"Goods are . . . 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes . . . ." The Report suggests that the broader definition contained in the Magnuson-Moss Act should replace this definition. The Magnuson-Moss Act defines a "consumer product" as "any tangible personal property . . . which is normally used for personal, family, or household purposes . . . ."

The Article 2/Article 9 definition of "consumer goods" has always caused a problem for retail dealers because it is based on the intentions of the buyer, which are often unknown to the seller. The Magnuson-Moss definition would add certainty in transactions by creating an objective standard to determine whether goods are consumer goods. It would also eliminate from the fact finding process the need to determine the subjective state of mind of one of the parties, thereby adding to the administrative ease of determining Article 2 cases.

[PRELIMINARY REPORT - 2-104]

E. DEFINITIONS: "MERCHANT"; "BETWEEN MERCHANTS"; "FINANCING AGENCY": § 2-104.

Rec. A2.1 (3)

No revisions are recommended in the text of § 2-104. Comment 1, however, should be revised to clarify that not all commercial buyers are "merchants."

[TASK FORCE - 2-104]

SECTION 2-104

The Study Group suggests that Comment 1 be revised to clarify that not all commercial buyers are merchants. Comment 1 implies a broader definition of merchant than is indicated in Comment 2, which assumes some professional, specialized knowledge. The Task Force agrees that there is a large group of buyers who should not be subject to the higher standards imposed on knowl-

edgeable merchants. To the extent that a clarification of Comment 1 would avoid confusion on this point, the recommendation is commendable.

[PRELIMINARY REPORT - 2-105]

F. DEFINITIONS: TRANSFERABILITY; "GOODS"; "FUTURE" GOODS; "LOT"; "COMMERCIAL UNIT": § 2-105.

No revisions are recommended in the text of § 2-105.

[TASK FORCE - NONE]

[PRELIMINARY 2-106]

G. DEFINITIONS: "CONTRACT"; "AGREEMENT"; "CONTRACT FOR SALE"; "SALE"; "PRESENT SALE"; "CONFORMING" TO CONTRACT; "TERMINATION"; "CANCELLATION:" § 2-106."

Rec. A2.1 (4).

With one minor exception, no revisions are recommended in the text of § 2-106. Consideration should be given, however, to moving the substantive effect of subsections (3) and (4) out of the definitions. See §§ 2-103 & 2A-505.

Greater clarity would be achieved if the last phrase in the first sentence of § 2-106(1) were revised to read "Contract for sale' includes both a present sale of goods and a contract to sell goods, including future goods, at a future time." Article 2 should clearly apply to the wholly executory contract for the future sale of goods that have not yet been procured, manufactured or planted.

[TASK FORCE - 2-106]

SECTION 2-106

Because section 2-106 is a "definition" section, the Study Group suggests that subsections 3 and 4 of this section, which state the legal effect of a termination or cancellation, should appropriately be placed in another section. This change, although without substantive effect, would simply restructure the Code in a more orderly fashion and is supported by the Task Force.

73 Subsections three and four of U.C.C. § 2-106 should probably be placed in Part 3 of Article 2 ("General Obligation and Construction of Contract").
Section 2-106(1) presently reads, "In this Article . . . 'contract' and 'agreement' are limited to those relating to the present or future sale of goods." This creates an ambiguity: is this limited to a present contract for future goods, or does it also include the possibility of an agreement for a future contract for the sale of goods. The proposed revision would clarify this confusion by pointing out that it only includes the former.

[PRELIMINARY REPORT - 2-107]


No revisions are recommended in the text of § 2-107.

During the various energy crises over the last 15 years, disputes under long-term contracts between the producers of oil, gas, coal and electricity and purchasers (usually pipelines or utilities) frequently have arisen. The issues involve, inter alia, excuse and adjustment, breach and adequate assurance and remedies. These disputes reveal the wide variety of risk allocation devices employed in energy contracts, including the notorious "take or pay" clause. The disputes frequently involve regulated utilities or arise in transactions somewhere between direct federal regulation of the producers and state regulation of retail sales of energy to consumers.

The courts have held that gas, coal and electricity are goods, as long as they are to be "severed by the seller", § 2-107(1), and that the process of severing is complete when the gas or oil enters the purchaser's pipeline. As a result, the courts have been required to apply Article 2 to unique transaction types which are influenced, indirectly, by regulatory rather than market policies. Moreover, the relational implications of the long-term contract frequently collide with those parts of Article 2 with roots in neoclassical concepts of contract. This tension is apparent in the decisions involving the "take or pay" clause. These developments do not warrant an exclusion of energy contracts from Article 2. Quite the contrary, they require a recognition that there are important sub-contexts within contracts.

12. E.g., Manchester Pipeline Corp. v. Peoples Natural Gas Co., 862 F.2d 1439 (10th Cir. 1989)(natural gas).
for the sale of goods and that differences within each sub-context pose continuing challenges in the application of Article 2 standards. Before revisions are required, it must first clearly appear that the courts, using sound Code methodology, are unable to protect the interests of both parties within the existing structure and policies of Article 2. To date, at least, the case for a major revision has not been made.

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-201]

ARTICLE 2, PART 2:
FORM, FORMATION AND READJUSTMENT OF CONTRACT.

A. OVERVIEW.

Without purporting to exhaust the subject matter, Article 2, Part 2 contains 10 sections dealing with the form, formation and adjustment of the contract for sale. In some respects, they marked, in 1958, a sharp departure from the common law. With time, however, the departures have become more familiar, if not less controversial, and many are now reflected in the Restatement, Second, of Contracts. In essence, these sections reduce the requirements of formality and, through the use of standards rather than rules, increase the chance that a contract will be formed earlier rather than later in the relationship. The test is whether the parties intended to conclude a bargain. If so, there is a contract to the extent that "there is a reasonably certain basis for giving an appropriate remedy."³

B. STATUTE OF FRAUDS: § 2-201.

Section 2-201 has generated considerable litigation, controversy and commentary.⁴ Despite its ancient lineage, there is no persuasive evidence either that the statute of frauds has prevented fraud in the proof of the making

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3. Cf. Restatement, Second, Contracts § 33(2), which states that the "terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy."
4. See Revision at 460-63.
of a contract or that its presence has channeled behavior toward more reliable forms of record keeping. On the other hand, there are claims that the statute of frauds is anachronistic, that the treatment of the quantity term corrupts other substantive provisions of Article 2, and that the exceptions in § 2-201(3), including the judicially grafted reliance exception, virtually eat up the rule.

On the other side of the Atlantic, England repealed the statute of frauds for sales in 1953. Since then there has been little discussion and no reports about the impact, if any. In short, the statute on frauds has apparently sunk in England without an adverse trace. Furthermore, Article 11 of the United Nations Convention of Contracts for the International Sale of Goods (CISG) provides: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses."

Are these the trends of the future? What would happen in the United States if § 2-201 were repealed? What is the potential impact upon the need for a writing, broadly defined, from the development of sophisticated electronic messaging systems? These are the somewhat cosmic questions that surround § 2-201.

5. Professor Vold argued that the "cases that justify the statute are... the thousands of uncontested current transaction where misunderstanding and controversy are avoided by the presence of a writing which the statute at least indirectly aided to procure..." Vold, The Application of the Statute of Frauds Under the Uniform Sales Act, 15 Minn. L. Rev. 391, 393-94 (1931). An empirical study suggested, however, that reliance on an order rather than the use of a writing was the prevalent practice in some trades. Comment, The Statue of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices, 66 Yale L.J. 1038 (1957). There is no recent study testing any of these propositions.


8. See, e.g., Metzger & Phillips, Promissory Estoppel and § 2-201 of the UCC, 26 Vill. L. Rev. 63 (1980); Restatement, Second, Contracts § 139.


10. A Contracting State may protect its domestic statute of frauds by making a reservation under Article 96. (The United States has not made a reservation.) In addition, the parties may impose or agree upon formal writing requirements. Thus, an offeror may require that an acceptance be in writing, Articles 18 & 19, and both parties may agree in a written contract that "any modification or termination by agreement" be in writing. Article 29. See § 2-209(2).
1. Repeal the Statute of Frauds?

Rec. A2.2 (1).

The Committee strongly recommends that the Drafting Committee carefully consider whether to repeal the statute of frauds.

Despite the trends noted above, the Study Group was not unanimous that § 2-201 should be repealed. Doubts were created by lack of information (e.g., what the impact would be?) and concerns that the repeal would clash with an evolving Article 2A and developments in the law of lender liability. Furthermore, some were concerned that the need in electronic contracting for an authentication system responded more to concerns about perjury than the objective of providing credible evidence that a contract was formed.

In any event, the lack of evidence that the statute of frauds either deters perjury or channels commercial behavior into good habits of form and the specter of courts straining to avoid the statute when it is clear that some agreement existed persuaded most of the Study Group that § 2-201 should go.

2. Amendment of the Statute of Frauds.

Rec. A2.2 (2).

Assuming that § 2-201 is not repealed, the Study Group recommends that the Drafting Committee consider the following proposals for clarification or revision.

(A) Delete all references to quantity now contained in § 2-201.

Even if there is a sufficient writing under § 2-201(1), the contract is not enforceable beyond the quantity of goods “shown in such writing,” § 2-201(1), or “admitted,” § 2-201(3)(b), or “goods... which have been received and accepted.” § 2-201(3)(c). The purpose is to prevent fraud in the making of the quantity term—a term that cannot be readily supplied as a “gap” filler under Article 2, Part 3. The effect of this requirement has been to induce the courts to strain to find some quantity term to interpret and, in addition, to undercut the basic “gap filling” policies of Article 2,

11. Although §2A-201 exhibits no retreat from the requirements of § 2-201, the expectation of a writing may be more common in leasing practice than in contracts for sale.

12. A leading case is Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784 (5th Cir. 1975), where the court, upon finding a quantity term in the writing, rejected the statute of frauds defense and turned to the question whether the quantity term was “too indefinite to support judicial enforcement.”
Part 3 without any evidence that fraud has been deterred or that the fact finding process was impaired.\textsuperscript{13}

The effect of any such deletion is simple. If it is clear from the signed writing that some contract for sale has been made, the statute of frauds is satisfied and all of the alleged terms, written or oral, may be proved in the usual way under Article 2.

\textbf{(B) Clarify who is a merchant under § 2-201(2).}

The phrase “between merchants” in § 2-201(2) has been interpreted narrowly by some courts, particularly where farmers are involved.\textsuperscript{14} This means that a farmer who failed to respond to a confirmation could still assert the statute of frauds defense even though he was a “merchant with respect to goods of that kind.”

Clarification of this phrase is required, with emphasis upon whether the narrower definition of merchant, used in § 2-314(1), should also be employed in § 2-201(2), rather than the broader definition in § 2-104(1).\textsuperscript{15}

\textbf{(C) Clarify in the statute whether reliance on a promise made in an oral agreement within the statute of frauds may be sufficient to make the promise enforceable.}

The cases disagree on the effect of reliance. Clarification is required whether reliance is a proper way to avoid § 2-201(1) and, if so, what limitations should be imposed. Compare Restatement, Second, Contracts § 139 (2), which lists a number of significant factors, including the “extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence.”

On the merits, the trend is toward a greater use of reliance as an independent ground to enforce an oral promise within the statute of frauds.\textsuperscript{16} If this trend is sound, a provision endorsing a reliance alternative should be included in § 2-201.

\textsuperscript{13} For a persuasive attack on the “quantity” requirement, see Bruckel, The Weed and the Web: § 2-201’s Corruption of the UCC Substantive Provisions—The Quantity Problem, 1983 U. Ill. L. Rev. 811 (1983).


\textsuperscript{15} See, generally, Onofry, The Merchants Exception to the UCC’s Statute of Frauds, 32 Vill. L. Rev. 133 (1987). Much of this definitional nit picking could be avoided if a provision, such as the 1949 version of § 1-102(3), were restored. That subsection provided: “A provision of this Act which is stated to be applicable ‘between merchants’ or otherwise to be of limited application need not be so limited when the circumstances and the underlying reasons justify extending its application.”

\textsuperscript{16} See, e.g., R.S. Bennett & Co. v. Economy Mechanical Industries, Inc., 606 F.2d 182 (7th Cir. 1979).
If this trend is rejected, the exclusivity of the statutory exceptions in § 2-201(3) should be stated more clearly in the statute.

(D) Clarify in which settings and by what methods after a lawsuit is filed an "admission" under § 2-201(3)(b) is effective to admit the existence of the contract.

One question is whether an admission in pre-trial discovery other than "in his pleading, testimony or otherwise in court" is effective to remove the case from the statute. There is disagreement over this, and the statute, read literally, supports a narrow view. A broader revision might include any authorized pre-trial discovery proceedings where an admission could be introduced as evidence in court. Similarly, the comments might clarify who is a "party" under § 2-201(3)(b). For example, is a former employee who was then acting as agent for the defendant a "party" who can admit the existence of a contract?

The Study Group has recommended that all references to "quantity" be deleted from § 2-201. If this revision is adopted, it would, as a practical matter, further broaden the potential scope of § 2-201(3)(b). A party could not escape perjury by admitting the contract but, conveniently, forgetting the quantity term.

(E) Clarify that the parol evidence rule does not apply, without more, to a writing used to satisfy the statute of frauds.

The usual principle is that even though a writing satisfies the statute of frauds, the "burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected." § 2-201, Comment 3. Decisions holding that an unanswered memorandum which satisfies the statute under § 2-201(2) cannot be contradicted under the parol evidence rule, therefore, should be viewed with suspicion. The parol evidence rule does not exclude evidence relevant to whether an enforceable contract was formed and, in any event, would not apply unless the parties "intended" the memo to be a "final expression of their agreement with respect to such terms as are included therein. . . ." § 2-202.

(F) Conform § 1-206 to any revisions made in § 2-201. See Rec. A.1(7).

(G) Coordinate any revisions in § 2-201 to developments in electronic data interchange (EDI) and electronic messaging systems (EMS).

Leary and Frisch have stated that in "today's electronic age, the whole concept of a signed writing may need rethinking." Assuming that a system or device to authenticate electronic contracting between trading partners will be developed, the questions of what that system should be and whether a separate Code section and new definitions will be required must be answered. These technological developments in the method and timing of communication arise out of developments not envisioned by the drafters of Article 2 and test the capacity of the Code to keep pace with business developments. In short, § 2-201 can be neither repealed nor revised without considering the effect, no matter how remote, of electronic messaging or electronic data interchange.

[TASK FORCE - 2-201]

ARTICLE 2—PART 2

SECTION 2-201

The original purpose of the Statute of Frauds (now codified at 2-201) was to prevent fraud caused by perjury so that parties would not be held to contracts that they never made. Today, however, the law of agreement, consideration, conditions and illegality have developed in ways that may (not all Task Force members agree) make this less likely. Conversely, it appears that the statute may promote more fraud than it prevents. For example, although the statute requires a writing sufficient to indicate that an agreement was made, the problem of forgery is persistent. In addition, the statute creates a bar to the enforcement of many oral contracts which the parties clearly intended to enter.

On the other hand, the Statute is firmly entrenched in American law both in the Code and in statutes outside the U.C.C.

18. See Revision at 462.
19. One proposed solution is to permit the parties to agree in advance of the particular sale on the form of and the documents in the transaction. See American Bar Association, Model Form of Electronic Data Interchange Trading Partner Agreement and Commentary § 1.1 (1989).
75 Willis, The Statute of Frauds—A Legal Anachronism, 3 IND. L.J. 427, 427 (1928).
76 Id. at 431.
78 Id.
There is, therefore, some concern that inviting states to repeal section 2-201 invites non-uniformity among the states of the worst kind—the requisites of basic enforceability of a promise.

As a consequence of these conflicting policies, the Task Force was unable to reach a conclusion as to whether repeal of the statute would be appropriate. One suggested substitution for the statute would be to alter the burden of proof to require proof by clear and convincing evidence (rather than by a preponderance) of the existence and terms of an oral contract. It is believed by some that the present burden of proof is basically meaningless as a safeguard against error.

The following discussion is based on the assumption that the Statute of Frauds is not repealed.

The Task Force is also divided as to whether all references to "quantity" now contained in section 2-201 should be deleted. Some members believe that the quantity provision may nullify substantive provisions of the Code. The risk that legitimate contracts for which other sections of the Code promise substantive enforceability will fail, not because of perjury, but on technical issues due to mechanical construction of the contract language. Under these premises, section 2-201 provides a means for avoiding a contract that proves to be a bad bargain.

The problem with the quantity provision conflicting with other substantive law is "most evident in its effect upon ordinary requirements and output contracts." Under section 2-201(1), if a requirements or output contract omits such "magic" words as "all" or "requirements," the contract is insufficient under the Statute of Frauds, although no such words are required under section 2-306(1). In some cases involving these contracts, courts have tended to look at the writings in a mechanical way without much consideration of the substance of the agreement.

80 Id. at 815.
81 Id. at 817.
82 Id. at 819-20.
83 See, e.g., Cox Caulking & Insulating Co. v. Brockett Distrib. Co., 150 Ga. App. 424, 258 S.E.2d 51 (1979) (holding that the phrase in seller's letter "for the above project" was not sufficient as a term of quantity within the statute of frauds, thus barring enforcement of an alleged oral contract).
If the quantity provisions of section 2-201 were eliminated, the quantity terms could be supplied by parol evidence. The burden of proof would still rest with the party asserting the existence of the agreement, so that the likelihood of fraud or misrepresentation would be greatly reduced. Not all members of the Task Force agree with this position. At least one member sees the quantity term as designed to prevent fraud in the making of the most important term in a sales contract, and the only term that cannot be readily supplied by Article 2 gap fillers. Because the price term may be supplied by section 2-305, the quantity requirement places a limit on the size of the contract, thus limiting the size of any fraudulently asserted contract. In addition, any change in section 2-201 would necessitate revision of section 8-319, which also contains a quantity term.

In Comment 2 of section 2-104, three categories of merchants are recognized: (1) a merchant is a person who has knowledge of the particular business practice involved in the transaction,84 (2) a merchant is a person who has a specialized knowledge in the goods involved in the transaction,85 and (3) a merchant is a person who has knowledge of either the business practices or the goods involved in the transaction (i.e., either of the above two standards).86

The Study Group suggests that for the section 2-201(2) exception to the general signature requirement of the Statute of Frauds, the broader definition of merchant (category 3, above) should be employed instead of the more restrictive categories 1 and 2, above. It is not clear to the Task Force, however, that the broader definition should be applicable. If the purpose of the exception is to hold parties who are knowledgeable of the business practices of their industry to bargains they actually made because they should understand the consequences of their acts in a business context, then the exception should apply only to those who have the requisite knowledge.87 The broader definition of merchant,

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84 This definition of a merchant is applicable in U.C.C. §§ 2-201(2), 2-205, 2-207, and 2-209.
85 This is applicable in U.C.C. §§ 2-314(1), 2-402(2), and 2-403(2).
86 This standard is applicable for U.C.C. §§ 2-103(1)(b), 2-327(1)(c), 2-603, 2-605, 2-509, and 2-509.
87 See Comment 2 to § 2-104 which states that under §§ 2-201(2), 2-205, 2-207, and 2-209 "almost every person in business" is a merchant under § 2-104(1) "since the practices involved in the transaction are non-specialized business practices such as answering mail." U.C.C. § 2-104 comment 2 (1990).
which incorporates knowledge of the goods as well as of the industry, is irrelevant in achieving this goal. If the purpose of the proposed revision is simply to further erode the Statute of Frauds by expanding the availability of ways to avoid it, then this proposed change will achieve its purpose. As to the question of whether the Code is presently ambiguous about which definition of 'merchant' is applicable for purposes of section 2-201(2), the comments are clear that it is the first definition under section 2-104 ("knowledge or skill peculiar to the practices or goods involved in the transaction") which applies.\footnote{\textit{U.C.C.} § 2-201 comment 2 (1990).}

The courts are split on the issue of whether reliance avoids the Statute of Frauds. The Study Group suggests that the Code clarify this point one way or the other with the suggestion that, on the merits, it is probably better to allow reliance as an exception to the Statute. Given the sharp division among the states on the issue, the Task Force fears that any amendment is not likely to be uniformly adopted, and may introduce intrastate inconsistency on the issue between the Code and non-Code Statutes of Frauds.

One of the most common arguments against reliance as an exception to the Statute of Frauds is the actual textual language of section 2-201. The section begins with the language: "Except as otherwise provided in this section," which on its face would appear to exclude detrimental reliance, or for that matter, any other exception to the Statute. Yet, courts have continued to allow promissory estoppel as an exception, often relying on section 1-103 of the Code.\footnote{To the degree that § 1-103 takes priority over the precatory language of § 2-201, it not only would allow promissory estoppel as an exception to the Statute of Frauds, but would also allow any other judicially created exceptions to apply to the statute's operation. Metzger & Phillips, \textit{Promissory Estoppel and Section 2-201 of the Uniform Commercial Code}, 26 \textit{Vill. L. Rev.} 63, 98 (1981).}

The policy of section 1-203 is also supported by the recognition of promissory estoppel principles. This section imposes an obligation of good faith in the performance and enforcement of every contract and duty under the Code.\footnote{\textit{U.C.C.} § 1-203 (1990).} This obligation of good faith may (not all Task Force members agree) encompass the acknowledgement of an oral contract which the other party had relied upon. There is support on the Task Force for the view that the
other party *should* (not to say that he *does*) have the right to decline to answer such questions. It has been suggested that one of the important purposes served by evidentiary privileges is the ability to avoid the dilemma of rewarding perjury while punishing the few who are honest.

In support of barring the use of reliance in cases involving section 2-201 is the concern that the application of estoppel principles will result in the practical abrogation of the statute. The argument is that the use of reliance diminishes the evidentiary function of the statute. However, the Code itself recognizes the evidentiary value of reliance in sections 2-201(3)(a), 2-201(3)(c), and 2-209(4). Therefore, it appears that if courts consider the evidentiary value of reliance in promissory estoppel cases the protection afforded by the statute will not be seriously diminished.

The Task Force tentatively recommends an appropriate revision to section 2-201 allowing the promissory estoppel defense to the Statute of Frauds. The language of section 217A(1) of the Restatement (Second) of Contracts provides a possible model:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and does induce action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the Promise. The remedy for breach is to be limited as justice requires.

The Task Force agrees that there is a need to clarify in which settings and by what methods after a law suit is filed an "admission" under section 2-201(3)(b) will be effective to admit the existence of a contract. The statute reads: "if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court . . . ." This leaves open the question whether an admission in pre-trial discovery is effective to remove the case from the Statute of Frauds. The Study Group recommends that pre-trial admissions be admitted under section 2-201(3)(b).

A majority of the Task Force members concur in this recommendation, although there is some concern that even honest

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92 Id.
93 *Restatement (Second) of Contracts* § 217A(1).
people will be led to perjure themselves because the law effectively requires it. The view that admissions during pre-trial discovery should be admissible comports with the general thrust of this exception, which is to admit into evidence contracts which do not meet the writing requirement of section 2-201(1), but otherwise meet basic standards of proof of their actual existence. If all references to "quantity" in section 2-201 were removed, it would eliminate the possibility of a party remembering the existence of a contract, thereby avoiding perjury, but conveniently forgetting the quantity contained therein.

Finally, with regard to the point that the parol evidence rule does not apply, without more, to a writing used to satisfy the Statute of Frauds, the Task Force supports the recommendation to clarify this in the Comments.

[PRELIMINARY REPORT - 2-202]


The parol evidence rule collides with the Code's broad definition of agreement in § 1-201(3). It operates to narrow the scope of the potential bargain in fact. This collision, however, arises when (and only when) the parties intend a writing to be the final expression of (to "integrate") part or all of the terms of the agreement. Section 2-202 is invoked to protect the parties intention to contract "out" of or discharge terms agreed to in prior or contemporaneous negotiations or terms derived from the surrounding commercial context. It is a limitation upon the general definition of agreement in § 1-201(3) which depends upon a particular intention that a writing should be integrated in whole or in part.

Rec. A2.2 (3).

The consensus of the Study Group was that § 2-202 presented no major problems and, in general, was preferable to the more complex provisions of the Restatement, Second of Contracts. A number of concerns exist, however, that might justify some revisions.

For example:

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20. For a clear and persuasive analysis in accord, see A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc., 852 F.2d 493, 495-96 (9th Cir. 1988)(maritime contract under California law).

1. To what extent should a "merger" clause in a standard form contract be permitted to accomplish indirectly what cannot be done directly, e.g., the disclaimer of an express warranty. See § 2-316(1). Other than § 2-302, there is no explicit control over the risk of unfair surprise. A possible solution is to require that a "merger" clause in a standard form contract be "separately signed" by the party against whom the clause operates. See § 2-205.22

2. Can the line where the parol evidence rule stops and contract interpretation begins be drawn with greater clarity?23 For example, suppose the court concludes that language in an integrated writing has a clear meaning and excludes evidence introduced to establish that the language has another, seemingly contradictory, meaning? Despite some authority to the contrary, it should be made clear, perhaps in the comments, that the extrinsic evidence is admissible if "relevant to prove a meaning to which the language is reasonably susceptible."24

3. In the absence of a merger clause,25 what is the test to determine whether the parties intended a partial or total integration? Section 2-202 is silent and the courts have disagreed, especially over the test to determine whether there is a "consistent additional term."

(A) The Study Group agrees with the test in Comment 3: "If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact." We recommend that the Drafting Committee incorporate this language into the text of § 2-202.26

4. The ambiguous "unless" in § 2-202(b) should be clarified. Even if the parties have intended a complete and exclusive statement of the terms,

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22. Another possible solution is § 211(3) of the Restatement, Second, Contracts, which provides: "Where the other party has reason to believe that the party manifesting [assent to a standardized agreement] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." For a general discussion, see Broude, The Consumer and the Parol Evidence Rule: § 2-202 of the UCC, 1970 Duke L.J. 881 (1970)

23. See Restatement, Second, Contracts § 214. Despite an integration, the parol evidence rule does not apply to disputes over whether a valid contract was ever formed or oral modifications of a written contract.

24. See A. Kemp Fisheries, supra note 20 at 495.

25. Note that the presence of a merger clause is not conclusive on whether the parties intended an integration. See Sierra Diesel Injection Service, Inc. v. Burroughs Corp., Inc., 874 F.2d 653 (9th Cir. 1989).

26. Cf. Restatement, Second, § 216(2), which states that an agreement is "not completely integrated if the writing omits a consistent additional agreed term which is... such a term as in the circumstances might naturally be omitted from the writing." (Emphasis added).
those terms still may be "explained or supplemented" by course of dealing, usage of trade and course of performance under § 2-202(a).

5. Is a general merger clause to which both parties have assented sufficient, without more, to exclude evidence of "course of dealing or usage of trade?" It is unclear from the statute, although most courts have held no.27

(B) We agree with this conclusion and affirm that usage of trade, course of dealing and course of performance are automatically part of the agreement unless identified in and explicitly negated by the writing. A general merger clause is not sufficient.

[TASK FORCE - 2-202]

SECTION 2-202

The consensus of the Study Group is that section 2-202 presents no major problems and, in general, is preferable to the more complex provisions of the Restatement (Second) of Contracts. Some minor revisions, however, are suggested.

The first Study Group recommendation concerns the impact of the cross-reference in section 2-316(1) to section 2-202 which, in the words of the Study Group, "raises the risk that a standard form 'merger' clause may exclude an express warranty made before the contract was signed, even though it is still part of the buyer's actual expectations."95 Expressly declining to discard the cross-reference, the Study Group recommends that section 2-202 be revised to ensure that the buyer is not unfairly surprised by the merger clause. One possible revision is to require that the merger clause be 'separately signed' by the other party. See sections 2-205 and 2-209(2). Another possibility is to draft a new comment requiring proof that the buyer expressly assented to the merger clause.96

In theory, a buyer should not be so prejudiced since, even with a merger clause, the writing should not be a bar to other testimony, "unless the court finds that the writing was intended

27. See Kastely, Stock Equipment for the Bargain in Fact: Trade Usage, "Express Terms," and Consistency Under Section 1-205 of the UCC, 64 N.C.L. Rev. 777, 785-96 (1986)(discussing the cases and arguing for an expanded trade usage).
by both parties as a complete and exclusive statement of all the terms."97 In theory, if a buyer does not know of the merger clause, the court could not make a factual finding of integration, and hence the testimony of warranty could not be foreclosed. This is problematic because a minority of courts accept a merger clause at face value,98 and the frequency of such clauses in standard form contracts makes it worthwhile to re-examine the problem.

Of course, this is one of the problems endemic to adhesion contacts, especially consumer contracts. One non-Code approach is to attack the use of such a clause where the seller has reason to know that the buyer does not realize it exists or what it means, as an unfair or deceptive trade practice, or breach of duty of good faith.99 That avenue, however, has not yet been widely explored.

The separate signing alternative100 does not deal effectively with the adhesion contract situation. Sections 2-205 and 2-209(2), cited by the Study Group, are not at all comparable. The firm offer provision of section 2-205 will almost certainly be confined in practice to merchant-merchant transactions. While the language of the section 2-209(2) provision (authorizing a clause excluding modification unless by a writing) expressly contemplates application to a non-merchant (in which case the non-merchant must separately sign), it again seems most unlikely that it would affect many non-merchant transactions.

More to the point is that a separate signing requirement is likely to only add another formality to the standard form contract without materially affecting the result. It is a technique directed at the bargaining process that may have impact where a contract is a "joint creative effort." But what we are dealing with is "that which would be a contract except that no bargaining process really shapes it."101 Consequently, efforts to control the result by tinkering with one detail of the process are likely to fail.102 The Task Force strongly believes that this suggested option should be rejected.

99 Id.
100 The alternative may have been prompted by the merger clause recommended by J. White & R. Summers, Uniform Commercial Code § 2-12, at 111-12 (3d ed. 1988).
102 Professor Leff observed:
The addition of a comment that the buyer expressly assented to the merger clause would be in the spirit of the present comment and would overcome the reluctance of some courts to see past the merger clause and permit the continued evolution of case law measuring the intent of the parties.\textsuperscript{103}

The Study Group also referred briefly to the impact of a merger clause on implied warranties and recommended clarification by adding a new comment to section 2-202, which would read: "when, if ever, a general merger clause excludes an implied warranty of merchantability or fitness." Professor Honnold's early analysis seems still applicable:

The Code's parol evidence rule probably would not bar oral conversations which provide the basis of an implied warranty. Section 2-202 excludes parol evidence of additional or inconsistent "terms"; an implied warranty may not be a "term", which is defined in Section 1-201(42) as "that portion of an agreement which relates to a particular matter." Section 1-201(3) defines "agreement" as the "bargain in fact," including the language of the parties and "implication from other circumstances." It is doubtful that implications added by law are part of the "bargain in fact."\textsuperscript{104}

It is not clear that there is a sufficient problem with this issue to warrant an additional comment.

\textsuperscript{[K]}eeping 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 process. By facilitating more bargaining? But that is absurd ....

\textit{Id.} at 148.

In a footnote, Professor Leff referred briefly to the parol evidence rule problem: "It is even more ironic, perhaps, that even to the extent that there is a happening leading to the consumer contact, it is in any event to a large extent shielded from effective judicial scrutiny by the vestigial parol evidence rule." \textit{Id.} at 147 n.54.

\textsuperscript{103} See, e.g., \textit{Sales of Goods and Services}, supra note 98, \S 18.5.

\textsuperscript{104} 1 \textit{State of New York Revision Commission Rep.: Study of the Uniform Commercial Code} 412 n.104 (Hein & Co.) (1955). White and Summers agree that a merger clause "would not keep out evidence introduced to impose rights and duties that arise by operation of law. Implied warranties are the prime example." U.C.G. \S 2-12. See also U.C.G. \S 2-10, at 106.
The Task Force agrees with the perceived need to draw the line between the parol evidence rule and contract interpretation with greater clarity. The basic concern expressed by the Study Group is the line of authority which supports the traditional "plain meaning rule": if the court finds that the document is "clear on its face," parol evidence is not admissible to explain it. Many courts suggest that the Code should specifically clarify that extrinsic evidence is admissible if "relevant to prove a meaning to which the language is reasonably susceptible."¹⁰⁵

The question presented is not whether the document is integrated and, therefore, whether the parol evidence rule applies, but whether, once it is determined that the rule does apply, the court must determine whether parol evidence is admissible to interpret the agreement when the agreement is arguably clear on its face.

The uniformity of the Code will certainly be enhanced by the clarification and adoption of one of these lines of authority to the exclusion of the other. The view expressed by the Study Group is clearly the majority view and the prevalent trend.¹⁰⁶ And although there is still recent authority in support of the "plain meaning rule,"¹⁰⁷ the fact that few judges appear to give any credibility to the notion of language being clear, in and of itself, outside the context in which it is used, militates toward the adoption of the standard proposed.

Another Study Group suggestion is that the "certainty" test of Comment 3¹⁰⁸ be incorporated into the text of the section. The problem has always been not in the articulation of a test for integration, but in the application of this test. Hundreds of cases show the struggle of courts trying to resolve the question of whether a document is integrated or not. It will probably make little dif-

¹⁰⁷ See, e.g., Trident Center v. Connecticut Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988) ("We question whether this [majority] approach is more likely to divulge the original intention of the parties than reliance on the seemingly clear words they agreed upon at the time."). ¹⁰⁸ "If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact." U.C.C. § 2-202 comment 3 (1990).
ference whether the test is articulated in the Code itself or in the comments to the Code.

A further Study Group recommendation is that "the ambiguous 'unless' in section 2-202(b) should be clarified." The point is this: section 2-202 always allows parol evidence to explain or supplement an agreement which is not integrated. The question is to what extent parol evidence can be admitted to supplement an integrated agreement. The structure of the section would imply that course of dealing, usage of trade and course of performance can supplement even an integrated agreement. This result is based on the fact that the effect of integration on the admissibility of additional terms is contained in section 2-202(b), and not in section 2-202(a), which permits the use of course of dealing, usage of trade and course of performance to supplement an agreement, even though other types of parol evidence would not be admissible to supplement an integrated agreement. It is unclear as to why this is ambiguous. This result would appear to be fairly obvious from the Code in its present form.

Finally, the Study Group recommends that steps be taken to make clear that a general merger clause to which both parties have assented, without more, is insufficient to exclude course of dealing and usage of trade. This view is supported by a majority of the courts and appears to be implicit in the comments.109 This view is also evident from the structure of the section itself, i.e., the section which allows for the admission of course of dealing and usage of trade section (a) is set out separately from the section which deals with integration by merger clauses (section (b)). Thus, the Report's suggestion that a merger clause, without more does not operate as a bar to the admission of evidence regarding course of dealing or usage of trade, is consistent with the apparent meaning of the Code and the prevalent view of the courts. To the degree that this is not clear in the Code, the suggestion that it should be clarified is sound.

109 The comment to Section 2-202 states:
Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased.
D. SEAL INOPERATIVE: § 2-203.

No revisions are recommended in § 2-203.

E. FORMATION IN GENERAL: § 2-204.

No major revisions are recommended in § 2-204.

Section 2-204, a core provision in Article 2's formation provisions, eliminates formal requirements in the manner and timing of formation and recognizes "conduct by both parties" as primary evidence of intention. It also empowers parties who "have intended to make a contract" to create a contract even though material terms are indefinite or not agreed, if there is "a reasonably certain basis for giving an appropriate remedy." § 2-204(3) This latter approach, although sometimes difficult to apply in particular cases,28 is also adopted in § 33 of the Restatement, Second, of Contracts. Rec. A2.2 (4).

A possible revision to § 2-204(3) would substitute the language "parties have intended to conclude a bargain" for "intended to make a contract." It is unlikely that the latter intention is present in most cases and doubtful that it should be required.29

The Study Group's only recommendation is to change the language in section 2-204 from "intended to make a contract" to "parties have intended to conclude a bargain," because it is un-

28. An important example is Bethlehem Steel Corp. v. Litton Industries, Inc., 507 Pa. 88, 488 A.2d 581 (1985), where, after several appeals, a divided court upheld the decision of the trial court that the failure to agree on a price escalation clause meant that the parties did not intend to contract at all.

29. See Kleinschmidt Div. of SCM Corp. v. Futuronics, 41 N.Y.2d 972, 363 N.E.2d 701, 702-03 (1977), where the court stated that the basic question under § 2-204(3) is whether the parties have reached a basic agreement: "Without agreement there can be no contract, and, of course, without a contract there can be no breach. This principle, basic as it is to contract law, finds explicit recognition in the . . . Code."
likely that the former intention is present in most cases, and it is, therefore, doubtful that it should be required.

The reason for the change is that the operative point under which Article 2 becomes effective through this section is the point that the parties intend to enter into an agreement,\(^{110}\) and not the point when the parties have the intent to contract,\(^{111}\) and "[w]ithout agreement there can be no contract."\(^{112}\) Thus, the current text of section 2-204 appears to put the cart before the horse. This suggested change would make the text of section 2-204 consistent with the usage of the concepts of agreement and contract which are set out elsewhere in the Code.

[PRELIMINARY REPORT - 2-205]

F. FIRM OFFERS: 2-205.

No revisions are recommended in the text of § 2-205.

No important issues of practical consequence appear to have arisen under § 2-205. We have no evidence on how the section is used or misused in practice.

Rec. A2.2 (5).

A possible clarification for the comments is that § 2-205 is not intended to displace other methods of creating options, e.g., through the use of consideration or by reliance. See § 1-103. Properly interpreted, § 2-205 is simply an additional, formal method to create an option.

[TASK FORCE - 2-205]

SECTION 2-205

The Study Group does recommend that the comments to section 2-205 clarify the fact that this section does not operate to displace any other method of creating options, but merely is an additional method. Although this appears to be generally recog-

\(^{110}\) The Code defines an “agreement” as “the bargain of the parties in fact as found in their language or by implication from other circumstances . . . .” U.C.C. § 1-201(3) (1990).

\(^{111}\) The Code defines a “contract” as: “the total legal obligation which results from the parties’ agreement.” U.C.C. § 1-201(11) (1990).

nized, such an addition to the comments or a clarification of the text could only help guide courts in their decisions.

[PRELIMINARY REPORT - 2-206]

G. OFFER AND ACCEPTANCE IN FORMATION OF CONTRACT: § 2-206.

Litigation under § 2-206 is sparse and the Study Group is tempted to leave well enough alone. Nevertheless, the Drafting Committee should consider the following possible revisions to text or comment.

1. Rec. A2.2 (6)

A new Comment providing working definitions of offer and acceptance could be prepared. These definitions, drawn, perhaps, from the Restatement, Second, of Contracts, should be consistent with the policy of § 2-204 and would apply to all sections where the words "offer" and "acceptance" are used.

2. Section 2-206(1)(a) provides an acceptable rule of construction for determining the manner and medium of acceptance. There is, however, no indication when an acceptance is effective. Does § 2-206 embrace the so-called "mailbox rule?" This omission may also cause problems in an age of quasi-instantaneous communication through electronics. Should the contract be formed when the impulse is transmitted or received? What are the justifications for concluding that any offer is accepted at the time the acceptance is transmitted?

Rec. A2.2 (7).

The Drafting Committee should, in a Comment to § 2-206(1), state clearly when, if ever, an acceptance that is made in a manner or medium "reasonable in the circumstances" is effective before being received.

3. The problem of the nonconforming shipment, treated in § 2-206(1)(b), raises an interesting issue10 (e.g., how to deal with a nonconforming shipment sent intentionally with the purpose to speculate on the market) and proposes a rather unorthodox solution (e.g., to treat the shipment as both an acceptance of the offer and a breach of contract unless the seller satisfies the notice of

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10. Section 2-206(1)(b) is designed to avoid what Llewellyn called the "unilateral contract trick:" If an offer required full performance for acceptance, a nonconforming performance at common law was always a rejection and a counteroffer. If the market moved up before the counteroffer was accepted, the offeror had power to avoid a contract by a prompt revocation.
accommodation condition). The remedial complexities of that solution are not elaborated in either the text or comments.\footnote{31} Nevertheless, the subsection has been ignored by the courts and no revisions are needed.

4. Section 2-206(2) attempts to cover in one sentence a problem (e.g., how to accept an offer inviting a bilateral contract by "beginning...a requested performance") which the Restatement, Second covers in several separate, complex sections. Nevertheless, there has been no important judicial activity under § 2-206(2) and no other reasons for revision have emerged. Although the "notice/lapse" issue poses analytical problems,\footnote{32} no revision is warranted.

5. Is the relationship between § 2-206 and § 2-207 clear enough? The Study Group was uneasy about the answer, but no specific solution is recommended.

[TASK FORCE - 2-206]

SECTION 2-206

The Task Force does not favor the drafting of a new comment that provides working definitions of offer and acceptance.

Currently, the Code does not define offer or acceptance, and therefore one must look to the common law of contract to define these terms.\footnote{113} This has never caused any problem under the Code, and it is unclear why a definition of offer and acceptance is now necessary.\footnote{114}

Although it provides an acceptable rule of construction for determining the manner and medium of acceptance, section 2-

\footnote{31} Nor do we learn what to do if there is a "prompt promise" to ship nonconforming goods.

\footnote{32} § 2-206(2) states that if an offeree employs a "reasonable mode of acceptance" but the offeror is not notified of "acceptance within a reasonable time," the offeror may treat the offer as having lapsed before acceptance. How can an offer lapse after it has been accepted? A better solution is to treat notice as a condition to the offeror's duty under an enforceable contract: Failure to provide notice within a reasonable time after partial performance excuses the duty and, thus, the contract. Cf. Restatement, Second, Contracts § 54.

\footnote{113} U.C.C. § 1-103 (1990).

\footnote{114} One possible suggested set of definitions proposed by the Report are those given in the Restatement (Second) of Contracts, which defines an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it," Restatement (Second) of Contracts § 24 (1981), and an acceptance as "a manifestation of assent to terms thereof made by the offeree in a manner invited or required by the offer." Id. § 50.1. Neither of these definitions give any clarity or guidance to the factual issues which embody offer and acceptance problems.
206(1)(a) does not mention when an acceptance becomes effective. The Study Group suggests that a comment to section 2-206 should be drafted to explain when, if ever, an acceptance is effective before being received.

This recommendation addresses the question of the "mailbox rule's" applicability to section 2-206, particularly as it applies to electronic transfers. The Report does not suggest under what circumstances, if any, acceptances should be effective before receipt, rather it only suggests that such circumstances be specified in a comment. It may be, however, that the circumstances which might justify the effectiveness of an acceptance before receipt are so fact sensitive that it should not be reduced to a rule of application. Possibly a broad guideline such as "when it is reasonable to place the risk of receipt of acceptance upon the offeror, acceptance will be effective upon dispatch of the acceptance in a reasonable manner," will suffice.

Some Task Force members are of the opinion that because section 2-206 is silent on the point, the mailbox rule applies by virtue of section 1-103. Furthermore, some members see no particular problem in applying the mailbox rule under modern conditions because: (1) the rule, by its name, is primarily applicable when the parties use the mail or other non-instantaneous methods of communication, and (2) the rule's basic rationale, which places the contractual uncertainty and risk of loss in transmission on the offeror, is the same regardless of the method used to communicate the acceptance.

[PRELIMINARY REPORT- 2-207]

H. ADDITIONAL TERMS IN ACCEPTANCE OR CONFIRMATION: 2-207.

Section 2-207 is controversial, complex and frequently litigated. The problem addressed in § 2-207 is created by the use of standard forms in commercial transactions. The claim is that in these transactions, the common law "mirror image" rule both (1) prevented the formation of contracts where

33. See Revision at 422-36, for an excellent analysis and treatment of the cases.
both parties thought they were bound, and (2) created the opportunity for one party's standard terms to become part of the contract even though the other party did not negotiate over and was not aware of them. Section 2-207 was designed to deal with these problems.

Experience under § 2-207, however, suggests that the dominant issue has been not whether some contract has been formed, but, rather, what are the terms of that contract? The primary problem, therefore, is to exclude from the contract material terms to which there has been no express assent. Arguably, § 2-207 does this imperfectly, if at all.

Rec. A2.2(8).

The Study Group concluded that a major revision of § 2-207 is required. In our judgment, the revision should emphasize the following:

1. The revision should draw on and be consistent with the underlying policies of Article 2, Part 2, particularly § 2-204;

2. The formula now contained in § 2-207(3) should be emphasized.

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34. For example, assume that after preliminary negotiations, Buyer makes an offer to Seller, delivery in three months. Seller mails an acknowledgment which clearly assents to Buyer's offer but also contains a standard form disclaimer of all implied warranties. Three months pass, the market has risen and Seller, claiming that no contract was formed, refuses to deliver. At common law, the acknowledgment was a counteroffer and the same result follows under § 58 of the Restatement, Second, Contracts. Under § 2-207(1), the acknowledgment creates a contract "unless acceptance is expressly made conditional on assent to the additional or different terms." This reverses the common law presumption that any additional or different term indicated that the offeror did not intend to conclude the bargain unless the offeror agreed to those terms.

35. Buyer sends an offer to Seller who sends an acknowledgment which accepts the offer and contains additional or different standard form terms and ships the goods. Buyer, without objecting to the standard form terms, accepts and pays for the goods. At common law, Seller's acknowledgment was a counteroffer and Buyer's conduct was an acceptance of the counteroffer, including the standard form terms. Under § 2-207(1), the acknowledgment plus shipment of the goods creates a contract and the standard form terms are proposals for addition to the contract. Whether they become part of the contract is determined under § 2-207(2).

36. Cf. Article 19 of CISG, which distinguishes additional or different terms that materially alter the terms of the offer from those that do not. Assuming in both cases that the reply purports to accept the offer, material terms create a counter-offer and non-material terms do not prevent the formation of a contract. This solution should be rejected by the Drafting Committee.

37. In essence, if both parties, by conduct or otherwise, recognize the existence of a contract a contract for sale exists "although the writings of the parties do not otherwise establish a contract." But what are the terms of this contract? Under § 2-207(3), the consist of "those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

In endorsing this approach, the Study Group assumed that the "supplementary terms" are balanced and otherwise fair.
3. The parties should have power to "contract out" of any revised § 2-207; and

4. Fortuities of timing in the use of standard forms should be irrelevant.

Specifically, we recommend that the Drafting Committee consider a proposal by Professor John E. Murray, Jr., which gives effect to the factual bargain of the parties and the "supplemental terms" in Article 2, Part 3 rather than any "additional or different terms" contained in standard forms.38 The concept of the "newly designed" § 2-207 can be derived from the model below:

2-207. Factual Bargains Made Operative.

(1) If a court finds exchanged written manifestations of an intention to be bound to an agreement or one or more written confirmations of a prior oral agreement they will be operative notwithstanding variations in the terms of the writing(s) if there is a reasonable basis for giving a remedy. The terms of the resulting contract will be the terms the parties have consciously considered and the standard terms of this Act. Terms deviating from the standard terms of this Act will be operative only in accordance with subsections (2) and (3).

(2) Immaterial deviations from the standard terms of this Act will become part of the contract if the party seeking to include such deviations establishes their immateriality and the writing of the other party does not limit the terms of the resulting contract to the terms of that writing.

(3) Material deviations from the standard terms of this Act will become part of the resulting contract if the party seeking to include such deviations establishes that the other party understood or reasonably should have understood such deviations and that such deviations would become part of any resulting contract to which that party expressed assent through language or conduct.

(4) If the Court finds that the writings of the parties clearly do not manifest a factual bargain or that there is no basis for affording a remedy for any factual bargain manifested by the writings, should the parties proceed to perform as if there were a contract, the terms of the resulting contract by conduct will be the express

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terms on which the writings of the parties agree and the standard terms of this Act.

[TASK FORCE - 2-207]

SECTION 2-207

Clearly some revision of section 2-207 is necessary as the existing text contains many interpretive difficulties. The better procedure for revising the section is to build on what has been done by amending the existing text rather than, as the Study Group seems to recommend, to start all over again. There are several reasons for preferring amendment to starting anew. First, much of section 2-207 works well in practice. For example, the section produces predictable results in two situations: (1) written confirmation of prior informal agreements, and (2) offer and acceptance by exchange of non-form correspondence. Second, it is easier to cure existing problems without creating new problems by amending the existing text rather than drafting it anew. Third, the accumulated case law under section 2-207 provides a context for construing that section. Though the caselaw is in disarray, it at least focuses a person on the problems of the "Battle of the Forms." A complete redraft of the section would sever it from that focus to a much greater degree than amendments would.

The revisers of section 2-207 must address two issues: (1) deal welshing, and (2) fairness of the terms of any contract resulting from section 2-207. Fairness of terms is by far both the most important and perplexing of these issues. Most of the difficulties with the present section 2-207 have been caused by the fact that it often hinders courts from finding contracts on fair terms. Any revision of section 2-207 that does not take account of this fact is doomed. Thus, it is disheartening to see that the Study Group's recommendations are premised on the assumption that the Code gap filler terms are balanced and fair.115 In fact, these supplementary terms are not balanced and fair in the Battle of the Forms context; they favor the buyer. The Task Force recommends that the Drafting Committee consider several matters in revising section 2-207.

1. The Section Should be Put on a Sound Doctrinal Footing. The underlying reason and purpose for the section must be clearly

stated in its Comments. What now passes for the reason and purpose, "a proposed deal which in commercial understanding has in fact been closed is recognized as a contract,"116 is useful for resolving the deal welsher issue. However, it fails to provide guidance on the fairness of terms issue. Thus, courts have found purchase orders drafted as offers to be acceptances making a contract on the seller's terms;117 acknowledgement forms which by any reasonable interpretation do not manifest assent to all of the buyer's terms to be acceptances making a contract on the buyer's terms;118 and buyer conduct in accepting goods knowing full well of the seller's terms, to make a contract containing not the seller's terms but standard Code gap fillers.119

The task is to formulate a principle that specifies when the contract is to be formed with jointly agreed upon terms and standard gap fillers (or specially drafted gap fillers for forms battles) and when, if ever, it is proper for one party's terms to prevail. This is far from easy.

2. Deal Welshing. The prevailing view of subdivision 2-207(1) is that it covers offer and acceptance by the exchange of non-matching forms.120 Thus, under this view, if the offeree responds to a form offer with his or her own form containing dickered terms identical to those in the offer, along with pre-printed terms which are additional to or different from the terms of the offer, the responding form constitutes an acceptance (assuming it does not contain the required expressly conditional language). This result abrogates the common law general rule that a response must mirror the offer to constitute an acceptance. It has been said that the reason for changing the rule is to prevent a party who has made a deal from avoiding liability ("welshing") on the ground that a

119 Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1445, 1 U.C.C. Rep. Serv. 2d (Callaghan) 1073 (9th Cir. 1986).
120 The drafting history of U.C.C. § 2-207 is remarkably silent on whether subsection (1) was intended to cover offer and acceptance by exchange of non-matching forms.
contract was not formed, because the response did not sufficiently match the offer.\textsuperscript{121}

The revisers of section 2-207 can take one of two approaches to the deal welshing problem. They can regulate deal welshing within revised section 2-207 or regulate deal welshing in a section separate from revised section 2-207. These two approaches are discussed below.

\begin{enumerate}
\item \textit{Regulating Deal Welshing Within Revised Section 2-207.}

It is generally believed that the main purpose of subdivision 2-207(1) is to prevent a party from welshing on a deal by asserting that, since the exchanged forms do not match, no contract was made. In practice, subdivision 2-207(1) has created more problems than it has solved.

The response of many (perhaps most) buyers and sellers to subdivision 2-207(1) has been to draft their pre-printed forms to avoid that subdivision. Thus, their forms routinely include language stating that only their terms are to be included in any contract, or that any acceptance is expressly conditioned upon the other party's assent to all their terms. In effect, the parties contract out of subdivision 2-207(1).\textsuperscript{122}

One reason for this response is that there is some uncertainty as to what are the terms of a contract formed under subdivision 2-207(1).\textsuperscript{123} This uncertainty provides a powerful incentive to avoid the application of that subdivision. Thus, an offeree realizing that a court could construe the contract to consist of the offeror's terms (the "First Shot" rule) will want to avoid that result. Similarly, an offeror concerned that a court might construe the contract resulting from the exchanged forms to exclude his terms,\textsuperscript{124} will want to avoid that result as well.

\begin{footnotes}
\item See, e.g., White & Summers, supra note 121, 33-34 (discussing dispute between co-authors as to what are the terms of the contract).
\item A court might apply the "knockout" rule. See White & Summers, supra note 121, 33-34. Also, it might manipulate the rules on offers so that the buyer's form (if sent first) does not constitute an offer.
\end{footnotes}
The Study Group has recommended emphasizing the subdivision 2-207(3) formula for determining the resulting contract's terms. This recommendation will both dispel the uncertainty that now exists and minimize the possibility of a court finding a contract solely on one side's terms. Unfortunately it is likely that buyers and sellers will continue to contract out of the rule recommended by the Study Group. This is so for several reasons: First, the supplementary terms supplied by the Code, which the subdivision 2-207(3) formula would read into the contract, often give to the buyer more than the seller would have been willing to concede.\textsuperscript{125} Therefore, the seller will still have a strong incentive to avoid the recommended rule. Second, it is in the best interest of the party who sends the first form (the offeror) to avoid the recommended rule, because the offeror will not know in advance what the resulting terms of the contract will be. Under the recommended rule, the terms of the contract would depend upon the contents of the responding form. Thus, under the recommended rule, the offeror can be bound to a contract although the terms of the contract will be unknown to him until after he is bound. Since buyers tend to be offerors, buyers will draft their forms to avoid the recommended rule. Since the seller's form sometimes constitutes the offer, sellers will have this additional reason to draft out of the recommended rule. Thus, both buyers and sellers will have legitimate reasons to be dissatisfied with the recommended rule. They will, therefore, draft their forms to avoid that rule.

Any solution that chooses to regulate deal welshing within revised section 2-207 must respond to these concerns of buyers and sellers. The concern of offerors that they can be bound to contracts, the terms of which they cannot know until after they are bound, could be met by giving offerors the right to avoid a

\textsuperscript{125} See, e.g., White & Summers, supra note 121, at 43 (stating that contract formed under subdivision (3) may disadvantage seller); Macaulay, The Use and Non-Use of Contracts in the Manufacturing Industry, 9 \textsc{Prac. Law.} No. 7, 13, 35-36 (1963) (Standard Code terms give buyers extensive warranty coverage and consequential damages which sellers routinely seek to limit). This point was not lost on the Code drafters. Compare the Code's treatment of standard warranty and remedy terms: Buyer generally obtains a warranty (see U.C.C. §§ 2-314 to -316) and full remedies (U.C.C. §§ 2-711(1) to -711(2)) with the treatment of additional terms in a form: Warranty disclaimer materially alters the contract and thus is not included; reasonable repair or replacement remedy clause does not materially alter the contract and is included (see U.C.C. § 2-207 comments 4, 5).
contract by objecting to the contract within a reasonable time after receiving the offeree's forms. The concern of sellers that the standard code gap fillers disfavor them could be met by redrafting more balanced standard gap fillers (or by drafting special gap fillers for revised section 2-207). 126

b. Regulating Deal Welshing in a Section Separate from Revised Section 2-207.

The deal welshing problem occurs when one side refuses to perform for reasons having nothing to do with the non-matching terms in the forms. Thus, for example, a party may welsh on a deal for a quantity of goods at an agreed upon price, because subsequent market price shifts make that price or quantity unattractive. The real reason for refusing to perform is dissatisfaction with the price term, a term both parties actually assented to. On the other hand, if the reason for refusing to perform is dissatisfaction with a non-matching term, then perhaps the refusal is justified. Suppose, for example, a seller refuses to ship the goods for the stated reason that the buyer has not agreed to warranty and remedy limitation terms proposed by the seller. The seller's real reason for not shipping may be dissatisfaction with the price because of a market shift. Is not the seller's true motive a question of fact? If the buyer successfully convinces the fact-finder that an unattractive price was the seller's true reason for refusing to ship, the buyer should prevail. Why not, then, treat the welsher problem as a question of fact? If a case of welshing is established, then the welsher would be precluded from asserting lack of contract.

To accomplish this result, the Drafting Committee could draft a separate section dealing with the deal welsher in the exchange of forms context. This approach has the advantage of focusing on the specific problem of deal welshing. The present rule suffers from being both over-inclusive and under-inclusive. It catches not only the welsher but also a host of parties who, far from welshing on a deal, have performed and now may find themselves stuck with the other party's terms. Neither the present rule nor the recommended rule will catch a deal welsher who has been crafty enough to include appropriate language in his form that prevents the formation of a contract under subdivision 2-207(1). The rule should

126 See infra text accompanying notes 144-45 (discussing this approach).
fit the problem. A separate section can be tailored to just the welshing problem without also being concerned with the terms of the resulting contract. Freed from concerns about welshing, the revisers can then concentrate on ensuring that the terms of any resulting contract are fair.

3. Fairness of Contract Terms. This is the engine that drives contract formation law, including section 2-207. The fact-specific nature of contract formation cases is often obscured by the popularity of seemingly simple rules of offer and acceptance, such as the Mirror Image rule and the Last Shot rule. However, the simplicity of the rules is belied by the jumbled case law existing at common law and under section 2-207. That caselaw represents nothing more than the courts’ attempts to reach fair results based upon the facts before them.

In the battle of the forms context where the parties have agreed to only a few terms and disagreed over the rest (by exchanging non-matching forms), but nevertheless intend an agreement, the task of a court is to fill the gaps in the agreement. The court must construct terms on the disputed points. In so doing the court has recourse to an old maxim: Where the parties have failed to agree on a particular term necessary to resolve a dispute, the court will imply a reasonable term.

The success of any section 2-207 revision is directly dependent upon how well the revision permits courts to fill gaps with reasonable terms. The present statute fails this test. First, the text of present subdivision 2-207(1) appears to substitute the tyranny of a First Shot rule for the tyranny of the pre-Code Last Shot rule.


128 E.g., 1 W. Page, The Law of Contracts 230-33 (2d ed. 1920). Cf. A.L.I. Minutes of the Revised Uniform Sales Act Conference, New York City, at 31 (Nov. 22-24, 1942) (available in A.L.I. Archives, Philadelphia, Pa., drawer 182, File: Sales Act, Conference, (Nov. 22-24, 1942)) (Llewellyn explaining when terms in a memorandum should become part of the contract under early draft of what is now § 2-207: “Both oral deals and wire deals are constantly followed by written confirmations, including highly reasonable terms. When those terms are highly reasonable and not objected to, the tendency of the courts has been to read them right in. I am all for that tendency.”).

129 The “First Shot” interpretation is the prevailing view of what U.C.C. § 2-207(1) means. It may not reflect what the drafters intended. See supra note 120.
Second, the text is silent on whether the Last Shot rule survives at all where, for example, the seller’s Last Shot form clearly calls to the buyer’s attention reasonable terms which the seller is insisting be part of the contract, and the buyer then accepts the goods. Third, the standard Code gap fillers, which supply terms in the mutual conduct-based contract situation, favor the buyer.

The Study Group’s recommendation to emphasize the subdivision 2-207(3) formula will cure the first problem. The second problem implicates not only the “counter-offer riddle” but also, if deal welshing is covered in a revised section 2-207, the question of what response by the offeree will avoid a contract by exchange of forms. In short, the second problem raises the question of what a party must do to contract out of subdivisions 2-207(1) and (3). The third problem implicates not only subdivision 2-207(3) but the courts’ timid attitude toward trade usage. Solutions to the second and third problems will now be addressed.

a. Contracting Out of Section 2-207.

To determine what a party must do to avoid the application of section 2-207, one should consider the reasons why special contract rules are necessary for the battle of the forms. The premise that underlies section 2-207 is that pre-printed boilerplate terms in each party’s form are not read. Indeed, they cannot reasonably be expected to be read, by the other party. This is the true source of the distinction between dickered terms and boilerplate terms. Dickered terms, which are handwritten or typed, reasonably come to the attention of the other party. Boilerplate terms, which are pre-printed often in dense columns of small type, do not.

131 See supra text accompanying note 125.
134 It has sometimes been asserted that dickered terms are vital, that is, more important, than anything in boilerplate terms. But the decision to preprint terms or to leave blanks to be filled in later does not turn on the relative importance of the two types of terms. Rather, it turns on the practical fact that blank terms must be left blank because they must vary from deal to deal. By their very nature they cannot be standardized and must be dickered.
Thus, if a term has reasonably been called to the other party’s attention, it is not the kind of different or additional term that section 2-207 is intended to cover, and it is not a term that should be ignored. In other words, a conspicuous term in a form, whether the term is handwritten, typed, or pre-printed, should have the same legal effect that it would have outside the battle of the forms. This is the principle that should guide the Drafting Committee’s determination of what a party must do to avoid the application of section 2-207.

(1) When a Response is Not an Acceptance: Contracting Out of Subdivision 2-207(1).

Assume, for example, that the buyer sends a form offer, and the seller responds with a form agreeing with the buyer’s dickered terms plus a cover letter stating that he accepts the buyer’s offer, but that the seller’s limitation of remedy term (which is set forth in the letter) is part of the ensuing contract. The seller’s response should not constitute an acceptance. Under pre-Code and non-Code law, where a response manifested assent to the offeror’s terms but included conspicuous major additional terms, most courts have not found the response to be an acceptance. The same result should follow under subdivision 2-207(1). Similarly, if the remedy limitation terms were handwritten, typed or conspicuously pre-printed on the form response instead of in a separate cover letter, the seller’s response should not be an acceptance.

If the response conspicuously stated that it was expressly conditional on the offeror’s assent to any different or additional terms in the response, this also should prevent the response from being an acceptance. Similarly, if the offer conspicuously stated that acceptance was limited to the terms of the offer, or if the offer contained conspicuous terms that were different from or major

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135 Cf. General Comment, supra note 133, at 13-14.
136 “Conspicuous” is defined in U.C.C. § 1-201(10) (1990). The present definition may need revision along two lines: (1) to ensure that the language of the term is reasonably understandable, and (2) to deal with the problems of terms on the reverse side of the form and crowded terms on the front of the form.
137 Minor additional terms should not prevent the response from being an acceptance. Cf. U.C.C. § 2-207 comment 1 (1990) (referring to letter or wire expressed and intended as acceptance that adds further minor suggestions). This reflects pre-Code law. See, supra note 128, 264-65.
additions to the response, the response should not be deemed an acceptance. In sum, no contract should be formed under subdivision 2-207(1) if a response contains a conspicuous major additional (or different) term.

(2) Resolving The Counter Offer Riddle: Contracting out of Subdivision 2-207(3).

The counter-offer riddle is this: Assuming that a response to an offer does not operate as an acceptance under subdivision 2-207(1), when is that response a counter-offer, and when is the response merely a prelude to a conduct-based contract under subdivision 2-207(3)? This distinction is significant, for if the response is a counter-offer, an offeree who is a buyer might be held to have accepted the terms of the counter-offer by accepting the goods. If the response is merely a prelude to a conduct-based contract under subdivision 2-207(3), then an offeree/buyer who accepts the goods makes a contract on terms common to the exchanged forms. The solution proceeds along the lines of the principle outlined above. If the response conspicuously called to the buyer's attention the specific terms of the seller, the buyer should be bound by those terms if he later accepts the goods. Thus, this type of response should be a counter-offer. However, acceptance of the goods should bind the buyer to just the conspicuous terms, not all of the terms in the seller's response. Any other response by the seller is merely a prelude to a conduct-based contract under subdivision 2-207(3). Examples of such other responses include a response with no conspicuous terms, and a response with a conspicuous, expressly conditional term but no other conspicuous terms.

It may be objected that this solution resurrects the Last Shot rule and that this is unfair to the buyer. To this objection there are two replies: First, the buyer is bound only by terms that are conspicuous. Outside the battle of the forms, buyers would be bound under similar circumstances, so they should be bound here. 133 Second, the solution recommended above provides the seller (as present section 2-207 and the Study Group's recommendations do

138 If there is a practical difficulty that the department accepting the goods is not the same department that negotiates and reviews the terms, this difficulty can be dealt with by permitting the buyer a reasonable time after he accepts the goods to object to the seller's terms and revoke his acceptance. Cf. Revised Article 3 - Negotiable Instruments § 3-311(2) (1990).
not) with a means to avoid standard Code gap-fillers which are often not to the seller’s liking.\textsuperscript{139}

b. \textit{Trade Usage as Modifying Standard Code Gap-Fillers.}

Under the present subdivision 2-207(3) formula, a conduct-based contract consists of terms on which the parties' writings agree plus standard Code gap-fillers. The problem with this approach is that the standard Code gap-fillers usually favor the buyer.\textsuperscript{140} This problem could be ameliorated if courts were willing to employ trade usage and course of dealing to modify the standard Code gap-fillers. There is no doubt that relevant trade usage and course of dealing do displace standard Code gap-fillers.\textsuperscript{141} However, as the Study Group report recognizes, courts have been rather timid here.\textsuperscript{142} Perhaps the answer is to reconsider Llewellyn's proposals for advisory merchants' panels on questions of trade usage. These proposals, together with the N.C.C.U.S.L. Annual Conference Committee of the Whole discussion of them are included in the Appendix to this report and are briefly discussed in the section of this report under section 1-205.\textsuperscript{143}

c. \textit{Special Balanced Standard Terms for Battle of The Forms.}

Alternatively, the Study Group might consider recommending more neutral gap filler terms to be used in battle of the forms situations. Standard gap fillers, appropriate where neither party has attempted to negotiate a term, may not be appropriate where one or both parties have conspicuously insisted on a term but did not reach agreement on the term.

Thus, for example, where the parties' negotiations and forms have been silent on the question of remedies for breach of contract, it is fair to give the buyer full remedies to effect his expectation interest.\textsuperscript{144} However, where the seller has in his forms attempted to limit the buyer's remedy to repair or replacement of the goods,

\textsuperscript{139} See \textit{infra} text accompanying note 125.
\textsuperscript{140} Id.
\textsuperscript{141} If there is a trade usage or course of dealing, it becomes part of the agreement so that there is no gap to be filled. See U.C.C. § 1-201(3) (1990) ("agreement" includes course of dealing and trade usage); \textit{id.} § 1-205 comment 4 (Code gap-fillers yield to parties' agreement including trade usage).
\textsuperscript{142} Prelim. Rpt., Part 1, \textit{infra} p. 1018.
\textsuperscript{143} See \textit{infra} pp. 1019 accompanying notes 57-62.
\textsuperscript{144} U.C.C. §§ 1-106(1), 2-711 (1990).
that remedy may be reasonable and fair in some circumstances and so should be part of the contract.145

[PRELIMINARY REPORT - 2-208]

9. COURSE OF PERFORMANCE OR PRACTICAL CONSTRUCTION: 2-208.

Rec. A2.2 (8).

No revisions are recommended in § 2-208(1). The Committee recommends, however, that § 2-208 be moved to Article 1 and integrated with § 1-205. Appropriate revisions of § 2-208(2) & (3) would then be required.39 See Rec. A.1(6)(A).

The “course of performance” principle is important enough to be placed in Article 1 and made applicable to all contracts subject to the UCC. If that is done, a new section on hierarchy, integrating § 1-205(4) and § 2-208(2), and on anti-waiver or anti-modification clauses should be drafted.

[TASK FORCE - 2-208]

SECTION 2-208

Although no revisions are recommended for this section, the Report suggests that section 2-208 be moved to Article 1 and integrated with section 1-205. A majority of Task Force members believe this is a sound suggestion, as there does not appear to be any need for the confusion which results from separating these two sections. Inevitably, all three forms of extrinsic evidence will overlap when the court invokes the aid of one. The term “contract for sale,” which is specifically geared toward Article 2, should be changed to the broader “particular transaction” which will govern the more generalized coverage of Article 1. In addition, section 2-208(2) will have to be integrated into the hierarchy of section 1-205. The opposition on the Task Force to this recommendation is premised on the potential confusion which a renumbering of existing Code sections may cause.

145 U.C.C. §§ 2-719(1), 2-207 comment 5 (reasonable remedy limitation clause involves no element of unreasonable surprise).

39. For example, the phrase “contract for sale” in § 2-208(1) should be changed in § 1-205 to a “particular transaction.” Also, the hierarchy of controlling terms in § 2-208(2) should be reviewed and integrated with § 1-205(4) and the waiver concepts in § 2-208(3) could be integrated with § 2-209(5).
10. MODIFICATION, RESCISSION AND WAIVER: 2-209.

Section 2-209 deals with four related problems: (A) When is an agreed modification of an existing contract enforceable, § 2-209(1); (B) To what extent can the agreement of the parties limit modification or rescission to a signed writing, § 2-209(2); (C) When is a contract as modified within the scope of the statute of frauds, § 2-202(3); and (D) What is a waiver and to what extent can waiver modify the original contract or the contract as modified. Each problem requires separate treatment.40

1. § 2-209(1).

Rec. A2.2 (9).

(A) The Committee recommends that the phrase “good faith” be inserted before the word “agreement” in the text of § 2-209(1).

The revision would bring “good faith” to the text from the comments for emphasis. The revision, however, would not define bad faith in this context or clarify the distinction between bad faith and economic duress.41

(B) Comment 2 should be revised to elaborate this distinction and to illustrate when a modification can be in bad faith but not be made under economic duress.42

2. § 2-209(2).

Unlike the common law,43 § 2-209(2) permits the parties, with some limitations, to create by a “signed writing” their own statute of frauds for modifications and rescission. Nonconforming agreements, even if made in good faith, will not be enforced.

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40. See Murray, The Modification Mystery: Section 2-209 of the Uniform Commercial Code, 32 Vill. L. Rev. 1 (1987) for a thorough and critical analysis of these problems.

41. See Hillman, A Study of UCC Methodology: Contract Modification Under Article 2, 59 N.C.L. Rev. 335 (1981)(arguing that duress is the tail that wags the modification dog).

42. Economic duress is grounds to avoid a modification when the agreement was induced by a wrongful threat (to breach the contract) coupled with no reasonable market alternative and damages that are uncertain or difficult to prove. A leading case is Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533 (1971). Bad faith, on the other hand, may exist even though there was no threat to breach. See Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134 (6th Cir. 1983). The overlap between the two concepts has created confusion in the courts and stimulated considerable writing. See also, Restatement, Second, § 87(1), which appears to adopt a different approach.

(C) Since no major problems have arisen under § 2-209(2), no revisions are recommended. A majority of the Study Group concluded, however, that an oral modification not in conformity with the parties’ “private” statute of frauds should not be enforced even though the exceptions in § 2-201(2) & (3), the “public” statute of frauds, were satisfied.44 This point could be made in the comments.

The fewer exceptions available under § 2-201, the greater is the need to clarify the effect of a “waiver” by the party for whose benefit the condition was inserted. The relationship between § 2-209(2) and the waiver doctrine, partially exposed in § 2-209(4) & (5), will be treated under Point 4, infra.

3. § 2-209(3).

This subsection is unclear and arguably irrelevant. It is unclear because § 2-209(3) fails to say whether the modifying agreement must also be in writing. A preferred interpretation is to treat the “contract as modified” as the only contract to which § 2-209(3) applies.45 It is irrelevant because it really adds nothing to § 2-201: A modified contract for sale, like the original, must satisfy § 2-201.

(D) The Committee recommends that § 2-209(3) be deleted. This conforms UCC § 2-209 to § 2A-208 of Article 2A.46

4. §§ 2-209(4) & (5).

Sections 2-209(4) & (5) deal with the effect upon contract terms of a waiver. There are two problems here: (1) A comprehensive definition of waiver is not provided; and (2) If the writing requires a signed writing to modify or rescind, § 2-209(2), it is not clear whether the attempted waiver must also satisfy the statute of frauds.

The failure to define waiver has produced confusion. Section 2-209(4) states that an ineffective “attempt” to modify or rescind “can operate as a waiver” and § 2-209(5) provides that a “waiver affecting an executory portion of the contract” can be retracted “unless the retraction would be unjust in view of a material change of position in reliance on the waiver.”

44. Presumably, this would include any judicial exceptions, such as reliance on the oral promise, as well. But see Murray, The Modification Mystery supra note 40 at 54.
45. Id. at 54-55.
46. The comment to § 2A-208 should be considered for possible adaptation to § 2-209.
The absence of a definition has generated some interesting judicial decisions\(^47\) and excited the usual amount of law review commentary on exactly what can and what cannot be waived. A working definition of waiver is clearly required.

Second, assuming that an oral waiver, through election or reliance has otherwise occurred, it is not clear whether the waiver is effective to discharge a condition that a modification or rescission should be in writing. Clarification of this point is also required.

(E) The Committee recommends, at a minimum, that the concept of waiver be defined in the comments. At a maximum, the Committee recommends that a comprehensive definition of waiver be expressed in revised §§ 2-209(4) and (5).\(^48\) This revision should also clarify whether an oral modification can waive the requirements of a “private” statute of frauds.\(^49\)

[TASK FORCE - 2-209]

SECTION 2-209

Section 2-209 speaks to related problems: (1) when an agreed modification of an existing contract is enforceable:\(^146\) (2) to what extent an agreement of the parties may limit modification or rescission to a signed writing;\(^147\) (3) when is a contract, as modified,

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\(^47\) E.g., Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280 (7th Cir. 1986)(attempted oral modification of delivery dates in contract with “private” statute of frauds not a waiver without showing of reliance).

\(^48\) At common law, there are two basic types of waiver, “election” waiver and “reliance” waiver. In the former, where an agreed condition has failed (i.e., the modification was oral and not in a signed writing as required by the contract) and the party for whose benefit the condition was agreed elects not to insist upon a writing, the condition is excused. In the latter, where one party states to another “I will not insist upon the stipulated event” and the other relies to his detriment, the executory term is excused. See § 2-209(5)(implicitly endorses a reliance waiver); Universal Builders, Inc. v. Moon Motor Lodge, Inc., 430 Pa. 550, 244 A.2d 10 (1968)(private statute of frauds waived by owner who orders extra work and permits it to be performed without requiring writing).

\(^49\) In a proposal not considered by the Study Group, John Murray suggests that §§ (4) and (5) should be deleted and that §§ (2) and (3) should be revised to state that where the contract as modified must be in writing to satisfy the “public” statute of frauds or the “private” statute of frauds created by the “signed agreement” of the parties, either statute of frauds requirement will be met by an appropriate writing or any of the alternative satisfaction devices found in 2-201 as well as the judicially engrained satisfaction device (with respect to 2-201), i.e., reliance.” See Murray, The Modification Mystery supra note 40. In effect, this would leave waiver, in general, to the common law and satisfaction of the statute of frauds, public or private, to devices other than waiver.


within the scope of the Statute of Frauds;\textsuperscript{148} and (4) to what extent a modification or rescission can operate as a waiver.\textsuperscript{149} The Report treats each problem separately.

The Study Group recommends that the phrase "good faith" be inserted before the word "agreement" in the text of section 2-209(1). The term "good faith" presently appears in Comment 2 of section 2-209.\textsuperscript{150} This change would thereby create a substantive duty of good faith in modifications. Such a duty technically does not presently exist under the Code because the comments are meant as restatements of the law set out in the Code text and not as independent sources of duties and rights.\textsuperscript{151} Because this technical change would not only emphasize the good faith requirement, but would eliminate also any argument about its existence,\textsuperscript{152} most Task Force members think that the change should be encouraged.

Economic duress is grounds to avoid a modification when the agreement was induced by a wrongful threat of breach.\textsuperscript{153} Economic duress, however, is not necessary to avoid bad faith modification, which may exist even though there was no threat to breach.\textsuperscript{154} Because the overlap between these two concepts has caused some confusion in the courts,\textsuperscript{155} the Report suggests that the differences between the concepts should be clarified in the comments. This clarification would allow proper claims of bad faith even though economic duress is not present. Most Task Force members agree with this proposal.

If one accepts the reading of section 2-209(3) as treating "the contract as modified" as the only contract to which the section applies,\textsuperscript{156} section 2-209(3) arguably is irrelevant since it appears

\begin{itemize}
  \item \textsuperscript{148} U.C.G. § 2-209(3) (1990).
  \item \textsuperscript{149} U.C.G. § 2-209(4) (1990).
  \item \textsuperscript{150} The general requirement of good faith in §1-203 imposes the obligation only in the performance and enforcement of contracts. See U.C.G. § 1-203 (1990) (imposing an obligation of good faith on each contract or duty's performance or enforcement within this Act).
  \item \textsuperscript{151} See Murray, \textit{The Modification Mystery: Section 2-209 of the Uniform Commercial Code}, 32 Vill. L. Rev. 1, 11 n.43 (1987).
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} See, \textit{e.g.}, Austin Instruments, Inc. v. Loral Corp., 29 N.Y.2d 124, 130, 272 N.E.2d 533, 535, 324 N.Y.S.2d 22, 25 (1971).
  \item \textsuperscript{154} See, \textit{e.g.}, Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 148 (6th Cir. 1983).
  \item \textsuperscript{156} This is generally agreed to be the preferred reading. See, \textit{e.g.}, E. Farnsworth, \textit{Contracts} 399, § 6.2 n. 23 (2d ed. 1990).
\end{itemize}
to add nothing to section 2-201. The elimination of this unclear section would also place Article 2 in conformity with the more recent thinking of Article 2A on the issue of modifications. The deletion of this section appears to be sound to the majority of Task Force members. It might, however, also be advisable to clarify in a comment the fact that the contract, with its modifications, is to be treated separately for statute of fraud purposes.

Sections 2-209(4) and (5), dealing with the effect of waiver, raise two problems: (1) there is not a definition of waiver in the Code, and (2) if the writing requires a signed writing to modify or rescind, section 2-209(2) is not clear about whether the attempted waiver must also be in writing. As the absence of a definition of waiver has caused confusion, a definition in the Code, as the Report suggests, is probably needed. In addition, a majority of Task Force members agree that the latter problem also needs to be clarified.

At least one member of the Task Force is of the opinion that section 2-209, in its entirety, should be left unchanged and section 2A-208 should be changed to conform to existing section 2-209(3).

157 Although some people believe U.C.C. § 2-209(3) has something to do with validation devices, one commentator has defined its scope in the following manner:

The conventional wisdom concerning the scope of § 2-209(3) recognizes five possibilities: 1) if the original contract is within § 2-201, any modification must be evidenced by a writing; 2) a modification must be in writing if the added term brings it within § 2-201 for the first time; 3) a modification must be in writing if the modification, itself, is within § 2-201; 4) a modification changing the quantity term must be in writing; 5) some combination of the foregoing.


159 See, e.g., Wisconsin Knife Works v. National Metal Crafters 781 F.2d 1280, 1286-87 (7th Cir. 1986) (discussing whether an attempted modification acts as a waiver).

ARTICLE 2 APPRAISAL

[PRELIMINARY REPORT - 2-210]


No revisions are recommended in § 2-210.

The principles in § 2-210, which are consistent with those in Chapter 15 of the Restatement, Second, of Contracts, have produced no major problems of practical importance in sales transactions. In fact, § 2-210 has facilitated the assignment by an immediate buyer to a second purchaser of warranties made and breached by his seller, thereby permitting the second purchaser to sue the seller without privity of contract. 51

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-301]

ARTICLE 2, PART 3:
GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

A. OVERVIEW.

Article 2, Part 3 deals with the "general obligation and construction" of the contract for sale. Sections 2-301 through 2-311 cover, inter alia, the "gap" filler terms, §§ 2-312 to 2-318 deal with warranties and §§ 2-319 to 2-328 cover delivery terms, consignment problems and sales by auction.

B. GENERAL OBLIGATIONS OF PARTIES: § 2-301.

No revisions in § 2-301 are recommended.

C. UNCONSCIONABLE CONTRACT OR CLAUSE: § 2-302.

Rec. A2.3 (1).

(A) No revisions in the Text of § 2-302 are recommended. 1

The Comments, however, should be revised to clarify, among other

50. See §§ 9-206 & 9-318 for the principles in secured transactions. But see Comment, § 2A-303, where the provisions of § 2-201 were incorporated "with substantial modifications to reflect leasing terminology and practice, as well as certain developments of the law with respect to creditor's rights." These modifications should be evaluated before a final decision on § 2-210 is reached. See, generally, Harris, The Rights of Creditors Under Article 2A, 39 Ala. L. Rev. 803 (1988).


1. But see § 2A-108, which includes the scope of and expands the remedies for unconscionable conduct in consumer leases.
things, the scope and content of the standard. The Drafting Committee should also consider whether to move § 2-302 from Article 2 to Article 1, where it clearly would be applicable to all of the UCC. A majority of the Study Group favor this action.

Innovative when first proposed, the principle of § 2-302 has now become part of general contract law. See Restatement, Second, Contracts § 2-208. Controversial at first, the principle has become more accepted as legislatures embrace it in consumer protection legislation and as courts have shown restraint in application, particularly in commercial disputes. In short, it has become a limited device for increased protection against abuse in the bargaining process—protection that extends the concepts of fraud and duress but stops short of rewriting the substantive terms of the contract. These developments support both the retention and the movement to Article 1 of § 2-302.

The comments to § 2-302, however, should be substantially revised. The revision should consider, among other things, the following problems:

1. If § 2-302 is primarily a device to remedy procedural unfairness, what factors are relevant to that inquiry? For example, if a contracting party has adequate information about the content of a writing but had limited choice, can the contract or clause be declared unconscionable?

2. Should the unconscionability principle be limited to the time of contracting, or can the court also consider unconscionable inducement and the unconscionable effect of enforcing a contract which was conscionable when made?

3. To what extent should § 2-302 provide a residual principle which is available even though more specific tests of procedural fairness, found in other sections of Article 2, have been satisfied? For example, if a disclaimer of implied warranties satisfies the conditions imposed by § 2-316(2) yet the relative bargaining power of the parties is called into question, should § 2-302 be invoked to review the contract?

(B) A majority of the Study Committee support '§ 2-302 as a residual principle. Even though there is no "unfair surprise" under

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2. There is a fine line between a substantive provision that is per se against public policy (e.g., a confession of judgment clause in some states) and a provision which is simply one-sided (e.g., an "add on" clause). The "proceduralists" would enforce the one-sided clause without inquiry into its commercial purpose if the contracting party had adequate information and choice.

3. Arguably, recognizing unconscionable inducement and effects is a change that should be made in the statute.

4. For an affirmative answer, see Martin v. Joseph Harris Co., Inc., 767 F.2d 296 (6th Cir. 1985)(under Michigan law, commercial buyer had no realistic choice).
§ 2-316(2), the one-sided clause may have been imposed upon a party with no “meaningful choice.”

(4) Should § 2-302 be revised to reflect the distinction between consumer and commercial contracts? Despite the precedent of § 2A-108, a majority of the Study Group have concluded no.

D. ALLOCATION OR DIVISION OF RISKS: § 2-303.

No revisions are recommended in § 2-303.

E. PRICE PAYABLE IN MONEY, GOODS, REALTY, OR OTHERWISE: § 2-304.

Rec. A2.3 (2).

No revisions are recommended in the text of § 2-304. Remedial problems created when the price is made payable in a foreign currency, however, should be considered.

A sale “consists in the passing of title from the seller to the buyer for a price. . . .,” § 2-106(1), and the buyer’s “obligation. . . . is to accept and pay in accordance with the contract.” § 2-301. Section 2-304(1) prescribes (1) in what the price may be paid, i.e., “money or otherwise,” and (2) the consequences of agreeing that the price is payable in goods or an interest in realty. § 2-304(1). There is virtually no litigation under this section.

A problem exists, however, where a seller and buyer stipulate that, because of the stability of its purchasing power, the price shall be paid in the “money” of another country. If the buyer fails to pay and the litigation occurs in American courts, the foreign currency will be converted into U.S. dollars on either the day of the breach or the day of the judgment. If there is a long delay in payment and dollars are less stable than the foreign currency, the seller suffers a loss. Leary & Frisch argue that there is “no reason why a commercial code should not permit parties to specify the currency that they desire to use as the ‘store of value’ for their transactions.” If so, then perhaps § 2-304 is the place where that authorization should be made.

F. OPEN PRICE TERM: § 2-305.

No revisions are recommended in § 2-305.

The contract price, when agreed to by the parties, allocates the risk of subsequent changes in the market that affect either the seller’s cost of production

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5. Revision at 456.
6. These problems are fully treated in the Uniform Foreign-Money Claims Act, drafted by the NCCUSL and approved and recommended for enactment in all the states. The statute has been enacted in Utah.
or the market value of the goods. Section 2-305, however, deals with the case where the parties or some stipulated external person or standard have failed to agree on or fix the price.\(^7\) In these cases, the issues are as follows:

1. Did the parties "intend . . . to conclude a contract even though the price is not settled?" This is a particularized application of the general principle in § 2-204(3) and will depend upon the facts and circumstances. If they did not, § 2-305(4) states that there is "no contract" and requires restitution by both parties.\(^8\)

No problems of substance have arisen here.

2. If the parties did intend to conclude a contract, § 2-305(1) provides the "gap" filler if certain circumstances exist: "In such a case the price is a reasonable price at the time for delivery. . . ." An important question is whether a "reasonable price" can be proved. If not, the contract may fail for indefiniteness. § 2-204(3).

Although uncertainty may be created by the complexity of the proof, no problems of substance have arisen under this standard.

3. What is the relevance of the duty of good faith under § 2-305?

Under § 2-305(2), if the agreement provides that the price is to be fixed by either the seller or the buyer, it "means a price for him to fix in good faith."\(^9\) If the party is a merchant, the objective standard of good faith in § 2-103(1)(b) is applicable. There has been some interesting litigation on this issue,\(^10\) but no problems different from those associated with the general application of the good faith duty have arisen.

4. A more interesting question involves an agreement between the parties to agree on the price. Assuming an intent to conclude a contract, the agreement to agree is, presumably, impressed with a duty to negotiate in good faith. Otherwise, the bargain would be illusory. If they fail to agree in good faith, the contract price is a "reasonable price. . . ." § 2-305(1)(b). But suppose that there is no agreement because one party negotiated in bad faith. Is the other party limited to the same gap filler or are other remedies available? Does the "agreement to agree" approach apply to other terms of the agreement?

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7. The pre-Code law is reviewed in Prosser, Open Price in Contracts For the Sale of Goods, 16 Minn. L. Rev. 733 (1932).
9. Cf. § 2-305(3), where one party is given the option to fix a "reasonable price" if the other's fault has prevented the fixing of the price "otherwise than by agreement of the parties."
The answers to these questions are not clear from the current text of Article 2. Whether they need to be answered at this time is another question.11

G. OUTPUT, REQUIREMENTS AND EXCLUSIVE DEALINGS: § 2-306.

Rec. A2.3 (3).

No revisions are recommended in the text of § 2-306. The Comments, however, should be revised to clarify several points and to encourage the parties to draft agreements more carefully.

1. “Output” and “requirements” terms both satisfy the statute of frauds, § 2-201(1), and provide flexibility in case of changing supply and demand. The duty of good faith imposes some control over discretion, as does the not “unreasonably disproportionate” limitation in § 2-306(1). Some courts, however, have concluded that the parties must also have an exclusive dealing arrangement for output and requirements contracts to be enforceable. Compare § 2-306(2).12

(A) This requirement of exclusive dealing is incorrect and should be expressly disavowed in revised comments.

2. The question, what is “bad faith,” is sometimes litigated under § 2-306(1). Either one party has ordered too much or produced too little or had no actual output or requirements, allegedly in bad faith.13 Similarly, disputes over the meaning of “best efforts” in exclusive dealing relationships sometime arise. § 2-306(2).14 These disputes result, in part, from open-

11. Arguably, Article 2 stops one step short of developing a persuasive duty to bargain in good faith, whether before the contract is performed or during performance or when a modification is proposed. See Bermingham, Extending Good Faith: Does the UCC Impose a Duty of Good Faith Negotiation Under Changed Circumstances?, 61 St. John’s L. Rev. 217 (1987)(concluding “no”). As result, there is uncertainty about when the duty applies and, of course, what is bad faith bargaining. See, generally, Farnsworth, Pre-Contractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum. L. Rev. 217 (1987). See Rec. A1 (5).

12. This requirement is effectively criticized in Bruckel, Consideration in Exclusice and Nonexclusive Open Quantity Contracts Under the U.C.C.: A Proposal for a New System of Validation, 68 Minn. L. Rev. 117 (1983)


ended standards that must be particularized in each case and from the lack of clear objectives to be achieved in the search for bad faith.15

(B) The Study Group recommends that an effort be made to better define these concepts in the comments.

3. A final issue is the relationship between the duty of good faith and the "unreasonably disproportionate" limitation. The former limits behavior at the time of actual output or requirements and the latter is concerned with stated estimates at the time of contracting or prior patterns of quantity.16 The particular question is whether a seller who in good faith has no output and a buyer who in good faith has no requirements may tender or demand no goods at all. Most commentators and at least one case17 have concluded yes, but this result is not clear from either the statute or the comments.

(C) We recommend that this conclusion (i.e., a good faith tender or demand for no quantity is not unreasonably disproportionate) be made clear in either the text or comments of § 2-306(1).

H. DELIVERY IN SINGLE LOT OR SEVERAL LOTS:
§ 2-307.

No revisions are recommended in the text of § 2-307.

Section 2-307 applies when the parties have not agreed upon delivery in installments. See § 2-612(1). The "single delivery" gap filler appears to be sensible and flexibility is provided by the "circumstances" exception. There has been no litigation of importance under § 2-307.18

I. ABSENCE OF SPECIFIED PLACE FOR DELIVERY:
§ 2-308.

No revisions are recommended in the text of § 2-308.

§ 2-308 determines the place for delivery "unless otherwise agreed." The manner of the seller's tender of delivery at that place is then set forth in §§ 2-503 & 2-504.


16. Again, one of the best judicial opinions on what is "unreasonably disproportionate" is Orange & Rockland, supra note 13.


18. Peters found a tension between the presumption in § 2-612(1) that an installment contract was intended when the goods were "separately accepted" and the policy favoring a unitary contract in § 2-307. She concluded that the tension could be resolved by making it clear that the time of delivery and payment need not be the same to have an installment contract. See Roadmap at 223-24.
One might question whether the “seller’s place of business” is a sensible default rule in transactions where the parties are at a distance and shipment of the goods is normal. Perhaps the parties will use the “fob” terms or a trade usage supporting shipment will become part of the agreement. Absent an “fob” term or trade usage, however, it may not be enough that another place for delivery is “common” in the trade. 19

J. ABSENCE OF SPECIFIC TIME PROVISIONS; NOTICE OF TERMINATION: § 2-309.

Rec. A2.3 (4).

Two revisions, as noted below, are recommended in the text or comments of § 2-309.

1. Performance issues.

Section 2-309(1) provides that the “time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.” No revision is recommended in the “reasonable time” standard, as elaborated in Comments 1 and 3-6. See § 1-204.

Section 2-309(1), however, does not mention the time when payment is due. Other Article 2 provisions must be consulted. See Comment 2. Unless otherwise agreed, payment is due “at the time and place at which the buyer is to receive the goods. . . .” § 2-310(a). Even so, payment is still not due until the seller has tendered the goods, § 2-507(1), and the buyer has had a reasonable opportunity to inspect them. §§ 2-310(b) & 2-513(1).

At that point, a failure timely to reject is an acceptance, § 2-606(1)(b), and obligates the buyer to pay the price. § 2-607(1). See § 2-709(1)(a), which permits the seller to recover the price of accepted goods when the “buyer fails to pay the price as it becomes due. . . .”

(A) The Drafting Committee should clarify when the price is due in the text of § 2-309(1) or in the comments. The current cross references are incomplete and Comment 2 is confusing.

2. Termination issues. 20

§§ 2-309(2) and (3) deal primarily with the following transaction. Seller and Buyer agree to “successive performances” under a distributorship relationship but the contract is “indefinite in duration.” In this situation,

20. See § 2-106(3).
"unless otherwise agreed," the contract is "valid for a reasonable time." After a reasonable time has expired, the contract "may be terminated at any time by either party" but "termination of a contract by one party . . . requires that reasonable notification be received by the other party. . . ." Thus, the contract is enforceable for a reasonable time but either party, by giving reasonable notice, may terminate it thereafter. No revisions are recommended in this statutory language.

A question not fully answered by § 2-309 is the extent to which the parties may contract out of the limitations of subsections (2) and (3). Notice is not required if the contract provides for termination "on the happening of an agreed event." § 2-309(3). Presumably, this is an external event (i.e., if the Cubs win) beyond the control of both parties. On the other hand, an "agreement dispensing with notification is invalid if its operation would be unconscionable." § 2-309(3). Presumably, this deters a termination that deprives the other of time to seek a substitute arrangement or to preserve assets. But what about a common provision (in franchise agreements) that gives one or both parties power to terminate for any reason upon giving 60 days notice? Is this power subject to the duty of good faith?

(B) A majority of the Study Group think that the duty of good faith should apply and recommend that the Drafting Committee make this clear in either the text or comments. A minority believe that the comments to § 2-309 already impose adequate restrictions upon terminations in these cases.

K. OPEN TIME FOR PAYMENT OR RUNNING OF CREDIT; AUTHORITY TO SHIP UNDER RESERVATION: § 2-310.

Rec. A2.3 (5).

No revisions are recommended in the text of § 2-310. The Drafting Committee should consider whether the different subsections of § 2-310 can be better integrated with other relevant sections of Article 2, Part 5.

There is no litigation of significance under § 2-310 and no problems of importance are apparent.

22. An agreed termination is "performance" of the contract under § 1-203.
23. For an case which imposed the duty of good faith but held that bad faith was not proved, see Zapatha v. Dairy Mart, Inc., 381 Mass. 264, 408 N.E.2d 1370 (1980). The Drafting Committee may wish to consider the position taken in the Uniform Franchise and Business Opportunities Act.
The question remains whether the comments and cross references adequately mesh § 2-310 with other sections (most of which are in Part 5) essential to its sound operation. If there is doubt, one solution is to redraft § 2-309(1) to include material on the time when payment is due, move § 2-310 to Part 5 and revise and integrate the remaining payment problems into an functional whole.

L. OPTIONS AND COOPERATION RESPECTING PERFORMANCE: § 2-311.

No revisions are recommended in the text of § 2-311.

There are no cases of importance interpreting § 2-311. The principle stated in § 2-311(1) is sound. See § 2-305(2). The balance of § 2-311 deals with who is responsible for what specification, § 2-311(2), and what happens when a specification is "not seasonably made." § 2-311(3).

M. WARRANTY OF TITLE AND AGAINST INFRINGEMENT; BUYER'S OBLIGATION AGAINST INFRINGEMENT: § 2-312.

No revisions are recommended in the text of § 2-312 at this time.

The Study Group did not have an opportunity fully to study the operation of § 2-312. A number of obvious problems, however, have arisen: (1) What is a sufficient "cloud" on title to breach the warranty; (2) Who makes a warranty of title in auctions and sheriff's sales; (3) Does § 2-312(1) adequately account for the development of trade practice; and (4) Should the disclaimer provision in § 2-312(2) be moved to § 2-316? See § 2A-214.

These and other problems should be treated before the Final Report is submitted.

N. WARRANTIES OF QUALITY: OVERVIEW


There are several sections of Article 2 that determine whether a seller has made and breached a warranty of quality and, if so, the buyer's remedies. These sections assume that warranties, express or implied, are terms of the contract between the parties. They make no effort to distinguish between commercial and consumer buyers and, with two exceptions, see § 2-715(2)(b) and § 2-719(3), assume that the damages for breach of warranty will involve economic loss rather than damage to person or property.
A first group, §§ 2-313 through 2-318, deals with the creation of warranties, express or implied, attempts to disclaim or limit warranties, conflicts between warranties and the extension of warranties beyond the immediate seller.

A second group involves remedies for breach of warranty and will be analyzed in Parts 6 and 7. If the goods do not conform to a warranty, the buyer may, before acceptance, § 2-606, reject the goods, §§ 2-601 through 2-605, and pursue available buyer’s remedies under § 2-711(1). The same remedies are available if the buyer, after acceptance, is able to revoke acceptance under § 2-608. If the buyer is unable to revoke an acceptance, however, the remedial options are narrowed. The buyer is liable for the price, cannot reject the goods, must give the seller notice of and has the burden to establish breach. See § 2-607. Moreover, the buyer’s direct damages are measured under § 2-714 and incidental and consequential damages are measured under § 2-715. Under controlled conditions, however, damages for breach can be liquidated, § 2-718(1), or limited, § 2-719, by agreement between the parties.

Finally, the time when the statute of limitations begins to run on a claim for breach of warranty is determined by § 2-725.

2. Consumer Protection.

Where consumer buyers are concerned, Article 2 occupies an uneasy position between federal law, e.g., the Magnuson-Moss Warranty Act and the fast developing state lemon and other laws. Consumer and non-consumer buyers are treated the same under Article 2. This may be an unsatisfactory position, because gaps in protection between federal and other state law exist to which Article 2 does not respond.

Rec. A2.3 (6).

To date, the Study Group has limited its effort to a review of existing provisions of Article 2 rather than recommending a increase in warranty protection for consumers. We suggest, however, that the Drafting Committee identify the gaps in protection between federal and non-uniform state law that are not covered by Article 2 for possible inclusion in a Comment. A majority of the Study Group

24. See Revision at 410-14, 442-43.
26. The areas where potential gaps may occur include: (1) The definition of “consumer” and consumer goods;” (2) The scope of any definition of warranty; (3) The extent to which the seller may disclaim implied warranties or limit remedies for breach; (4) The