impression in a footnote that those issues should be left to a different Study Group already created under different auspices.\(^8\) It is difficult to see how an Article 2 revision could successfully finesse the issues in that way. No matter what emanates, if anything, from the other work, many computer-related transactions will still so affect sales matters as to necessitate some application of Article 2. The issues are too interrelated and important not to be considered in any revision of Article 2.

The Study Group Report's focus on existing sections also lacks any inquiry into such matters as including within a new Article 2 those areas of contract law on which the Code is presently silent.

In preparing this appraisal, the issue of coverage was approached from two angles. First, an attempt was made to form some general impressions about the extent to which courts have relied on certain non-Code doctrines in deciding cases involving the sale of goods. The second angle involved the question of whether the information learned would help explain why some pre-Code doctrines were codified and others were not. Therefore, the subjects selected for this informal empirical study were doctrines which are closely related to existing Code doctrines. They include the law of contract beneficiaries, mistake, and frustration of purpose. The frequency of application of each doctrine was determined by reference to judicial citation of Restatement sections found in the appendices to the Restatement (Second) of Contracts.

The initial choice for inclusion in this study was the third-party beneficiary doctrine. This was particularly attractive because the Code not only contains provisions pertaining to a conceptually related doctrine,\(^9\) but does in fact deal with some aspects of the

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\(^7\) See U.C.C. § 2-102 (1990) (stating that the scope of Article 2 applies only to transactions in goods).

\(^8\) Prelim. Rpt., Part 1 n.5 and accompanying text, infra p. 1010.

\(^9\) The law of assignments also deals with the rights of third persons who were not parties to the original contract. But unlike the third-party beneficiary, the assignee acquires its rights subsequent to the contract's formation. See, e.g., U.C.C. §§ 2-210 & 9-318 (1990).
beneficiary problem. For example, section 2-318 offers three alternative approaches to the extension of warranty liability to third parties, and section 2-210 touches on the enforceability of an assignee's promise to perform the assignor's duties.\textsuperscript{10} According to this study, there were no less than 19 sales cases that cited one or more sections of the Restatement or Restatement (Second) for an aspect of third-party beneficiary law on which the Code is silent.\textsuperscript{11}

Although the Code explicitly recognizes the doctrine of impracticability of performance,\textsuperscript{12} it says nothing of the doctrine of frustration of purpose although the two share a common conceptual base, that is, both deal with erroneous forecasts of the future. In twelve instances, frustration was argued in a sale of goods case with citation to either the First or Second Restatement.

Of greater quantitative significance is the doctrine of mistake. Mistake is characterized as a related doctrine because it, too, qualifies or excuses performance on the ground that one or both parties erred in their assumptions. In all, there were seventeen cases in which this doctrine was referred to.

These findings about the frequency of citation to the Restatements and non-Code law are not surprising. Both as a practical and a political matter, the coverage of the Code must be limited to some degree. It is inevitable, therefore, that contract litigation will occasionally implicate law that is external to the Code. This is not meant to suggest, however, that the choices made are inconsequential. To the extent that outside law is controlling, the goals of the Code are jeopardized. For example, the exclusion of mistake from the Code leaves (as this empirical survey suggests) a substantial gap in the Code's coverage of the law of mistaken assumptions. This is especially troubling where the gap must be filled by unpredictable law that is subject to competing tensions—

the desire for commercial stability and sympathy for a mistaken


\textsuperscript{11} See, e.g., United States\textsuperscript{a} v.\textsuperscript{b} Pall Corp., 367 F. Supp. 976, 980 (E.D.N.Y. 1973) (citing Restatement of Contracts § 133 (1932) for the general rule that a person may claim as a third party beneficiary if the performance of a promise will satisfy a duty of the promisee to the beneficiary); United States\textsuperscript{a} v.\textsuperscript{b} Glassman Constr. Co., 266 F. Supp. 110, 115 (D. Md. 1967) (citing Restatement of Contracts § 140 for the proposition that a third party beneficiary can acquire greater rights against a promisor than the promisee).

\textsuperscript{12} See U.C.C. § 2-615 (1990).
contract party. Furthermore, the potential for confusion is further exacerbated by the inherent indeterminacy of U.C.C. section 1-103.

It is not suggested that the law of mistake or any other particular doctrine should be added to a revised Article 2. The point is rather that greater attention should be paid to how complete a statement the Code should make on the law of sales, and that the volume of cases involving non-Code law is a source of useful information in this regard. It remains to be determined, however, how heavily this information should be weighed. The fact is that having this information would strengthen whatever decisions are ultimately made.

III. Consumer Considerations

A. The Recommendations Regarding Consumer Provisions

There is a degree of ambivalence about the Study Group’s recommendations pertaining to consumers. On the one hand, there is a clear attempt to declare neutrality. This begins with the assessment that the general policies of Article 2 “establish a commendable balance between facilitation (efficiency) and regulation (fairness) in contracts for sale where neither party is a consumer.” It continues with the recommendation that “[t]he revised Article 2 should neither incorporate more comprehensive consumer protection legislation than already enacted apart from the UCC nor contain new sections specially drafted to fill apparent gaps. The responsibility for enacting comprehensive consumer protection legislation should be located outside of the scope of general commercial legislation.”

On the other hand, the Report, early on, acknowledges “numerous important developments in consumer protection on both

13 Newman, Relief for Mistake in Contracting, 54 Cornell L. Rev. 232, 237 (1969). The risk of inconsistent decisions in this area is due in part to the dichotomy in Anglo-American law between the desire for stability of commercial transactions on the one hand, and concern over the unfairness of enforcing a contract against a party who lacked complete information regarding all the relevant circumstances. Id. at 236-37. This problem of inconsistency is compounded by the fact that the Second Restatement contains a significantly different articulation of the doctrine than that contained in the first.

14 See infra pp. 1010-12 and text accompanying notes 48-51.


the federal and state level” implemented after Article 2 was drafted, and that there are “noticeable gaps in coverage where Congress or the FTC has failed to go far enough and other state legislation is incomplete or non-existent.”17 The Study Group also recommends that the Drafting Committee consider whether the special consumer protection provisions included in Article 2A “are appropriate for inclusion in a revised Article 2,”18 and that Section 2-102 be revised to state that “subject to any statute or decision which establishes a different rule for sellers or buyers of consumer goods, the provisions of Article 2 shall apply.”19 Moreover, the disagreements within the Study Group regarding disclaimers, parol evidence and privity often implicate consumer issues. Finally, the Study Group recommends that the Drafting Committee “identify” gaps in consumer protection not covered by Article 2, and possibly include a reference to them in a comment.20

The result of this somewhat intricate minuet is somewhat questionable and even debatable. While there seems to be agreement on the general proposition that a commercial code by definition is not to deal with consumer matters, there also appears to be enough concern about specific issues that impact consumers to at least warrant affixing warning labels on some Official Comments, along with a more splintered interest in fashioning “limited” affirmative rules in the statute.

Left out of all this, or at least not articulated, is a persuasive policy basis for one side or the other. To some extent, this is quite understandable, perhaps inevitable, in view of the kind of document and task involved. Consumer laws are controversial,21 and there were many more digestible fish to fry. But before a Drafting Committee is in place, serious consideration should be given to the possibility of confronting at least some consumer problems in the warranty area and providing expressly for them in the revised “commercial” code.22

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21 Part of the folklore some recall about Article 2 is that the drafters chose not to include more consumer provisions out of the political concern of arousing lobbies which might threaten enactment of the Code.
22 The only provisions in the current Article 2 which refer to consumer matters are those in §§ 2-318 and 2-719(3) which, in effect, establish some rules
B. Some Preliminary Reasons To Include Express Consumer Provisions

1. Impact on Case Law

To begin with, although the language of the current Article 2 is consumer neutral, the case law is not. Consumer cases have played an important role in the development of Article 2 case law involving warranties and remedies for breach of warranties. Perhaps the most prominent of these is that dealing with failure of essential purpose (section 2-719(2)). Identification of one or more sections in which consumer cases have colored the interpretations is not really necessary. Consumer issues will always put pressure on more general law unless there is some pre-emptive consumer law applicable to the situation. In the early days of the Code, the pressures started on disclaimer issues; it was some years before failure of essential purpose was reached. But consumers got there, and the law continues to bear their mark.

To say the Code will be “neutral” to consumers cannot overcome the fact that it will continue to apply to consumer sales transactions. No one, after all, is proposing that the “commercial” code not apply to consumer transactions. If there is no applicable “consumer” law, a “commercial” code court will be tempted to make some by interpretation—thereby implicating all the stare decisis problems associated with that process.

In an ironic way, one of the provisions recommended by the Study Group could help overcome that problem. Section 2-102 would be revised to state that “subject to any statute or decision which establishes a different rule for sellers or buyers of consumer goods, the provisions of Article 2 shall apply.” The change from the present text is underscored: the revised provision seems to authorize courts to promulgate different rules for consumer transactions. If courts did so with appropriate labels, the “commercial” code would not be sullied. Of course, such a statute provides absolutely no guidance, and if the provision is construed to authorize courts to develop their own consumer law and depart from

limited to cases of personal injury of consumers. See also § 2-607 comments 4, 5. The Study Group, incidentally, recommends removal of these provisions in the interests of drawing proper boundaries between sales warranties and strict liability in tort.
Article 2 simply because the transaction involves a consumer, all hopes for uniformity become sheer pretense.

2. Lack of Consumer Sales Law

There is not available a viable package of non-U.C.C. law to resolve consumer sales law problems. The federal Magnuson-Moss Act is in most respects a disclosure statute, although it carries with it significant substantive provisions (referred to below) limiting implied warranty disclaimers and broadening the class of those legally entitled to assert breach of warranty claims. Clearly the federal law does not purport to provide sales law per se.

Despite the prevalence of little FTC Acts (although in different forms) and the explosion of cases in recent years, it is clear that not all consumer disputes are covered. In some states, it is clear, for example, that pure warranty cases are not covered;23 in others, "private" disputes are not covered.24 Texas, as usual, is exceptional; its statute expressly applies to sales warranty actions.25 On the other hand, it is ironic that "consumer" is construed in some states to include commercial parties.26 In those states, deferring consumer protection to little FTC Acts would result in no differentiation at all between consumers and commercial parties.

So-called "lemon" laws do not purport to be comprehensive sales laws.27 They focus specifically on remedies available for breach of warranty. However, they generally assume the existence of warranties and provide no rules for creation, limitation or disclaimer. Moreover, most apply only to new passenger cars.28 Thus,

23 See, e.g., NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE TRADE PRACTICES § 5.2.7.1 (2d ed. 1982 & Supp.).
24 Id. § 7.5.2. See also McDonald, The Applicability of the Illinois Consumer Fraud and Deceptive Business Practices Act to Private Wrongs, 39 DePaul L. Rev. 95, 96-97 (1989).
25 TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987).
28 In the following state codes, there is some coverage of used cars: N.Y. GEN. BUS. LAW § 190-b (McKinney 1988); R.I. GEN. LAWS § 31-5.5 (1982 & Supp. 1990); MASS. GEN. LAWS ANN. ch. 90, § 7N 1/4 (West 1989); MINN. STAT. ANN. § 325F.662 (1990); CONN. GEN. STAT. § 42-220 (1987).
while (from the perspective of the consumer) they provide both a more bright-line form of remedy than Article 2 and an impetus for resolution of warranty claims, in the larger perspective, they are merely a remedy add-on to Article 2 for a limited class of products.

3. Consistency With the National Policy Established by the Magnuson-Moss Act

Consideration must be given to whether a revised Code should be textually consistent with the national policy established in the Magnuson-Moss Act. Implicitly, the answer of the Study Group is “no.” The Study Group does contemplate that the act is one of those laws to which reference might be made in a revised section 2-102, and perhaps in warning label comments to other sections. But it makes no explicit reference to the act other than to note the difference between the current Article 2 and the act’s definition of “consumer product.”

In view of the fact that Article 2 will continue to apply to consumer transactions, even if on a “consumer-neutral” basis, does it really make sense to acknowledge only in the comments that the implied warranty of merchantability cannot be disclaimed in any transaction involving consumer goods where there is a written warranty? Additionally, does it make sense that the Magnuson-Moss Act flexibly jumps both horizontal and vertical privity hurdles in a single bound.

Even if one cavils at the thought of cross-referencing a federal act in a state uniform law, at the very least express consideration ought to be given to whether that state law should express the controlling federal position. Perhaps such consideration supported some of the Study Group disagreement regarding privity and merchantability issues. More explicit consideration is required. How can we ignore controlling law?

31 The Study Group’s recommendation that the definitional difference be considered by the Drafting Committee is meaningless in view of its recommendations that all current Article 2 references to consumer goods be deleted. See Prelim. Rpt., Part 3, Rec. A2.3(8), infra p. 1083.
32 Whether the Magnuson-Moss (anti) privity provisions apply in the absence of a written warranty is considered below.
Consideration should not be only on the grounds that there happens to be federal law governing these issues. The fact that there is such law should require re-examination of the policies underlying that law, e.g., whether implied warranty disclaimers should be banned. Not only has there now been some years of experience under the Magnuson-Moss Act, but there is also experience in a number of states which have, in some instances, gone even further.\(^3^4\)

Finally, it is worth noting that the Magnuson-Moss Act will apply even in merchant transactions so long as the subject matter of the sales contract is a consumer product as defined in the act.\(^3^5\) Thus, the impact of the law is not limited to consumer transactions.

4. Reconsideration of Adhesion Contract Issues

Finessing consumer issues also sidesteps several extremely basic issues that require periodic reconsideration: (a) Isn’t it time to try to deal in a statutory way with the adhesion contract? (b) Given the enormous changes in marketing and merchandising since World War II, shouldn’t there be some revision of our approaches to warranty and privity issues?

It is, of course, old hat that statutory provisions still relate to the paradigm bargain transaction from which sales law originally arose—the two horse traders bargaining over a horse in what was literally a hands-on transaction. The warranty of description at least recognized that special protections were necessary when the goods were not at hand (or underhand). Since then little has been done to break away from the eye-ball bargain paradigm. The statutory rules on disclaimers do not change the situation; they operate on the premise that there is a bargain being struck by two parties and simply provide a few guidelines on how the “bargaining” on that point is to be conducted.

The typically colorful observations of the late Professor Leff set the stage for reconsideration:

Contract seems to presuppose not only a deal, but dealing. It is the product of a joint creative effort. At least classically, the idea seems to have been that the parties combine their impulses and desires into a resulting product

\(^3^4\) The jurisdictions are identified in National Consumer Law Center, Sales of Goods and Services, § 17.3.13 (2d ed. 1982 & Supp. 1990).
which is a harmonization of their initial positions. What results is neither's will; it is somehow a combination of their desires, the product of an ad hoc vector diagram the resulting arrow of which is "the contract."36

In the old horse-trade deal, what the parties left out of their spoken bargain "was covered by statute, custom or legal implication."37 By contrast, in many modern deals, what was not discussed is covered by a document prepared by one of the parties.38 Over time, scholars grappled with the new problems and created from the residuary category "contracts," the new subcategory "contracts of adhesion." Their basic insight was a simple and elegant one: there is a critical difference between a bargaining process and an on-off light switch. In the typical consumer-goods deal, for instance, the consumer must take the whole deal (or most of it) as a deal, or leave it, all of it.39

The adhesion contract theorists "detected the non-process nature of some 'contracts' (including consumer transactions) and thus created, so they thought, a new category, roughly speaking 'that which would be a contract except that no bargaining process really shapes it.""40 As Professor Leff sees it, the bargaining process in these transactions is

over two things, price and standard variations in the product. In fact, there is only one element of the deal that has not been the subject of any contracting process: the contract. And what does that look like? It looks like a contract. But when one stands far enough back from the whole deal, from the whole process of goods buying, what one sees is a unitary, purchased bundle, of which the product, say a car, is just the most tangible (and, oddly enough, the most mutable) thing. One goes out and acquires the whole "set" which is a "deal on a car," and of the interchangeable subsets (object, extras, con-

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37 Id. at 140.
38 Id.
39 Id. at 142.
40 Id. at 143 (quoting "adhesion contract theorists").
tract), it is in fact arguable that the contract is more of a "thing" than the goods which are sold pursuant to it.

[The] key insight about "contracts of adhesion" was that they were products of non-bargaining, unilaterally manufactured commodities. Because as a thing, an object, it looks like the referent of the noun form of the word "contract"; it looks the way the product of the process of bargaining so often looks. What happened, it seems to me, is that of all the indicia which determine whether a thing is a contract or not, the most irrelevant—the physical appearance of the thing as a thing—turned out to be the most powerful. This thing, the consumer contract, just happens to look like the result of what in the consumer-contract context is a nonhappening, the consumer contracting process. 42

Professor Rice has briefly and well described changed market and marketing conditions:

The principal structural and organizational attributes of contemporary consumer goods markets and marketing are mass production, mass distribution, mass merchandising, and mass advertising. While mass production also characterized past eras, mass distribution, merchandising, and advertising are largely features of the post-1950 period.

Mass merchandising also implies mass contracting; and the recent emergence of the broad use of retail store, national and bank credit cards accentuates the standardized, mass credit trend that developed with the growth and general availability of consumer installment sale and loan credit. In essence, with increased variety and abundance of consumer goods has come the standardization of transactions and the bureaucratization of market structure and institutions. In this lies both the supreme irony and the lesson of the marketing revolution; to wit, vastly

41 "It is even more ironic, perhaps, that even to the extent that there is a happening leading to the consumer contract, it is in any event to a large extent shielded from effective judicial scrutiny by the vestigial parol evidence rule." Leff, supra note 36, at 147 n.54. This particular problem is considered by the Study Group. See Prelim. Rpt., Part 2, infra p. 1043-44; Prelim. Rpt., Part 3, infra p. 1106.

42 Leff, supra note 36, at 146-47 (footnotes omitted).
greater opportunities to satisfy highly personal or individual material and nonmaterial wants come at the cost of personalized or individualized contacts and contracts.43

More recently, Professor Rice referred to the marked contrast between the structure and orientation of the decisionmaking institutions and processes of the national consumer goods market and the fifty-state legal system. [M]uch more than the tension between national markets and state regulation [is involved. A study of privity rules] demonstrates the existence of fundamental differences in perspective by juxtaposing the functional emphasis of markets on producer-to-consumer distribution and the formalistic focus of the law on contractual relationships. The contrast reflects . . . the preservation in law of a traditional and formalistic model of market transactions despite the occurrence of significant changes in consumer goods marketing and markets.44

The logic of these observations leads to the conclusion that the focus should be not on the bargaining process but on the product.45 In the context of warranty, that is minimal quality protection. The clearest candidates are an implied warranty of merchantability that cannot be disclaimed and broad standing to assert claims for manufactured goods. It would seem also to extend to remedies in the event of failure of essential purpose of a limited remedy.

There has already been experimentation in some states with disclaimer bans46 which can be added to the results under the Magnuson-Moss Act. Moreover, it has been pointed out that the

43 D. RICE, CONSUMER TRANSACTIONS 12-13 (1975).
45 Professor Leff was explicit about this:
[T]he critical strategic decision seems to be between deal control and goods control. . . . Now, keeping in mind the nature, factual and legal, of the usual consumer-goods (or services) transaction, deal control is ordinarily a stupid option; it is silly to seek to shape and control the contours of a process that does not take place. [H]ow does one go about regulating the contract as a process. [sic] By facilitating more bargaining? But that is absurd . . . ."
Leff, supra note 36, at 148.
46 See supra note 34 and accompanying text.
costs of such consumer laws are borne not just by those states which adopt them but also by those who adhere to the classic tradition.47

[PRELIMINARY REPORT - 1-103]

ARTICLE 1:
RELEVANCE TO ARTICLE 2

A. INTRODUCTION.

The general provisions of Article 1 are important to the proper interpretation and application of Article 2, as well as other Articles of the UCC. Some of these general provisions have a closer relationship to Article 2 than others. For that reason, a review of selected provisions in Article 1 is necessary, even though we do not provide a systematic analysis of the entire Article. That analysis, although needed, must await another day.

In this section, we tried to identify those provisions of Article 1 where, in the light of Article 2, revisions are indicated. Also, we recommend at least two new provisions for Article 1 and the possible transfer to Article 1 from Article 2 of at least one other provision.1

This Report does not consider the impact of electronic messaging systems upon the Article 1 definitions. This important development, as well as the impact on Article 2 itself, is covered in a separate report by the Electronic Messaging Services Task Force of the Committee on Uniform Commercial Code of the American Bar Association.2

B. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW APPLICABLE: § 1-103.

Grant Gilmore once remarked that the UCC, as a code, goes as far as it goes and no farther. Section 1-103, entitled "supplementary general principles of law applicable," gives directions on where to go when other state or federal law is not "displaced by the particular provisions of this Act."

There are two specific questions: (1) Does the UCC displace the common law in a particular area: and, if not, (2) What common law principle

47 See generally Rice, supra note 43.
1. The provision is § 2-208. Another candidate for transfer is § 2-302.
should the court choose? A broader interpretive question is whether § 1-103 provides sufficient flexibility and guidance for the courts to develop principles within the framework of the UCC, without having to find and integrate other "principles of law and equity."

For example, Article 2 uses but does not define the term "offer." See § 2-206(1) & 2-207(1). Arguably, under § 1-103 these sections do not displace the common law definition.3 Is a court bound by whatever concept of offer is applicable in the state or may the court develop a definition which is consistent with the formation policies found in Article 2, Part 2? This is an important question for which there is no clear answer. Since the general law of contract has developed in an uneven fashion and the precedent in a particular state may have been announced without reference to either Article 2 or the Restatement, Second, of Contracts, some further guidance to the court is needed.4

Rec. Art.1 (I).

The Study Group recommends that the Drafting Committee consider how § 1-103 might be revised to expand the displacement of common law contract principles that are inconsistent with the policies of Article 1 and Article 2, if not their specific provisions. With expanded displacement, the Drafting Committee should also consider how to give a court guidance in fashioning principles within the framework of the UCC. For example, the Comments could state a preference for the Restatement, Second as a reliable source of modern contract law and encourage courts to reject external precedents not clearly displaced by a particular section which are, nevertheless, inconsistent with dominant Code policies.5

[TASK FORCE - 1-103]

ARTICLE 1—PART 1

SECTION 1-103

As presently written, U.C.C. section 1-103 is hopelessly indeterminate. Its language tells us very little about the appropriate

4. See also, Summers, General Equitable Principles Under Section 1-103 of the Uniform Commercial Code, 72 Nw. U.L. Rev. 906 (1978)(arguing for a broader construction of the displacement principle).
5. These revisions would be consistent with the civil law conception of a commercial code. For an early analysis of this problem, see Comment, The UCC as a Premise for Judicial Reasoning, 65 Colum. L. Rev. 880 (1965).
result in a particular case. In all but the uncommon “easy case” courts seem free to open the door to common law and equitable principles to whatever extent they choose. Although there have been several commendable attempts, a meaningful interpretation of the only textual clue to its application (the “[u]nless displaced” language of section 1-103) has not been achieved. It cannot be assumed that courts will or will not import into a Code case a particular non-Code rule.

The Task Force agrees with the Study Group that a serious reconsideration of the extent to which common law and equitable principles continue to serve as sources of law in resolving cases under the Code is necessary. A better appreciation of the importance this issue has to commercial law development should ultimately result in an approach which makes the law more predictable and which better facilitates the essential need to keep the Code responsive to commercial practice. The Task Force, however, questions whether the Study Group has offered a workable solution.

The recommendation that section 1-103 be revised to expand the displacement of contract principles that are inconsistent with Code policy is theoretically appealing but practically unsound. The problem with an analysis emphasizing policy is that the Code is replete with conflicting policies and goals. What then is to prevent their manipulation to reach a desired outcome? Once policy be-

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48 An example of an easy case is the Code’s explicit displacement of the pre-existing duty rule. See U.C.C. § 2-209(1) (1990) (“An agreement modifying a contract within this Article needs no consideration to be binding.”).


51 For example, a crucial premise underlying Article 2 is that the parties are free to establish the terms of their contract. Yet, this freedom is not without restriction. Section 2-302 offers a way of disarming unconscionable bargains, and § 1-203 provides that the parties may not disclaim the prescribed obligation of good faith.
comes the sole arbiter of decision, courts will be free to decide cases on a statutory or common law basis almost without restriction. Therefore, to the extent that a methodology seeks to derive precise answers from imprecise expressions of the drafter's intent, the objectives of certainty, predictability and uniformity of commercial law cannot be achieved. Moreover, what if Code policies conflict? How is a court to decide in favor of one policy or the other?

Perhaps the solution lies not in a revision of section 1-103, but rather in the drafting of the sections themselves. The Drafting Committee could try to make clear in each section—clearer than the original framers—which common law doctrines continue to survive in which contexts. Also, the official comments could suitably serve as a forum for the discussion of the viability of related non-Code law. The point is that the Study Group's recommendation, if implemented, could have the untoward effect of increasing confusion and nonuniform interpretation.

[PRELIMINARY REPORT - 1-105]

C. TERRITORIAL APPLICATION OF THE ACT; PARTIES' POWER TO CHOOSE APPLICABLE LAW: § 1-105.

Since § 1-105 was first approved,\(^6\) considerable scholarly attention has been lavished upon choice of law theory in general.\(^7\) Less attention, however, has been paid to § 1-105,\(^8\) presumably because it is easier to accept its statement of general principles of choice of law when the relevant law to be chosen is uniform. Uniformity, however, has been increasingly disrupted by non-uniform versions of Article 2,\(^9\) variant consumer protection legislation and diverse certificate of title acts, to name a few sources of discontent. These trends increase the importance of § 1-105 in sales disputes that sprawl across state lines.\(^10\)

Rec. A.1 (2).

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7. Some of the competing theories are discussed in Reese, A Suggested Approach to Choice of Law, 14 Vt. L. Rev. 1 (1989).
8. There has been little recent discussion of § 1-105. For an early analysis, see Nordstrom, The UCC and Choice of Law, 1969 Duke L.J. 623.
9. See Revision at 403-04.
10. Under § 1-105(1), the choice standard is so broadly stated that in the typical case a court could always enforce the choice of law agreement of the parties and, if none, always select the law of the forum.
In light of these emerging differences in sales law, the Study Group recommends that the Drafting Committee consider whether a revision of § 1-105 is required. More particularly, should there be a separate choice of law section for sales? Compare §§ 2A-105 & 2A-106, which provide specific choice of law principles where leased goods are covered by a certificate of title or the lessee is a consumer.

[TASK FORCE - 1-105]

SECTION 1-105

The Task Force has a few concerns regarding section 1-105. First, some members have taken the position that the section should be restricted so that it would not be applicable to a wide range of contracts (usually form contracts) which, while not unconscionable, do not reflect a real choice by one of the parties. In this regard perhaps a provision similar to section 2A-106 would be appropriate.52

The second concern about the current language of the present section is that it specifies a list of Code provisions which override the right to contractual choice of law. Other sources of exceptions should also be included. For example, many states have statutes which regulate consumer credit contracts—especially as to interest rates, but also as to some of their terms.53 These statutes usually specify that they apply, regardless of contractual language to the contrary, to all transactions where the debtor is a citizen of the state enacting the statute.54 Thus many states now have in effect two statutes which contradict each other: Section 1-105, which says its choice of law provision governs over all statutes except those listed, and the consumer credit statute which, while not listed, plainly states that it governs. The list in section 1-105 is, therefore, too limited and needs some sort of a residuary category.

52 Section 2A-106 states, in pertinent part,

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable.

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.


54 Id. § 16a-1-201.
Thirdly, and finally, the Code permits the parties to choose the law of any reasonably related state. Even modern, flexible choice of law doctrines do not go so far. For example, the Restatement (Second) of Conflicts of Laws provides that a contractual choice of law will be valid if: (1) it selects a state reasonably related to the transaction, and (2) the law selected is not violative of the public policy of a more related state. The Drafting Committee is encouraged to consider adding that second restriction. On this point, it has been suggested that the current, more flexible approach means that states have virtually no legislative power because state rules can be circumvented at will unless everything associated with a contract is from one state (a rare event these days). Thus, support for contractual choice of law among Task Force members is not unanimous.

[PRELIMINARY REPORT - 1-106]

D. REMEDIES TO BE LIBERALLY ADMINISTERED:
§ 1-106.

Rec. A.1 (3).

Although no revisions are recommended in the text of § 1-106, the Study Group recommends that the policy in § 1-106(1) be stated explicitly and elaborated in Article 2, namely, a revised § 2-701. See Rec. A2.7 (1).

[TASK FORCE - 1-106]

SECTION 1-106

The Task Force believes that Section 1-106, with its mandate for a liberal administration of remedies, is the most important

55 Restatement (Second) of Conflicts of Laws § 187 (rev. 1989).
56 Under old-style "territorialists" choice of law analysis, the parties could not choose the law applicable to a contract; the validity of a contract was determined by the law of the place the contract was signed (last signature), and issues relating to breach were determined by the law of the place of performance. To permit the parties to choose the applicable law would mean that the parties had the right to veto legislation.
11 This recommendation finds support in recent cases which have invoked § 1-106(1) to impose controls upon the choice of remedies given to sellers and buyers in Article 2, Part 7. See White, The Decline of the Contract-Market Damage Model, 11 U. Ark. Little Rock L.J. 1 (1988-89).
remedy provision in the Code. The case law on Code remedies demonstrates that the courts have made liberal use of this mandate to achieve sensible results even though a different result might have been indicated by a literal construction of a particular remedy provision. In this vein we note that the recommendations of the Study Group regarding Code remedies merely reflect the case law encrustation of the past quarter century. Thus, a strong case can be made for the proposition that the Code's remedy provisions are functioning quite well and do not need extensive revision.

[PRELIMINARY REPORT - 1-201(9)]

E. GENERAL DEFINITIONS: § 1-201(9): BUYER IN THE ORDINARY COURSE OF BUSINESS.

§ 1-201(9), which has relevance to both Article 2 and Article 9, defines "who" is a buyer in the ordinary course of business (BIOCB) but does not state "when" that status arises. This has caused disagreement in disputes arising under both § 2-403(2) and § 9-307(1). In addition, other questions concerning the prose" and the effect of this important definition have arisen. The Study Group concluded that, from the perspective of Article 2, specific revisions in § 1-201(9) should be made.

Rec. A.1 (4).

The Study Group recommends the following revisions in the text of or the comments to § 1-201(9). They are stated here, even though some will be repeated elsewhere in the Report and others will be implemented by revisions in other sections of Article 2 or, possibly, Article 9.13

(A) The case of Tanbro Fabrics14 apparently held that a BIOCB of goods from a seller took free of a security interest in the goods even though they were in the possession of the seller's secured party. Unless the secured party has authorized the disposition, we reject

13. A Study Group to review Article 9 has recently been appointed by the ALI and the PEB. Our recommendations will impinge upon that Study Group's jurisdiction and coordination will be required. Nevertheless, we have taken positions that appear to be sound from the perspective of Article 2. See Harrell, Sales-Related Conflicts Between Articles 2 and 9, 22 U.C.C. L.J. 134 (1989).
the rule of Tanbro Fabrics and recommend an appropriate revision of § 9-307(1) or § 1-201(9).

(B) We recommend that the time when the status of BIOCB arises before delivery should be no earlier than the time when the buyer has a right to possession of the goods under Article 2. This revision should be made in § 1-201(9). Exactly when the buyer has a right to possession is determined by §§ 2-711 through 2-716.

(C) We recommend that the "objective" definition of good faith for the merchant buyer, see § 2-103(1)(b), be applicable to all disputes where a merchant claims to be a BIOCB. Thus, to qualify as a BIOCB under § 9-307(1) and § 2-403(2), a buyer would have to be honest and to observe reasonable standards of fair dealing to take free of a security interest. This revision should be made in § 1-201(9).*

(D) Two other revisions in the definition of BIOCB in § 1-201(9) are recommended.

The first revision concerns pawnbrokers. Initially, the Drafting Committee should decide whether special rules are required for pawnbrokers and, if so, whether they should be developed outside of § 1-201(9). In any event, the phrase "but does not include a pawnbroker" should be revised to clarify that it refers to a seller, not to a buyer. The current version of § 1-201(9) is ambiguous.

Second, the phrase "or leasehold interest" should be inserted after "security interest" in line 3 to conform to § 2A-103(1)(a).

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 1-203]

F. OBLIGATION OF GOOD FAITH: § 1-203.

The obligation of good faith is imposed by § 1-203 on "every contract or duty within this Act...in its performance or enforcement. Accord: Restatement, Second, Contracts § 205. The general definition of good faith

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15. The Study Group agrees that if a buyer otherwise in the ordinary course of business can recover goods in the possession of its seller's secured party, important commercial expectations may be impaired. See Dolan, The Uniform Commercial Code and the Concept of Possession in the Marketing and Financing of Goods, 56 Tex. L. Rev. 1147 (1978).

16. We agree with the conclusions in Frisch, Buyer Status under the UCC: A Suggested Temporal Definition, 72 Iowa L. Rev. 531 (1987).

17. See Article 4A-105(a)(6), where good faith "means honesty in fact and the observance of reasonable commercial standards of fair dealing."
is "honesty in fact." § 1-201(19). The special definition for merchants in Article 2 is "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." § 2-103(1)(b). The imprecision of the good faith standard and the tension between the subjective and objective definitions has stimulated a torrent of words in the law journals. The divergent views expressed indicate that any attempt to define more precisely what is good faith or bad faith would be counterproductive.

Rec. A.1 (5).

Although the Study Group agrees that good faith should be expressed as a general standard, the following recommendations are made to improve clarity in and to expand the scope of its application.

(A) The scope of the obligation should remain limited to the "performance or enforcement" of the contract for sale. A majority of the Study Group concluded that, unless the parties have otherwise agreed, there was no justification for extending the obligation to pre-contract negotiations which do not result in a contract for sale.  

(B) It should be made clearer in the comments or in the text of Article 2, Part 7, that bad faith in "performance or enforcement" is a breach of contract for which contract remedies are available. Unless the conduct amounts independently to a tort, bad faith under § 1-203 is not conduct for which punitive damages are available. See § 1-106(1).

(C) It should be made clearer in the text of § 2-103(1)(b) that the "objective" standard of good faith applies to all issues of performance and enforcement where merchants are involved, not just those sections which specifically mention "good faith."  

(D) The Drafting Committee should consider whether the definition of good faith should include a "reasonableness" component for all commercial sellers and buyers, not just merchants. For "merchants" under Article 2, good faith "means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." § 2-103(1)(b) (emphasis added.) For other commercial parties, i.e., those who are not consumers, good faith could mean "honesty in fact and the observance of reasonable commercial standards of fair dealing." See § 4A-105(a)(6). Such a revision should be made in § 2-103(1)(b).


19. A literal reading of § 2-103(1) suggests that the phrase "good faith" must actually appear in the text before the "merchant" definition applies. This reading should be rejected.
The Drafting Committee should also consider whether an "objective" standard of good faith is appropriate for all commercial parties subject to the entire UCC.

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 1-205]

G. COURSE OF DEALING AND USAGE OF TRADE: § 1-205.

Section 1-205 is a crucial component of the broad definition of agreement in § 1-201(3). Our impression is that its potential has been under-utilized by the courts.

Rec. A.1 (6).

The Study Group endorses the objectives of and recommends no major revisions in the text of § 1-205. We do recommend, however, a new subsection for § 1-205 and a new, separate section in Article 1 dealing with Proof of Facts at Trial.

(A) The new subsection to § 1-205 is taken from § 2-208, "Course of Performance or Practical Construction," now located in Article 2. "Course of Performance" is part of the definition of Agreement in § 1-201(3). This important principle of interpretation should not be limited to contracts for the sale of goods. Thus, we recommend that § 2-208(1) be moved from Article 2 to § 1-205. In addition, we recommend that § 1-205(4) be revised to incorporate the principles of subordination expressed in § 2-208(2). In sum, § 2-208(1) and (2) should be integrated into subsections of § 1-205.20

(B) The new section for Article 1 would be taken from an article by Professors Allen and Hillman, entitled "Evidentiary Problems In-And Solutions For-The Uniform Commercial Code"21 The new section, entitled "Rules Governing the Proof of Facts at Trial," would provide comprehensive guidance to the parties and the courts in the proof of facts. The Study Group recommends that the Drafting Committee give careful consideration to its adoption, along with appropriate definitions, as part of Article 1.

20. In the process, the principles of subordination should be reviewed to insure that they are not too rule oriented.
[TASK FORCE - 1-205]

SECTION 1-205

The role of trade usage was central to Llewellyn's view of Sales law.\(^57\) That role is reflected in Article 2. Courts' timid approach to trade usage has caused a number of sections not to work as well as they should have.\(^58\) The Study Group should consider adopting Llewellyn's proposals to use panels composed of merchants to make non-binding findings on trade usage. Those proposals, together with the discussion of them at the 1942 Annual Conference are appended.\(^59\)

At the time they were initially discussed, these proposals may have seemed radical, and this may be why they were not adopted.\(^60\) Today they are not unusual. In fact, they resemble the procedures for medical malpractice screening panels extant in several states.

Certainly, if the Study Group moves in the direction of recommending a substantial performance test directly or indirectly (by adding the reference to good faith in 2-601),\(^61\) Llewellyn's merchant panel proposals should be considered. These panels are desireable to minimize the uncertainty inherent in the substantial performance test.\(^62\)

[PRELIMINARY REPORT - 1-206]

H. STATUTE OF FRAUDS FOR KINDS OF PERSONAL PROPERTY NOT OTHERWISE COVERED: § 1-206.

§ 1-206(1) provides a separate statute of frauds for the sale of personal property, but 'does not apply to contracts for the sale of goods (Section 2-

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\(^59\) See Apps. C & D.

\(^60\) The merchant panel proposals first appear in the Draft for a UNIFORM SALES ACT, 1940 § 69 (reproduced in App. B). They are significantly expanded in the Revised Uniform Sales Act, Second Draft §§ 59 to 59-D (Dec. 1941) and were discussed in the National Conference of Commissioners on Uniform State Laws, Fifty-Second Annual Conference, August, 1942. See Apps. C & D (providing the relevant documents and transcript). The proposals disappear from the next draft of the Sales Act (UNIFORM COMMERCIAL CODE - REVISED UNIFORM SALES ACT, Third Draft (1943)) and do not recur, perhaps because the objections raised in the 1942 Annual Conference could not be overcome.

\(^61\) Prelim. Rpt., Part 6, Rec. A.2.6(1)(A), (B), infra p. 1158-59.

201). . . ’’ § 1-206(2). 22 But if goods are sold in a contract where services predominate, § 2-201(1) does not apply. Does § 1-206(1) still govern if the value of the personal property exceeds $5,000? The answer is not clear. 23 If § 1-206(1) applies, another problem emerges. There are major differences between the two statutes of frauds: More detail is required in § 1-206 to satisfy the writing requirement than in § 2-201(1) and no statutory exceptions, such as those provided in § 2-201(3), are provided at all.

Rec. A.1 (7).

The Study Group recommends that § 1-206 be revised to (1) state that it is inapplicable to any contract where goods are sold if § 2-201 does not apply and, in any event, to (2) conform with any revisions of § 2-201 dealing with the nature of the required writing and any statutory exceptions. The current differences between the two statutes are, arguably, not clearly justified and have caused confusion in the courts. 24

If § 2-201 is repealed, § 1-206(2) should be modified accordingly.

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 1-207]

I. PERFORMANCE OR ACCEPTANCE UNDER RESERVATION OF RIGHTS: § 1-207.

At common law, if a debtor tendered a check to a creditor in “full payment” of a disputed obligation and the creditor, with knowledge that it was offered in “full” payment, accepted and cashed the check, the obligation was discharged even though the creditor announced that the check was accepted with a “reservation of rights.” A hotly debated question is whether § 1-207 changed the common law rule by providing that a “party who with explicit reservation of rights . . . assests to performance in a manner demanded

22. For a recent effort to interpret § 1-206 where goods were not involved, see Horn & Hardhart Co. v. Pillsbury Co., 703 F. Supp. 1062 (S.D.N.Y. 1989). See also, Note, UCC § 1-206: A New Departure in the Statute of Frauds, 70 Yale L. J. 603 (1961).

23. The question is in whether a contract where some goods are sold but services predominate and is not within the scope of § 2-201(1) must be treated as a service contract or a contract for sale of goods for purposes of § 1-206(1).

24. See, e.g., Dairyland Financial Corp. v. Federal Intermediate Credit Bank of St. Paul, 852 F.2d 242 (7th Cir. 1988), holding that where § 1-206 governed, the part-performance exception in § 2-201(3) could be applied.
or offered by the other party does not thereby prejudice the rights reserved. 25
Since many of the underlying disputes arise under Article 2 (as well as
involve Article 3), the issue is relevant to our study.
Rec. A.1 (8).
The Study Group agrees with the proposed revision of § 3-311,
which preserves the common law rule under stated conditions where
checks are involved and recommends a new § 1-207(2) to insure
that § 1-207 does not apply to an accord and satisfaction.

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-101]

ARTICLE 2, PART 1:
SHORT TITLE, GENERAL CONSTRUCTION AND
SUBJECT MATTER

A. INTRODUCTION.

Part 1 performs a function for Article 2 similar to that performed by
Article 1 for the entire UCC. Part 1 deals with the scope of Article 2 and
provides a series of important definitions that are applicable throughout the
Article. Our approach is to consider in some detail the scope issue and to
identify definitions that appear to create the most difficulties.


No revisions are recommended in the text of § 2-101.

[TASK FORCE - 2-101]

ARTICLE 2—PART 1

SECTION 2-101

The Task Force agrees that no change is necessary here. While

with County Fire Door Corp. v. C. F. Wooding Co., 202 Conn. 277, 520 A.2d 1028
(1987)(common law rule not displaced). In check cases, most courts have agreed with the
result reached by the Supreme Court of Connecticut. See Grosse & Goggin, The 1-207
it is clear that Article 2 covers a broader array of transactions than just sales, however, the title section is qualified and clarified by the subsequent section on scope (2-102), and questions of scope are addressed there.

There is no compelling reason to change this section because, after forty years or so, everyone is used to calling it the "sales code." Since section 2-102 sets out the scope of the Code, no one is likely to be misled by the name. However, because it is widely held that Article 2 covers "transactions in goods" (see discussion on 2-102 below), it would be reasonable to at least consider merging 2-101 and 2-102 or, in some way, reconciling these two sections.

[PRELIMINARY REPORT - 2-102]

C. SCOPE; CERTAIN SECURITY AND OTHER TRANSACTIONS EXCLUDED FROM THIS ARTICLE: § 2-102.

Rec. A2.1 (1).
The Study Group recommends the following revisions in the text of or comments to § 2-102.1

1. Some Problems.

The scope of Article 2 currently is determined from several sources: (1) the text of § 2-102 and § 2-107; (2) the definitions of "goods," "seller," "buyer" and "contract for sale" in Part I; (3) the language, frequently restrictive, in particular sections of Article 2, e.g., § 2-314(1);2 (4) the preemptive scope of other Articles of the UCC, e.g., Article 9; (5) the preemptive effect of federal and other state law, and (6) the power of a court to apply Article 2 by analogy in cases to which it does not apply by its terms.3

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1. The Study Group has benefited from a thoughtful memo on § 2-102, prepared by Professor Ann Louisin of the John Marshall Law School.

2. E.g., § 2-314(1) imposes an implied warranty of merchantability in a "contract for their sale" rather than in a "transaction" in goods. Other sections, such as § 2-201(1), contain similar limitations.

The complexity of the scope problem has been eased by the promulgation of Article 2A: The lease is not a transaction in goods to which Article 2 applies. But what about "pure" service contracts? 

(A) A majority of the Study Group agrees that Article 2 should not be directly applied to the "pure" service contract. As for extension by analogy, see Rec. A.2.1(1)(F).

Between the extremes of the "pure" service contract and the "pure" contract for the sale of goods, lie the so-called "mixed" transactions, where the transfer of goods is combined with personal or professional services in various contexts, including construction contracts. A current example of some interest is a contract for the sale or license of computer systems, which involves hardware, software and various backup services. Are these "transactions in goods" to which Article 2 should apply? Is scope an either-or proposition, or is there room for a selective application of relevant Article 2 sections to a part of the transaction?

Here are some possible approaches to these persistent scope problems.

2. Possible Solutions:
   Influence of Context.

The scope principles of § 2-102 are limited by the phrase, "unless the context otherwise requires. . . ." No one is sure what this means, and the courts have not provided much enlightenment. It confuses an already complex problem.

(B) The Study Group recommends that this phrase be clarified in either the text or the comments.

   Relationship to Article 9.

   Section 2-102 does not apply to "any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction." Section 9-102(1)(a) provides that Article 9 applies to "any transaction (regardless of its form) which is intended to create a security interest in person property or fixtures. . . ." A typical transaction involves a "sale and repurchase" agreement. The mesh

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5. See, e.g., Rodau, Computer Software Contracts: A Review of the Caselaw, 21 Akron L. Rev. 45 (1987). A Study Committee, under the auspices of the National Conference of Commissioners on Uniform State Laws, is considering whether a Uniform Computer Software Contracting Act should be prepared.
6. See Revision at 402-03 (suggesting that the traditional scope of Article 2 should be "reconsidered in light of the changing practices and needs of the parties involved").
7. Professor Lousin would delete the phrase because it is "ambiguous and, in fact, appears to restrict the scope of Article 2." Lousin, Memo to Study Group 3.
here is uncertain and may unduly restrict the application of Article 2 in transactions where both Article 2 and Article 9 should apply.

(C) The Drafting Committee should identify such cases and provide some guidance for disposition in the comments.

Relationship to Other State and Federal Statutes.

Section 2-102 also provides that “nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.” This phrase is inartfully drafted and provides no indication of what those statutes are.

(D) The Study Group recommends, at the very least, that a list of either particular statutes or types of statutes be provided in the text of § 2-102. Section 2A-104, which lists “types” of statutes to which a lease governed by Article 2A may be subject, provides a possible model for revising the current language of § 2-102.

“Transactions in Goods.”

The Study Group agreed that we could “live with” the phrase “transactions in goods” in § 2-102, as interpreted in “mixed” transactions by the courts, as well as with occasional judicial decisions extending Article 2 by analogy. The lack of precision here, however, produced some extended discussion of possible alternatives.

One possibility is to revise § 2-102 to apply to “contracts for the sale of goods” (a restriction) but indicate in the comments that the phrase includes contracts where the sale of goods is a predominate part. Some guidance might then be given on when goods “predominate” in the transaction.

Another possibility is to revise § 2-102 to apply to any transaction where goods are sold (an expansion) unless the sale is incidental.\(^8\)

The middle ground between the extremes in the mixed transaction is to identify the area of dispute, i.e., warranties, and, if it involves goods, apply Article 2 to that dispute and non-code law to the balance.

(E) Without taking a position, the Study Group recommends that the Drafting Committee review the various options and either preserve the current language of § 2-102 or select an alternative approach, such as those identified above.\(^9\)

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\(^8\) Professor Lousin suggested the following language: “This Article applies to sales of goods, to transactions that are substantially similar to sales and to sales of goods and other things or services where the transfer of the goods from one party to another is a substantial component of the sale.” Lousin, Memo to Study Group 1.

\(^9\) Some of the Study Group favors the approach taken in § 2.2 of a proposed revision of the Canadian Sale of Goods Act. (The proposal was made in 1982 but was
Extension by Analogy.

Neither Article 1 nor Article 2 contains a section defining when, if ever, a court should extend Article 2 by analogy to disputes not otherwise within its scope. The pressure for this extension is greatest where the dispute involves the quality of goods transferred in a transaction where services predominate.\textsuperscript{10} The need for a section on extension, however, will vary with which scope option is selected for § 2-102. For example, if the “middle ground” option were selected, there would be no need for an extension section (disputes involving goods would always be covered) unless the court exercises its discretion to extend Article 2 to “pure” service disputes or other transactions in goods, such as a bailment or loan of goods.\textsuperscript{11}

(F) The Study Group recommends that some explicit provision governing extension by analogy be included in Article 2 or in a comment and that the provision be tailored to the “scope” option selected for inclusion in § 2-102. See § 2A-102, Comment.

Consumer Protection.

The Drafting Committee’s recommendations on the extent to which Article 2 should provide special protection for consumer sellers and buyers are outlined in Rec. Int.(2).

(G) For purposes of the initial scope determination, we recommend that language similar to that in § 9-206(1) and § 2A-104, be inserted in a new subsection to § 2-102.

[TASK FORCE - 2-102]

SECTION 2-102

The problem with this section is that the scope of Article 2 is unclear. Although the title appears to limit it to “sales,” the text begins with the phrase “Unless the context otherwise requires, this Article applies to transactions in goods . . . .” The Report

\textsuperscript{11} Conversely, if the first possibility were adopted (scope restricted), a greater need for guidance on extension by analogy would exist.
points out that no one is sure what the phrase means, and there is some suggestion in the Report that the phrase should be deleted.

This mysterious language was added to the Code in a 1956 revision, which was a response to the Report of the New York Law Revision Committee which had criticized the Code for not having a scope section. This language both broadened and narrowed the scope of Article 2. It narrowed it by limiting it to goods, but it broadened it by expanding its application to "transactions," which covers a broader array of relationships than simply sales.

Because of the range of possible relationships which could be covered by the term "transactions," the drafters concomitantly added the precatory limiting language "unless the context otherwise requires . . ." This language was supposed to limit the application of Article 2 in certain transactions other than sales. How this was to be limited is unclear, however. One commentator has suggested that the language meant that:

it was widely assumed in commercial circles that this qualification would prevent the application of any section in Article 2 to a case not involving a sale if the section to be applied used sales language, such as "sale," "buyer," or "seller." Thus it was expected, for example, that the warranties expressed in sections 2-313, 2-314, or 2-315 would not be applied to a transaction in which goods were leased, because all of these sections employ "sales language," indicating that they are "sales provisions" in-

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65 "Goods" is a term which is defined in the Code in § 2-105(1): (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).
appropriate for non-sales cases. In other words, it was thought that the context of these sections, and others like them, militated against their use in non-sales cases.67

This view, though, has not been generally recognized by the courts. Several courts have taken the position that Article 2 is applicable to non-sales transactions in goods even if the applicable section is specifically addressed to a sales situation, if the policies underlying the section are reasonably applicable to the non-sales situation under consideration.68

It is therefore clear, as the Study Group points out, that this language creates some difficulty and that it is in need of clarification. We find the suggestion that the language be deleted altogether as an inappropriate response. Article 2 is primarily geared toward sales transactions, and the fact that it is inappropriate for certain other types of contractual relationships should be specified.

The language "transactions in goods" has been especially troublesome in regard to "mixed" transactions. The Study Group does not recommend anything in particular, but suggests several possibilities to deal with this confusion. One suggested possibility is to change the language to "contracts for the sale of goods," which would be a restriction of the present language, but clarify this in the comments to note that it covers any transaction which is predominantly a sale of goods. Another suggested possibility is to revise section 2-102 to apply to any transaction where goods are sold, unless the sale of goods is incidental, which would be an expansion of the present language.

It is not clear how either proposed revision would clarify the borderline between covered transactions and those outside Article 2. This ambiguity may explain why the Study Group did not advocate a particular position. Perhaps it is advisable to leave well enough alone and let the courts continue as they have been doing.

The Study Group recommends the addition of a provision explaining the appropriate times that Article 2 should be extended

68 See, e.g., W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970) (holding that a consumer who leases has protection equivalent to a consumer who purchases).
by analogy. This is based on an attempt to update the scope provision of Article 2 to mirror the scope provision of Article 2A: i.e., section 2A-102. To the degree that uniformity between Article 2 and Article 2A is sought, this may be a sound recommendation. However, as a matter of necessity, its usefulness is unclear. Article 2 specifically deals with transactions in goods. It is unclear why it should enumerate those areas outside its own defined scope. The degree to which a court can and should appropriate Article 2 for non-sale transactions is not a statutory, but rather a judicial function.

Section 2-102 declares that Article 2 "does not apply to any transaction which . . . is intended to operate only as a security transaction." Since some transactions might properly come within both Article 2 and Article 9, the Study Group recommends that these types of cases be identified and that the comments provide further guidance. The Code is fairly explicit: transactions solely intended as Article 9 transactions are excluded. Those transactions, which have elements both of a sale (or other non-security type transaction properly covered under Article 2) and a secured transaction, are properly covered by Article 2 (as well as Article 9). This is an area which probably requires flexibility, and an attempt to give a laundry list of potential situations may be misleading and will surely be less than complete.

Finally, in an attempt to get Article 2 to conform to the language of Article 2A, the Task Force further recommends that the language in section 2-102 ("nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers") be changed to "Section 2-102 is also subject to any applicable consumer protection statute of this State." To the degree that is a desirable goal, this recommendation is sound. It is not clear, however, that it would accomplish anything of substance.

[PRELIMINARY REPORT - 2-103]

D. DEFINITIONS AND INDEX OF DEFINITIONS: § 2-103.

Rec. A2.1 (2).

The following revisions are recommended in the text of § 2-103.

A. As recommended in C, above, the Drafting Committee should consider how the phrase "unless the context otherwise requires" can
be clarified. Does it operate solely as a restriction on the text and, if so, under what circumstances?

B. As recommended in Rec. A.1(5), the Drafting Committee should consider whether all non-consumer sellers and buyers, whether merchants or not, should be held to an “objective” standard of good faith. The language in § 4A-104(a)(6) provides a possible “objective” standard for the commercial buyer or seller who is not a merchant.

C. Section 2-103(3) incorporates a definition of “consumer goods” from Article 9: Goods are “consumer goods” if the are used or bought for use primarily for personal, family or household purposes.” § 9-109(1) (Emphasis added). The Magnuson-Moss Warranty Act, however, defines a “consumer product” as “any tangible personal property... which is normally used for personal, family, or household purposes...” 15 U.S.C. § 2301(1) (Emphasis added). The Drafting Committee should consider whether the broader definition of consumer goods in the Magnuson-Moss Warranty Act is appropriate for Article 2.

[TASK FORCE - 2-103]

SECTION 2-103

Should all non-consumer sellers and buyers be held to an “objective” standard of good faith whether they are merchants or not? The Study Group does not give any reason for considering this proposed change. It does appear to be a sound suggestion, though, because it would set an easier standard for Article 2 contracts which would be much easier to apply by courts. It would also be consistent with the general theory of objective contract interpretation.

Article 2 adopts the Article 9 definition of “consumer goods”.

69 Article 1 sets out the general rule of good faith, which applies to all contracts: “‘Good faith’ means honesty in fact in the conduct or transaction concerned.” U.C.C. § 1-201(19) (1990). This has generally been interpreted as a subjective standard, and it is applicable to any transaction within the Uniform Commercial Code. Article 2 sets out a special rule for merchants which incorporates the subjective standard of Article 1 with an objective standard: “‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” U.C.C. § 2-103(1)(b) (1990).