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**Uniform Commercial Code Annual Survey:  
General Provisions, Sales, Bulk Transfers, and  
Documents of Title**

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# **Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title**

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## **GENERAL PROVISIONS**

### **CONFLICT OF LAWS**

A drafting compromise by the U.C.C. drafters in section 1-105 dictated the state having an "appropriate relation" to govern choice of law problems in the absence of a contractual clause, and if there is a clause, a "reasonable relation" to the state selected. The purpose was to leave choice of law problems to the general rules of the common law.<sup>1</sup> Thus, some courts in breach of warranty cases continue to apply the tests of "place of injury" for personal injury suits and "place of contracting" for what does not involve personal injury,<sup>2</sup> while others look for the state having the most "significant contacts" with the transaction.<sup>3</sup>

When there is a choice of law clause, two approaches continue to be used: "reasonable relation" and "appropriate relation." Reasonable relation is held to require less contact by the state selected by the parties than appropriate relation. It is questionable, however, whether the selection merely serves to effect an

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1. Professor Leary was present at some of the discussions among the drafters and makes the statement from memory.

2. *Morgan v. Mar-Bel, Inc.*, 614 F. Supp. 438, 41 U.C.C. Rep. Serv. (Callaghan) 1271 (N.D. Ga. 1985) (injury in Georgia, place of contracting Florida, plaintiff loses under Georgia's privity requirement).

3. *See, e.g., Travenol Laboratories, Inc. v. Zotal Ltd.*, 394 Mass. 95, 474 N.E.2d 1070, 40 U.C.C. Rep. Serv. (Callaghan) 487 (1985) (law of Massachusetts having more significant contacts applied to prevent Massachusetts buyer's setoff of damage claim in action for price rather than the allegedly contra rule of Israel, in which seller was located. Goods were sold "F.O.B. Cambridge, Massachusetts." Court ruled that established conflicts principles establish, for U.C.C. purposes, the appropriateness of the relation of a jurisdiction's laws).

allocation of a risk that under governing law could have been allocated by a term in the contract specifically allocating the risk.<sup>4</sup>

With this background, counsel seeking to protect the client from any unfortunate results of a choice of law clause, endeavor to show, often unsuccessfully, that the result is contrary to strong policy of the forum state.<sup>5</sup>

In *Burroughs Corp. v. Suntogs of Miami, Inc.*,<sup>6</sup> the parties selected Michigan law and agreed to a two-year limitation period. A Florida statute, amended after Florida's adoption of the U.C.C., provided that a contractual provision shortening the period provided in the applicable statute of limitations was "void."<sup>7</sup> Nevertheless, the Supreme Court reversed the lower court ruling that Florida public policy voided the clause. The court based its decision upon the policy found in U.C.C. section 1-105, an analogy to Florida's usury law,<sup>8</sup> that the statute before it was "riddled with exceptions,"<sup>9</sup> and concluded "third, we do not consider the protections offered by a statute of limitations fundamental to a legal system."<sup>10</sup>

4. *Intamin, Inc. v. Figley-Wright Contractors, Inc.*, 595 F. Supp. 1350, 40 U.C.C. Rep. Serv. (Callaghan) 766 (N.D. Ill. 1984) (contract for construction of a roller-coaster, which under Illinois' "dominant aspect" test would be a service contract. The contract provided for construction and enforcement "in accordance with the law of the State of Illinois and the Uniform Commercial Code of that State" except as expressly contradicted by a term of the contract).

5. *Mostek Corp. v. Chemetron Corp.*, 642 S.W.2d 20, 40 U.C.C. Rep. Serv. (Callaghan) 840 (Tex. Ct. App. 1982) (goods delivered in Texas. Illinois law applied as parties had not contracted "at will, fraudulently or capriciously" to avoid law of Texas. Warranty disclaimers and disclaimers of negligence not contrary to Texas law. Illinois precluded disclaimers of strict liability in tort); *Kathenes v. Quick Chek Food Stores*, 596 F. Supp. 713, 39 U.C.C. Rep. Serv. (Callaghan) 1326 (D.N.J. 1984) (personal injury claim of consumer having been settled, the indemnity action between bottler and supplier was governed by contractual choice of Ohio law, and no strong public policy of New Jersey required application of New Jersey's product liability law to the commercial transaction between merchants. Contractual limitation of liability term in confirming invoice, under U.C.C. § 2-207, became a part of contract as a nonmaterial additional term); *Bancorp Leasing & Fin. Corp. v. Burhoop*, 39 U.C.C. Rep. Serv. (Callaghan) 1426 (9th Cir. 1984; unpublished and not citable in 9th Circuit) (parties to secured transaction selection of Colorado's rebuttable presumption of value in nonconforming sale of collateral not contrary to California's public policy because California's rule is absolute bar of deficiency. Here presumption was rebutted).

6. 472 So. 2d 1166, 41 U.C.C. Rep. Serv. (Callaghan) 498 (Fla. 1985).

7. Fla. Stat. Ann. § 95.03 (West 1975) reads, "Any provision in a contract fixing the period of time within which an action arising out of a contract may be begun at a time less than that provided by the applicable statute of limitations is void."

8. Citing *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981) (choice of law clause permits recovery of interest at a rate higher than the Florida cap but permissible in the other state). Usury law of Florida was "fraught with exceptions."

9. 472 So. 2d at 1168, 41 U.C.C. Rep. Serv. (Callaghan) at 501.

10. *Id.* The other two stated grounds were that the statute had not been applied to maritime cases under "an earlier, even more stringent version" (citing *Arrow Baffe Corp. v. South Atl. & Caribbean Lines, Inc.*, 280 So. 2d 43 (Fla. Dist. Ct. App. 1973) and two earlier district court of appeals cases). The earlier version expressly declared shortening clauses "contrary to the public policy of the state." *Id.* at 1168 note, 41 U.C.C. Rep. Serv. (Callaghan) at 501 note. Also cited were *Aetna Casualty & Surety Co. v. Enright*, 258 So. 2d 472 (Fla. Dist. Ct. App. 1972) and one other case, in which the only connection with Florida was that plaintiff resided in Florida when suit was

An attempt, effective in lower court, to avoid a choice of law provision on the ground that it had not been brought to the attention of the buyer was reversed by the Fifth Circuit as "clearly erroneous" on the evidence, as the paper was "transparent" showing clearly that there were terms on the reverse.<sup>11</sup>

## HYBRID SALES AND SERVICE CASES

The year was uneventful for the Ad Hoc Subcommittee on Scope of the Code. There were actually only three interesting cases on what constitutes a transaction in goods.

The dreary litany of repair, construction, and purchase of business contracts not being subject to the U.C.C. continued,<sup>12</sup> as did the "true lease" versus the

started. The court noted that such contractual provisions had been upheld in 1918 and that a statute of limitations was "merely . . . an affirmative defense" and did not invalidate the contract.

11. *Lafayette Stabilizer Repair, Inc. v. Machinery Wholesalers Corp.* 750 F.2d 1290, 40 U.C.C. Rep. Serv. 122 (5th Cir. 1985) (in addition to the transparency of the paper, the signer was "a lawyer with approximately twenty-seven years of experience" and thus could be reasonably expected to examine the back of the paper. The result reached by the trial court was a judgment for the return of the purchase price "and certain associated expenses such as interest paid on the loan to finance the purchase price and the cost of repairs" for a total judgment of \$86,436.55. Defendant's claim that a term limiting its liability for the cost of repairs to \$6,900 was a U.C.C. § 2-718 liquidated damage clause was dismissed as well as its claims of lack of prompt notice of breach of warranty and lack of proper inspection).

12. In general, U.C.C. not applicable: *Gee v. Chattahoochee Tractor Sales, Inc.*, 172 Ga. App. 351, 323 S.E.2d 176, 40 U.C.C. Rep. Serv. (Callaghan) 30 (1984) (installation of engine block); *Clancy v. Oak Park Village Athletic Center*, 364 N.W.2d 312, 40 U.C.C. Rep. Serv. (Callaghan) 832 (Mich. Ct. App. 1985) (puddle on racquetball court, slipped and fell); *DeValerio v. Vic Tanny Int'l*, 363 N.W.2d 447, 40 U.C.C. Rep. Serv. (Callaghan) 836 (Mich. Ct. App. 1985) (use of equipment at a spa). U.C.C. applicable: *Yorke v. B.F. Goodrich Co.*, 130 Ill. App. 3d 220, 474 N.E.2d 20 (1985) (vinyl pellets and technical assistance, goods aspect predominates); *but cf.* *Acchione & Canuso v. Reed Mining Tools, Inc.*, 39 U.C.C. Rep. Serv. (Callaghan) 1585 (E.D. Pa. 1984) (change of function of machine but sale of goods because contract was for parts with free design services. Court said if contract had been to change the soft tunnel boring machine into a rock cutter, contract would have been for services). The last case seems to overemphasize form. Sale of business as an entity—U.C.C. not applicable: *Beaulieu of Am. Inc. v. Coronet Indus., Inc.*, 327 S.E.2d 508, 41 U.C.C. Rep. Serv. (Callaghan) 20 (Ga. App. 1985) (sale of industrial plant, general statute of frauds applicable); *D.G. Porter, Inc. v. Fridley*, 373 N.W.2d 917, 41 U.C.C. Rep. Serv. (Callaghan) 1823 (N.D. 1985) (sale of bar and grill, goodwill, liquor license, assignment of lease, etc. predominate); *accord* *Flo-Mor, Inc. v. Birmingham*, 176 Ga. App. 375, 336 S.E.2d 264, 42 U.C.C. Rep. Serv. (Callaghan) 228 (1985); *Dravo Corp. v. White Consol. Indus.*, 602 F.2d 1136, 40 U.C.C. Rep. Serv. (Callaghan) 362 (W.D. Pa. 1985) (main assets were drawings and tracings and five-year noncompetition agreement). Not every asset in a sale of a business needs to be goods; rather, goods must predominate. *De Filippo v. Ford Motor Co.*, 516 F.2d 1313 (3d Cir. 1975), *cert. denied*, 423 U.S. 912 (1975). Construction contracts: *Wellmore Coal Co. v. Powell Constr. Co.*, 600 F. Supp. 1042, 40 U.C.C. Rep. Serv. (Callaghan) 362 (W.D. Va. 1984) (coal preparation plant; because both parties treated transactions as a sale, U.C.C. warranties applied); *Smith v. Urethane Installations, Inc.*, 492 A.2d 1266, 41 U.C.C. Rep. Serv. (Callaghan) 733 (Me. 1985) (in contract to insulate a home, U.C.C. statute of limitations not applicable); *Union Exploration Co. v. Dowell Div. Dow Chem. Co.*, 41 U.C.C. Rep. Serv. (Callaghan) 759 (D. Kan. 1985) (primary cement work on oil wells; U.C.C. principles regarding exculpatory provisions applied); *Peerless Pump v. Blythe-Vanguard Constr. Corp.*, 40 U.C.C. Rep. Serv. (Callaghan) 494 (S.D.N.Y. 1985) (a

disguised sale distinction in the application of a variety of sections of the U.C.C.<sup>13</sup> A distinction was also made between the true finance lease and other leases,<sup>14</sup> anticipating the distinction to be made upon the adoption, anywhere, of the Uniform Personal Property Leasing Act approved by the National Conference of Commissioners on Uniform State Laws.<sup>15</sup> There were also cases arguing whether the U.C.C. applied to distributorship agreements.<sup>16</sup>

manufacture of effluent pumps to buyer's specifications was still a sale of goods, not a service contract. Statute of limitations not tolled). *Miscellaneous: Weiss v. Karch*, 466 N.E.2d 155, 477 N.Y.S.2d 615, 39 U.C.C. Rep. Serv. (Callaghan) 901 (1984) (damage rules of article 2 apply to sale of securities transferring cooperative apartment); *Pierce v. Pac. Gas & Elec. Co.*, 166 Cal. App. 3d 85, 212 Cal. Rptr. 283, 41 U.C.C. Rep. Serv. (Callaghan) 20 (1985) (electricity in stream of commerce a "product" for strict liability issue; dismissal reversed. Warranty issue not in pleadings nor in discovery. Hence, dismissal of warranty count affirmed); *Piney Woods Country Life School v. Shell Oil Co.*, 726 F.2d 225, 40 U.C.C. Rep. Serv. 1220 (5th Cir. 1984) (natural gas; U.C.C. used to determine time of sale for royalty purposes); *Amoco Prod. Co. v. Western Slope Gas Co.*, 754 F.2d 303, 40 U.C.C. Rep. Serv. (Callaghan) 370 (10th Cir. 1985) (natural gas; U.C.C. applies).

13. As to applicability of the U.C.C. in some lease transactions, *see Beneficial Commercial Corp. v. Cottrell*, 688 P.2d 1254, 39 U.C.C. Rep. Serv. (Callaghan) 1308 (Mont. 1984) (warranty disclaimers and unconscionability in a lease with nominal option to purchase); *Irving Leasing Corp. v. M & H Tire Co.*, 16 Ohio App. 3d 191, 475 N.E.2d 127, 40 U.C.C. Rep. Serv. (Callaghan) 381 (1984) (applying U.C.C. § 2-302); *Hannaford Bros. Co. v. State Tax Assessor*, 487 A.2d 251, 40 U.C.C. Rep. Serv. (Callaghan) 374 (Me. 1985) (lease constituted a sale for use tax purposes); *Baldwin v. National Safe Depository Corp.*, 697 P.2d 587, 41 U.C.C. Rep. Serv. (Callaghan) 471 (1985) (U.C.C. applied to "operating lease"); *Baker v. Promark Prods. W., Inc.*, 692 S.W.2d 844, 41 U.C.C. Rep. Serv. (Callaghan) 725 (Tenn. 1985) (breach of warranty); *Henderson v. Benson-Hartman Motors, Inc.*, 33 Pa. D. & C. 3d 6, 41 U.C.C. Rep. Serv. (Callaghan) 782 (Pa. Ct. Common Pleas 1983) (warranty beneficiaries under U.C.C. in lease transaction); *Chemical Bank v. Rinden Professional Ass'n*, 498 A.2d 706, 41 U.C.C. Rep. Serv. (Callaghan) 1035 (N.H. 1985) (lease-purchase agreement applying U.C.C. art. 2 as to modifications and effect of assignment to bank).

14. *Baldwin v. National Safe Depository Corp.*, 697 P.2d at 589 n.2, 41 U.C.C. Rep. Serv. (Callaghan) at 473 n.2. *Cf. BancOhio Nat'l Bank v. Freeland*, 13 Ohio App. 3d 245, 468 N.E.2d 941, 39 U.C.C. Rep. Serv. (Callaghan) 748 (1984) (15-year statute of limitations governs lender's sale of collateral and claim for deficiency, not U.C.C. § 2-706(3) as to notice and § 2-725 as to limitations. What if bank had been assignee of sales contract with a seller's reservation of title?

15. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Personal Property Leasing Act at its summer 1985 meeting using occasionally modified U.C.C. art. 2 sections. At this writing, it has not been adopted by any state. In Dec. 1985, the U.C.C. Permanent Editorial Board recommended the addition of the Act, with minor changes, to the U.C.C. as a new art. 2A. Therefore, under future consideration is whether the Act should be formally integrated into the U.C.C. by action of the ALI and the National Conference of Commissioners on Uniform State Laws at appropriate meetings of those bodies.

16. *See Lorenz Supply Co. v. American Standard Inc.*, 419 Mich. 610, 358 N.W.2d 845, 39 U.C.C. Rep. Serv. 1169 (1984) (distributorship agreement not mentioning exclusive dealing or supplying requirements not a transaction in goods for U.C.C. § 2-201 purposes). *But see Seaman's Direct Buying Serv., Inc. v. Standard Oil of Cal.*, 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158 (1984) (implying that a "dealership arrangement" clearly implied an arrangement to supply the dealer's requirements, thus satisfying the general statute of frauds as to contracts not to be performed within a year as well as the U.C.C.'s provision). *See also Rustproofing Center, Inc. v. Gulf Oil Corp.*, 755 F.2d 1231, 40 U.C.C. Rep. Serv. (Callaghan) 802 (6th Cir. 1985) (open price to be fixed by Gulf, not a failure to act in good faith if price is higher than retail prices charged by

*RRX Industries, Inc. v. Lab-Con, Inc.*<sup>17</sup> raised again for the Ninth Circuit the question of the classification of computer software. Admittedly the decision should be case by case,<sup>18</sup> but, just as an architect's or engineer's contract is for services and not for a sale of the completed drawings,<sup>19</sup> so too a computer software contract, when a proper analysis of the design features of a program is really the predominant factor, should be a contract for services.<sup>20</sup> On the other hand, prepackaged software programs, like cassettes and phonograph records, should be classified as "goods,"<sup>21</sup> although a contract for a musician to play a musical number to be taped for just one listener would not be.

Categorizing computer software as "goods" may be influenced by the paucity of precedent if a service categorization, emphasizing the brain-work requirement for custom-designed software, were to have been adopted. Perhaps the matter will be clarified by the new Scope Subcommittee, along with the problems arising in many recognizable service contracts.<sup>22</sup>

dealer's competitors); *Conoco Inc. v. Inman Oil Co.*, 774 F.2d 895, 41 U.C.C. Rep. Serv. (Callaghan) 1602 (8th Cir. 1985) (violation of good faith under U.C.C. § 1-203 for supplier to bid against the distributor for supply contract with jobber's oldest and best customer); *Loos & Dilworth v. Quaker State Oil Ref. Corp.*, 42 U.C.C. Rep. Serv. (Callaghan) 46 (Pa. Super. 1985) (U.C.C. principles applied by analogy; termination of franchise agreement must be with honesty in fact (U.C.C. § 1-201(19)), and franchisor must have acted in a commercially reasonable manner. Hence franchisee offering no evidence of what is commercially reasonable can still recover upon proof of a lack of honesty in fact. New trial ordered by trial judge affirmed, charge should have used an "or" instead of an "and" between "good faith" and "acting in a commercially reasonable manner").

17. 772 F.2d 543, 41 U.C.C. Rep. Serv. (Callaghan) 1561 (9th Cir. 1985).

18. The court stated that "the sales aspect of the transaction predominates," and that "employee training, repair services, and upgrading were incidental." 772 F.2d at 546, 41 U.C.C. Rep. Serv. at 1564. For the need for case-by-case analysis, the court cited Note, *Computer Programs as Goods under the U.C.C.*, 77 Mich. L. Rev. 1149 (1979). The court does not discuss the service aspect of designing the software.

19. Software not packaged for repeated sales to many different computer users seems more analogous to design drawings that are not considered goods. See *Department of Transp. v. Bethlehem Steel Corp.*, 28 Pa. Commw. 439, 368 A.2d 888, 21 U.C.C. Rep. Serv. (Callaghan) 36 (1977) (bridge design plans not goods). *Dravo Corp. v. White Consol. Indus.*, 602 F. Supp. 1136, 40 U.C.C. Rep. Serv. (Callaghan) 362 (W.D. Pa. 1985), in which the court said of a sale of engineering drawings, "The significance of these items in this transaction is not their physical properties, but the ideas contained therein." 602 F. Supp. at 1140, 40 U.C.C. Rep. Serv. at 369. The significance of specially designed software is not its physical properties but the commands it enables the operator to give to the hardware.

20. While a contract to publish books for general sale may be a contract for goods, a contract to write a book and deliver one copy or all copies to one person would be a contract for services. In *Printing Center of Texas, Inc. v. Supermind Publishing Co.*, 669 S.W.2d 779, 39 U.C.C. Rep. Serv. (Callaghan) 127-30 (Tex. Ct. App. 1984) the court said that to treat a contract to print and deliver 5,000 books as a transaction in goods was a "doubtful assumption," but the issue was not properly raised.

21. Thus, prepackaged programs to be inserted in any number of personal computers should be classified as "goods," just as are cassettes for producing music on any given number of players or phonograph records.

22. One member of this Subcommittee has long complained of the difficulty of finding precedent applicable to commercial service contracts. The new Ad Hoc Subcommittee on Scope, chaired by Professor Boss, met with this Subcommittee for the first time at the Section's 1985 spring meeting.

*Safeway Stores, Inc. v. Certainteed Corp.*<sup>23</sup> was the second interesting case. Safeway contracted for the building of a warehouse. The roofing contractor used products produced by Certainteed. The court treated the case as a sale of goods for warranty purposes, distinguishing it from an earlier construction of a building case<sup>24</sup> in which it was ruled that the U.C.C. was not applicable. While Safeway was treated as having express warranty rights against Certainteed,<sup>25</sup> the statement that the roof was "bondable up to twenty years" did not make the warranty one extending to future performance (except in the view of a dissenting judge).<sup>26</sup>

Finally, a sale of the breeding rights to a stallion by a natural method was, in *Kwik-Lok Corp. v. Pulse*,<sup>27</sup> ruled not a sale of goods when live breeding was contemplated, since the predominant subject of the contract was not readily removeable from the donor at the time of identification to the contract.<sup>28</sup>

### ***Other Statutes Affecting Articles 2 and 7***

Other statutes are beginning to affect sales law under the U.C.C. The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act<sup>29</sup>—

23. 687 S.W.2d 22, 41 U.C.C. Rep. Serv. (Callaghan) 46 (Tex. Ct. App. 1985).

24. *Id.* at 24 n.1, 41 U.C.C. Rep. Serv. at 47 n.1. *Vaughn Bldg. Corp. v. Austin Co.*, 620 S.W.2d 678 (Tex. Ct. App. 1981), *aff'd* 643 S.W.2d 113 (Tex. 1983). *Accord* *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 363 N.W.2d 155, 40 U.C.C. Rep. Serv. (Callaghan) 396 (Neb. 1985) (a one-ply, System I roof manufactured and designed by defendant and installed by others under defendant's supervision). In both the claim was for breach of warranty. *Contra* *Elizabeth Gamble Deaconess Home Ass'n v. Turner Constr. Co.*, 14 Ohio App. 3d 281, 470 N.E.2d 950, 39 U.C.C. Rep. Serv. (Callaghan) 1198 (1984) (U.C.C. does not apply to materials incorporated into a structure). Apparently alternative A of U.C.C. § 2-318 precluded suit as a third-party beneficiary of the installer's contract with the supplier. *But see infra* text accompanying note 94.

25. This was based on Certainteed's advertising and description of its product as "bondable up to twenty years," which had been examined by the plaintiff before making the contract. Suit was instituted nine years after installation and was ruled to be barred by U.C.C. § 2-725. 687 S.W.2d at 24, 41 U.C.C. Rep. Serv. (Callaghan) at 46, 47.

26. The majority felt that the language quoted was only a warranty or representation that a bond could be purchased and Safeway had introduced no evidence on the point. *Id.* at 25, 41 U.C.C. Rep. Serv. (Callaghan) at 48. Judge Guillot, dissenting, felt that the language meant that a bond could be purchased at any time for a minimum of one year and up to a maximum of 20 years after completion depending on when the bond was purchased. Hence the warranty "explicitly" extended to future performance. *Id.* at 27, 41 U.C.C. Rep. Serv. (Callaghan) at 50. Extending the warranty, however, would eliminate the need to pay any premium for the roofing bond.

27. 41 Wash. App. 142, 702 P.2d 1226 (1985).

28. *Id.* at \_\_\_\_\_, 702 P.2d at 1228 n.1. Where the sperm is packaged and sold for artificial insemination. Another aspect of breeding rights, the saleable right of each of 36 syndicate members to nominate a mare to breed each season, was involved in *Trimble v. North Ridge Farms, Inc.*, 41 U.C.C. Rep. Serv. (Callaghan) 1458 (Ky. 1985). The issue was whether the secured party after default could exercise the nominating right for the 1982 season that had been sold as permitted by the syndicate agreement assigned as collateral. The trial court had ruled in favor of the assignee of the secured party who then exercised the rights. By the time the case reached the Supreme Court of Kentucky, which affirmed a reversal of the trial court by the Kentucky Court of Appeals, the case could only be left open for a determination of damages, an issue not ripe for the appellate court.

29. 15 U.S.C. §§ 2301-2312 (1982).

figured in three cases. In a case involving a defective car with counts under the U.C.C. and under Magnuson-Moss, damages for emotional distress were denied.<sup>30</sup> In another case, a dealer who had agreed in writing to perform warranty work for DeLorean cars, and had furnished a lessee with the manufacturer's warranty, had thereby issued a written warranty under Magnuson-Moss and could not disclaim the warranty of merchantability.<sup>31</sup> Recovery of damages for loss of use of the car when the dealer refused to make repairs because DeLorean could not pay, and for costs of litigation and attorney's fees, was allowed. The third case reached a similar warranty result in a lease closely resembling an installment sale.<sup>32</sup>

A North Carolina statute relating to suits for damages resulting from the use of fertilizer, which prescribed the evidence required, caused a dismissal of a grower's suit.<sup>33</sup>

Federal and state "seed laws" have been held not to preempt the warranty and unconscionability provisions of the U.C.C.<sup>34</sup>

Colorado's livestock bill of sale laws did not affect the U.C.C.-mandated result in three cases.<sup>35</sup> The results are similar to many interpretations of the effect of motor vehicle certificate of title laws.<sup>36</sup>

In one case, a federal court, applying New York law, refused to dismiss a claim that a breach of warranty, as alleged, was a claim of deceptive practices

30. *Wise v. General Motors Corp.*, 588 F. Supp. 1207, 39 U.C.C. Rep. Serv. (Callaghan) 900 (W.D. Va. 1984). Hence, attorney's fees allowed under Magnuson-Moss to successful plaintiffs were not recoverable.

31. *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 324 S.E.2d 462, 40 U.C.C. Rep. Serv. (Callaghan) 408 (1985). Because Hubco Leasing Inc. was an alter ego of the dealer plaintiff, it was allowed to revoke acceptance of the lease.

32. *Henderson v. Benson-Hartman Motors, Inc.*, 33 Pa. D. & C. 3d 6, 41 U.C.C. Rep. Serv. (Callaghan) 782 (1983).

33. *L. Harvey and Son Co. v. Jarman*, 76 N.C. App. 191, 333 S.E.2d 47, 42 U.C.C. Rep. Serv. (Callaghan) 107 (1985).

34. *Hanson v. Funk Seeds Int'l*, 373 N.W.2d 30, 41 U.C.C. Rep. Serv. (Callaghan) 1244 (S.D. 1985); *Martin v. Joseph Harris Co., Inc.*, 767 F.2d 296, 41 U.C.C. Rep. Serv. (Callaghan) 315 (6th Cir. 1985) (construing the Federal Seed Act, 7 U.S.C. § 1551-1611 (1982), Mich. Comp. Laws Ann. §§ 286.701-286.716 (West 1979) and S.D. Codified Laws Ann. §§ 38-12-1 to 38-12-52 (1969 and 1984 Supp.), which do not provide for a civil remedy).

35. *Cugnini v. Reynolds Cattle Co.*, 687 P.2d 962, 39 U.C.C. Rep. Serv. (Callaghan) 112, (Colo. 1984) (compliance not necessary for passage of title); *Moffat County State Bank v. Producers Livestock Mktg. Ass'n*, 598 F. Supp. 1562, 40 U.C.C. Rep. Serv. (Callaghan) 314 (D. Colo. 1984), (description in art. 9 financing statement need not comply with livestock bill of sale law); *Colorado State Bank of Walsh v. Hoffner*, 701 P.2d 151, 40 U.C.C. Rep. Serv. (Callaghan) 1490 (Colo. Ct. App. 1985) (failure of seller and reselling buyer to comply does not affect passage of title).

36. See, e.g., *Taylor & Martin, Inc. v. Hiland Dairy, Inc.*, 676 S.W.2d 859, 39 U.C.C. Rep. Serv. (Callaghan) 1672 (Mo. Ct. App. 1984) (failure to comply with Texas certificate of title to motor vehicle law does not preclude passage of title); *Safeco Ins. Co. v. Lapp*, 695 P.2d 1310, 40 U.C.C. Rep. Serv. (Callaghan) 887 (Mont. 1985). *Inmi-Etti v. Aluisi*, 492 A.2d 917, 40 U.C.C. Rep. Serv. (Callaghan) 1612 (Md. Ct. Spec. App. 1985) (erroneous issue of certificate of title confers no title).



under New York's "little FTC Act,"<sup>37</sup> relying on Massachusetts and Washington cases.<sup>38</sup>

A Virginia pre-U.C.C. law, not specifically repealed by the U.C.C., requiring a particular type size in contracts, was ruled implicitly repealed by the requirement of U.C.C. section 2-316 that disclaimers be conspicuous.<sup>39</sup> On the other hand, an Arkansas special statute regarding the sale or transfer of judgment liens prevailed over an I.R.S. lien despite the failure of the transferee to file under the U.C.C.<sup>40</sup>

A storer of grain in Arkansas taking an advance payment had not passed title to the warehouseman and so was still protected by the surety bond required of the warehouse by the Arkansas public grain warehouse law.<sup>41</sup>

Perhaps our most interesting case in this area is *Baker v. Promark Products West, Inc.*,<sup>42</sup> in which the Tennessee Supreme Court used its Product Liability Act's expanded definition of "seller"<sup>43</sup> to permit recovery for breach of the implied warranty of merchantability against a lessor who had leased a stump grinder for half a day.<sup>44</sup> The plaintiff was a user, not the lessee.<sup>45</sup> The lower courts granted summary judgment to the lessor and the distributor. The high court reversed as to the lessor, using cases applying the U.C.C. warranties to leases without distinguishing those doing so on a finding of equivalence to sale. A division of authority was, however, recognized.<sup>46</sup> The court affirmed the dismissal of the claim against the distributor for the reason that the distributor

37. *Associates Capital Servs. Corp. of N.J. v. Fairway Private Cars, Inc.*, 590 F. Supp. 10, 39 U.C.C. Rep. Serv. (Callaghan) 818 (E.D.N.Y. 1982).

38. *Id.* (citing *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. 498, 396 N.E.2d 149 (1979); *Linthicum v. Archambault*, 379 Mass. 381, 398 N.E.2d 482 (1979); *Haner v. Quincy Farm Chems., Inc.*, 29 Wash. App. 93, 98-103, 627 P.2d 571, 575-77 (1981)). Many of the little FTC Acts provide for the recovery of attorney fees, and some for treble damages.

39. *Armco Inc. v. New Horizon Dev. Co. of Va., Inc.*, 331 S.E.2d 456, 41 U.C.C. Rep. Serv. (Callaghan) 367 (Va. 1985).

40. *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 767 F.2d 464, 41 U.C.C. Rep. Serv. (Callaghan) 1002 (8th Cir. 1985).

41. *Tucker v. Durham*, 284 Ark. 264, 686 S.W.2d 402 (1985).

42. 692 S.W.2d 844, 41 U.C.C. Rep. Serv. (Callaghan) 725 (Tenn. 1985).

43. The Tennessee Products Liability Act, Tenn. Code Ann. §§ 29-28-101 to -108 (1980), provided that "Seller" shall also include a lessor or bailor engaged in the business of leasing or bailment of a product.

44. The plaintiff's claim in tort was dismissed under Tenn. Code Ann. § 29-28-106(b) (1985 Supp.), which prohibits suits on a strict liability in tort basis unless either the seller is the manufacturer or the manufacturer has been declared insolvent or is not subject to process. The manufacturer had been nonsuited and was not a party to the appeal.

45. 692 S.W.2d at 845, 41 U.C.C. Rep. Serv. at 727. Previously, *Commercial Truck and Trailer Sales, Inc. v. McCampbell*, 580 S.W.2d 765, 26 U.C.C. Rep. Serv. (Callaghan) 340 (Tenn. 1979) held that Tenn. Code Ann. § 29-34-104, abolishing privity in all actions "for personal injury or property damage brought on account of negligence, strict liability or breach of warranty," had implicitly amended Tennessee's U.C.C. § 2-318 to broaden the class of warranty beneficiaries.

46. 692 S.W.2d at 848-49, 41 U.C.C. Rep. Serv. at 731-32. The court cited cases from Alaska, Alabama, California Appeals, Florida law in a federal court, Georgia Appeals, Idaho, Illinois Appeals, and a lower court case in New York that had been reversed on other grounds by the Appellate Division. To the contra were cases from Delaware, Maryland, Montana, and Virginia,

merely transmitted orders for the equipment involved to the manufacturer, which shipped directly to the lessor.<sup>47</sup>

It seems that other statutes must be considered more often than we think.

## ARTICLE 2—SALES

### STATUTE OF FRAUDS

Courts continue to struggle with the myriad forms of commercial arrangements that defy easy categorization and seem not to have been contemplated when many provisions of article 2 were originally drafted. Consider, for example, distributorship agreements and the U.C.C.'s statute of frauds. If within the category "transactions in goods" they would be covered by article 2,<sup>48</sup> that alone is not enough to trigger U.C.C. section 2-201. They must additionally be "contract[s] for the sale of goods."<sup>49</sup> Finally, assuming that section 2-201 does apply, how can its quantity requirement be satisfied when the future needs of the distributor will always be uncertain?<sup>50</sup> These problems arose in *Lorenz Supply Co. v. American Standard, Inc.*<sup>51</sup>

The trial court permitted the plaintiff, Lorenz, to prove, and the jury found that the parties had agreed that Lorenz was to become a distributor of American Standard products. The only writing that in any way evidenced this agreement was in a letter from American Standard to Lorenz that "welcome[d]" Lorenz "to the numbers of American Standard distributors across the country."<sup>52</sup> Affirming a judgment in favor of Lorenz, the Michigan Supreme Court, without deciding whether the agreement was within the general scope of article 2, held it was not a contract for the sale of goods within the meaning of section 2-201. The court's reasoning was simple and straightforward: it had to rule the way it did to preserve the enforceability of distributorship agreements it felt would be at risk if section 2-201 were to apply. A lengthy concurrence offers a different route to the same result. Justice Brickley had no difficulty finding that the agreement was subject to both article 2 and its statute of frauds, but would solve the quantity dilemma by inferring a quantity term, that is, the distributor's requirements.<sup>53</sup>

but at the time none of these contra jurisdictions had a products liability act in force. *But see* proposed Uniform Personal Property Leasing Act's treatment of warranties.

47. The arguments used are similar to those used to rule that financing agencies are not subject to liability for breaches of warranty in the transactions financed. *See, e.g., J.P. Marks Int'l, Inc. v. Corema S.A. Empresa De Comercio E. Exportacao*, 41 U.C.C. Rep. Serv. (Callaghan) 733 (S.D.N.Y. 1985).

48. *See* U.C.C. § 2-102 (1978) ("unless the context otherwise requires, this Article applies to transactions in goods").

49. U.C.C. § 2-201 (1978).

50. One absolute requirement of § 2-201 is that the writing specify a quantity. *See* U.C.C. § 2-201, Comment 1 (1978).

51. 419 Mich. 610, 358 N.W.2d 845, 39 U.C.C. Rep. Serv. (Callaghan) 1169 (1984).

52. *Id.* at 614, 358 N.W.2d at 849, 39 U.C.C. Rep. Serv. (Callaghan) at 1171.

53. *Id.* at 635, 358 N.W.2d at 855-56, 39 U.C.C. Rep. Serv. (Callaghan) at 1185-86. Most commercially minded courts have been willing to accept the sufficiency of a writing if it provides for

The result is correct but, because of their obvious result orientation, both opinions are less than satisfactory. This is a perfect example of what could become standard practice if the U.C.C. fails to maintain its adaptability to current commercial practices.

While the U.C.C. leaves little doubt that a partial payment will satisfy section 2-201 as to an apportionable part of the goods,<sup>54</sup> it is silent whether a partial payment on an indivisible contract is sufficient to allow proof of the oral agreement. The seller's argument that oral proof should not be allowed was rejected in *The Press, Inc. v. Fins & Feathers Publishing Co.*<sup>55</sup> Strongly critical of the statute's potential for permitting escape from otherwise enforceable bargains, the court refused to broaden its scope by recognizing an indivisible contract exception to the partial payment exception.<sup>56</sup>

Finally, while on the subject of payment, it should be mentioned that courts continue to adhere to the rule that the buyer's stopping of payment on a check does not strip it of its payment character.<sup>57</sup>

## BATTLE OF THE FORMS

Several recurring issues under U.C.C. section 2-207 received attention in *Daitom, Inc. v. Pennwalt Corp.*<sup>58</sup> The battle of the forms began when Pennwalt submitted a proposal, together with preprinted terms and conditions, for the sale of two rotary vacuum dryers. Among the terms and conditions were a limitation of liability clause and a clause providing a limitations period of one year from the date of delivery for any action for breach of warranty. Daitom responded with its purchase order and its preprinted terms and conditions, which included a reservation of all warranties and remedies available at law. Moreover, the purchase order provided that "acceptance by seller" was "expressly limited to such terms and conditions."<sup>59</sup> When the dryers proved defective, Daitom sued. The district court entered summary judgment for Pennwalt, finding that the claim was barred by the one-year limitations period.<sup>60</sup>

delivery of a party's requirements or output. See Leary & Frisch, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 40 Bus. Law. 1457 (1985). Admitting that a requirements term is specific enough to satisfy the statute, the majority refused to infer such a term because "not all distributorship agreements are requirements or output contracts." *Id.* at 612, 358 N.W.2d at 847, 39 U.C.C. Rep. Serv. at 1171.

54. See U.C.C. § 2-201, Comment 2 (1978) ("if the price has been paid, the seller can be forced to deliver an apportionable part of the goods").

55. 361 N.W.2d 171, 40 U.C.C. Rep. Serv. (Callaghan) 33 (Minn. Ct. App. 1985).

56. Not clear from the court's opinion is what weight, if any, was accorded the fact that there was no quantity dispute. *Id.* at 174, 40 U.C.C. Rep. Serv. (Callaghan) at 36.

57. *Miller v. Wooters*, 131 Ill. App. 3d 682, 476 N.E.2d 11, 40 U.C.C. Rep. Serv. (Callaghan) 1623 (1985).

58. 741 F.2d 1569, 39 U.C.C. Rep. Serv. (Callaghan) 1203 (10th Cir. 1984).

59. *Id.* at 1575-76, 39 U.C.C. Rep. Serv. (Callaghan) at 1212.

60. *Id.* at 1573, 39 U.C.C. Rep. Serv. (Callaghan) at 1207. Throughout the opinion the Tenth Circuit makes no effort to hide its sympathy for the buyer, Daitom, who because of circumstances beyond its control, could not within the one-year period try out the machinery and discover the defects.

The Tenth Circuit, applying nonexistent Pennsylvania law,<sup>61</sup> reversed. It first rejected Daitom's contention that the acceptance of the original proposal was expressly contingent on Pennwalt's agreeing to the terms and conditions accompanying the purchase order. Absent was an explicit communication that Daitom would not proceed unless its terms were accepted by Pennwalt.<sup>62</sup> Having concluded that the exchanged writings formed a contract, the court's next job was to ascertain its terms. Believing that Daitom's reservation of its legal rights implicitly reserved the U.C.C.'s four-year period and remedies,<sup>63</sup> the court applied the "knock-out" rule and held that the conflicting terms in Pennwalt's offer and Daitom's acceptance cancelled one another.<sup>64</sup> Consequently, in the absence of evidence of course of performance, course of dealing, or usage of trade, the U.C.C. will supply the missing terms.

Notice that it is possible for a knocked-out term to become part of the contract if the created gap is filled by an identical term. In *Pennwalt*, if the U.C.C.'s gap fillers are used, the final contract will conform to Daitom's terms and conditions. Should this be the result? The court is correct, however, in its view that before resorting to the U.C.C., course of performance, course of dealing, and usage of trade should be consulted for appropriate terms.

Not surprisingly, U.C.C. section 2-207(2)(b) continues to be the subject of frequent litigation, forcing courts to decide whether additional provisions in the acceptance or confirmation materially alter the contract. Two recent cases have indicated that a clause providing for a one-year limitations period for bringing

61. Pennwalt is a Pennsylvania corporation with its principal place of business in Pennsylvania. Apparently for this reason the parties never disputed the application of Pennsylvania law to the warranty claims. Unfortunately, no Pennsylvania court had ever decided the exact issues raised by the case.

62. 741 F.2d at 1577, 39 U.C.C. Rep. Serv. (Callaghan) at 1214. The judicial trend favoring a narrow construction of the U.C.C. § 2-207(1) (1978) proviso that an acceptance is not an acceptance if "expressly made conditional on assent to the additional or different terms" shows no signs of abating (emphasis added). See also *Challenge Mach. Co. v. Mattison Machine Works*, 138 Mich. App. 15, 39 U.C.C. Rep. Serv. (Callaghan) 1578 (1984); *Phillips Petroleum Co. v. Bucyrus-Erie Co.*, 125 Wis. 2d 418, 373 N.W.2d 65, 41 U.C.C. Rep. Serv. (Callaghan) 1192 (1985). Additionally, the court thought the phrasing of the purchase order detracted from Daitom's argument of conditional acceptance. See 741 F.2d 1569, 39 U.C.C. Rep. Serv. (Callaghan) at 1203. It read more like an offer than an acceptance. This reasoning underscores the observation in last year's survey of the importance of distinguishing between "offers" and "acceptances." See Leary & Frisch, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 40 Bus. Law. 1467-68 (1985). Perhaps, if the purchase order had been labeled an offer, the court would have held that its terms were controlling. See U.C.C. § 2-207(2)(a) (1978).

63. 741 F.2d at 1577-80, 39 U.C.C. Rep. Serv. (Callaghan) at 1215-16, 1218-20. On this point the dissent differed. Judge Barrett argued that "[t]here was no term in Daitom's purchase order in conflict with the express one-year limitation." *Id.* at 1583, 39 U.C.C. Rep. Serv. (Callaghan) at 1224.

64. *Id.* at 1579-80, 39 U.C.C. Rep. Serv. at 1218-19. The "knock-out" rule is premised on the applicability of U.C.C. § 2-207(2) (1978) to additional terms only, not different terms. If the writings contain different terms, these terms will not become a part of the contract. For other decisions adopting this approach, see *Challenge Mach. Co. v. Mattison Machine Co.*, 138 Mich. App. 15, 39 U.C.C. Rep. Serv. (Callaghan) 1578 (1984); *St. Paul Structural Steel Co. v. ABI Contracting, Inc.*, 364 N.W.2d 83, 40 U.C.C. Rep. Serv. (Callaghan) 789 (N.D. 1985).

suit is not a material alteration,<sup>65</sup> and a third decided that a limitation of remedies clause is immaterial.<sup>66</sup> On the other hand, a forum selection clause is a material alteration.<sup>67</sup>

In another case,<sup>68</sup> the Seventh Circuit, applying Wisconsin law, ruled that a disclaimer of implied warranties materially altered the original bargain of the parties. But as the court points out, this does not necessarily end the matter. There is always the possibility that the other party agreed to the additional term,<sup>69</sup> and so it was in this case. The court found persuasive the district court's finding that the buyer was aware of the terms, assigned the limited warranty to its customers, and invoked the limited warranty on numerous occasions. Thus, according to the court, the buyer had "*expressly* agreed . . . by its course of conduct."<sup>70</sup>

## WARRANTIES

### GENERAL

The usual mass of litigation on warranty issues, mostly routine and of minor significance, was found in the cases reported. A few had some interest.

Uncooked pork hit the books again<sup>71</sup> with apparently no consideration given to whether technological advances had occurred after the earlier precedent that was cited.<sup>72</sup> Two cases held that guns with which one child killed another were "merchantable" as the ordinary purpose of a handgun is to fire a bullet, and each gun did.<sup>73</sup> The absence of a safety catch did not result in a breach of that warranty. In New Hampshire, the exploding bottle, this time containing champagne for sale in a state liquor store, raised an issue of sovereign immunity.<sup>74</sup> If liability was in tort, the state had waived its immunity. The ruling was that the

65. *Acchione & Camesa, Inc. v. Reed Mining Tools, Inc.*, 39 U.C.C. Rep. Serv. (Callaghan) 1585 (E.D. Pa. 1984); *Therma-Coustics Mfg. Co. v. Borden Inc.*, 213 Cal. Rptr. 611, 40 U.C.C. Rep. Serv. (Callaghan) 1640 (1985).

66. *Kathenes v. Quick Chek Food Stores*, 596 F. Supp. 713, 39 U.C.C. Rep. Serv. (Callaghan) 1326 (D.N.J. 1984).

67. *Occidental Chem. Corp. v. H & W Indus., Inc.*, 41 U.C.C. Rep. Serv. (Callaghan) 756 (E.D. Pa. 1985).

68. *Twin Disc, Inc. v. Big Bud Tractor, Inc.*, 772 F.2d 1329, 41 U.C.C. Rep. Serv. (Callaghan) 1627 (7th Cir. 1985).

69. *See* U.C.C. § 2-207, Comment 3 (1978).

70. 772 F.2d at 1335, 41 U.C.C. Rep. Serv. at 1635 (emphasis added).

71. *Popour v. Holiday Food Center, Inc.*, 364 N.W.2d 764, 40 U.C.C. Rep. Serv. (Callaghan) 1671 (Mich. Ct. App. 1985).

72. *Cf. Clouser v. Shamokin Packing Co.*, 240 Pa. Super. 268, 361 A.2d 836 (1976), in which a motion to dismiss the complaint was denied. An allegation of negligence entitles plaintiff to prove that since the date of prior precedent a viable method of detecting trichinosis has been developed.

73. *Rhodes v. R.G. Industries, Inc.*, 173 Ga. App. 51, 325 S.E.2d 465, 40 U.C.C. Rep. Serv. (Callaghan) 1668 (1984); *Love v. Zales Corp.*, 689 S.W.2d 282, 41 U.C.C. Rep. Serv. (Callaghan) 69 (Tex. Ct. App. 1985).

74. *Sheehan v. New Hampshire Liquor Comm'n*, 493 A.2d 494, 40 U.C.C. Rep. Serv. (Callaghan) 1665 (N.H. 1985).

retailer's liability lay in contract, and for such actions immunity had not been waived.

The Fourth Circuit, in a nonwarranty case, struggled with a statute changing privity rules.<sup>75</sup> The panel concluded that to avoid retroactivity in application, the change was effective only for sales occurring after the effective date. Hence, if the accident and injury occurred after the effect, but the sale was made before, the statute did not apply. The result is a logical application of contract principles, treating warranty as a contract term.<sup>76</sup>

The advantage of drafting to meet two possible characterizations of the transaction is shown in three cases involving leased chattels.<sup>77</sup> In two of these, lessor warranties were disclaimed as if the provisions of article 2 applied.<sup>78</sup> In the third the suit was against the seller to the lessor. Curiously, the purchase agreement was signed by the ultimate lessee, but was conditioned upon obtaining from AgriStor Leasing acceptable financing or a lease agreement. The disclaimers were held to be not conspicuous and hence unenforceable.<sup>79</sup>

The implied warranty of merchantability requires that the seller be a merchant.<sup>80</sup> A Washington State court ruled that one who sold for the first time

75. *Farish v. Courion Indus., Inc.*, 754 F.2d 1111, 40 U.C.C. Rep. Serv. (Callaghan) 857 (4th Cir. 1985). U.C.C. § 2-318 (Alt. C.) (1978) was enacted in 1965. It was construed as continuing a statute enacted in 1962. But the goods were manufactured prior to the effective date of the 1962 statute, while the accidents occurred in 1979 and 1981. No statute of limitations point was raised. The decision was an en banc rehearing of two panel decisions. Nine judges sat. Four joined with Circuit Judge Sprouse's majority opinion. One judge concurred in a separate opinion and four judges dissented. The division was on what the Supreme Court of Virginia "would probably hold" on the issue, 754 F.2d at 1127, 40 U.C.C. Rep. Serv. (Callaghan) at 870.

76. The case has significance if a change in U.C.C. § 2-318 (1978) from alternative A to alternative C is contemplated in any jurisdiction. Taking a similar contract term approach, the New York Court of Appeals in *Heller v. U.S. Suzuki Motor Corp.*, 40 U.C.C. Rep. Serv. (Callaghan) 917 (1985) ruled that warranty suits against a remote manufacturer not filed within four years of sale to distributors, were time-barred without regard to the date of the sale to the purchaser claiming breach of warranty. At least one member of the Subcommittee believes that the key in each case should be the date the ultimate buyer or user first had contact with the product influenced by the manufacturer's advertising. In tort cases the privity rules should be considered procedural and the policy in favor of protecting against injury should be considered far stronger than privity rules.

77. *AgriStor Credit Corp. v. Schmidlin*, 601 F. Supp. 1307, 41 U.C.C. Rep. Serv. (Callaghan) 1653 (D. Ore. 1985); *AgriStor Leasing v. Hansen*, 41 U.C.C. Rep. Serv. (Callaghan) 1660 (D. Minn. 1985); *AgriStor Leasing v. Kjergaard*, 41 U.C.C. Rep. Serv. (Callaghan) 1667 (D. Minn. 1985). The last two cases also held that a "finance lessor" was not a "merchant" for U.C.C. § 2-314 purposes.

78. See 41 U.C.C. Rep. Serv. (Callaghan) at 1660; 41 U.C.C. Rep. Serv. (Callaghan) at 1667.

79. *AgriStor Leasing v. Guggisberg*, 617 F. Supp. 902, 41 U.C.C. Rep. Serv. (Callaghan) 1671 (D. Minn. 1985). In the notice on the front about conditions of sale on the reverse only the word "NOTICE" was in all capitals and the text did not indicate that disclaimers of warranties were included. The disclaimers were in bold type on the reverse with a place where buyer would initial an acceptance. The buyer had not initialed. At the end of the text on the reverse side the sales person had signed.

80. U.C.C. § 2-314(1) (1978). U.C.C. § 2-104(1) (1978) defines a "merchant" as one "who deals in goods of the kind" involved or holds himself out as having the knowledge or skill of those who do, or who employs an intermediary having such knowledge or skill. For some recent cases holding that a "finance lessor" is not a "merchant" for warranty purposes, see *supra* note 76.

had not achieved the status of a merchant in that sale.<sup>81</sup> On the other side of the continent, a Massachusetts court gave merchant status to a public transportation authority selling its used railcars.<sup>82</sup>

### DISCLAIMERS AND LIMITED REMEDIES

Provisions limiting a buyer's remedy to a return of the purchase price raise questions. Black letter law apparently provides that disclaimers of warranties are effective if made as provided in U.C.C. section 2-316.<sup>83</sup> U.C.C. section 2-718 provides for liquidated damages.<sup>84</sup> U.C.C. section 2-719(3) makes a limitation or exclusion of consequential damages subject to attack for unconscionability.<sup>85</sup> When seeds do not live up to the sales warranties, what damages are "the loss resulting in ordinary course of events from the seller's breach" under U.C.C. section 2-714(1),<sup>86</sup> and what are consequential damages? In *Harrison v. Funk Seeds International*,<sup>87</sup> the South Dakota Supreme Court did not address this question specifically in holding unconscionable a disclaimer of warranties in accordance with U.C.C. section 2-316 and a limitation of remedy to a recovery by a farmer of the price paid for seeds. If the damages suffered when the corn grown from the seeds did not produce good ears of corn and did not make good silage were thought of as consequential, an application of the doctrine of unconscionability was invited.<sup>88</sup> If the damages, cost of fertilizer, and loss of crop

81. *Fred J. Moore, Inc. v. Schinmann*, 700 P.2d 754, 41 U.C.C. Rep. Serv. (Callaghan) 741 (Wash. Ct. App. 1985).

82. *Ferragamo v. Massachusetts Bay Transp. Auth.*, 41 U.C.C. Rep. Serv. (Callaghan) 304 (Mass. 1985).

83. U.C.C. § 2-316(2), (3) (1978) requires either that the disclaimer be "conspicuous" and mention "merchantability" or be in words clearly indicating no warranty at all.

84. U.C.C. § 2-718 (1978) requires that the amount be "reasonable in the light of the anticipated or actual harm caused by the breach" but only an "unreasonably large" amount is void as a penalty. A term limiting warranty recovery to a return of the purchase price will often be unreasonably small. As such it can only be attacked as not reasonable in the light of the harm caused by the breach. *But see supra* note 83.

85. U.C.C. § 2-719(1)(a) (1978) provides that the agreement may limit "the buyer's remedies to . . . repayment of the price." Subsection (1)(b) would permit this limit to be "expressly agreed to be exclusive" and hence a sole remedy. No controls for rendering such a clause unenforceable are specifically provided. Subsection (3) does subject exclusions of consequential damages to the test of unconscionability, but no such test (unless it can be found from § 2-302 on general unconscionability) applies to damages under U.C.C. § 2-714 (1978). Usually in statutory interpretation the particular (here U.C.C. § 2-719) controls the general (here U.C.C. § 2-302, in which unconscionability is concerned). Comment 1 to U.C.C. § 2-719 (1978) indicates that the U.C.C. requires "at least a fair quantum of remedy." But is this legislating by Comment?

86. U.C.C. § 2-714(1) (1978).

87. 373 N.W.2d 30, 41 U.C.C. Rep. Serv. (Callaghan) 1244 (S.D. 1985).

88. U.C.C. § 2-719(3) (1978). Indeed the court strongly relied on *Durham v. Ciba-Geigy Corp.*, 315 N.W.2d 696, 33 U.C.C. Rep. Serv. (Callaghan) 588 (S.D. 1982) a pesticide case in which there was a specific exclusion of consequential damages. That court held that the provisions of S.D. Codified Laws Ann. § 38-21-46 (1976) requiring a filing with the state's Secretary of Agriculture within a prescribed time limit did not preempt the U.C.C. in actions for breach of contract. It nonetheless stated that the public policy of South Dakota as set forth in the Insecticide, Fungicide

value were regarded as damages occurring in ordinary course because a good crop would have sold for enough to cover these items, then the court was obviously equating the reference to "a fair quantum of remedy" in Comment 1 to U.C.C. section 2-719<sup>89</sup> to the doctrine of unconscionability. The concept of an unreasonably small quantum of liquidated damages was not even mentioned.<sup>90</sup> If the court was ruling that a disclaimer of the implied warranty of merchantability could be unconscionable despite compliance with U.C.C. section 2-316, it certainly did not say so.<sup>91</sup> The case appears to rest on the disparity in bargaining power between the farmer purchaser and the seed merchant.<sup>92</sup> A dissent by two judges indicates that when the seller sells a product of nature such as seeds as distinguished from a product fabricated by the seller, a plaintiff's burden to establish a defect should not be supplied by inference from a poor crop in certain areas of the farmer's land.<sup>93</sup>

The case emphasizes the failure of article 2 of the U.C.C. to provide guidelines on the difficult question of when damages are ordinary and when they are consequential.<sup>94</sup> If, however, the requirement of a fair quantum of remedy is equated to a conscionable limitation of remedy, perhaps one of the greatest needs for a clear distinction vanishes.<sup>95</sup>

The division of authority on whether the failure of the essential purpose of a limited remedy for breach of warranty also destroys a provision excluding recovery for consequential damages continues as additional jurisdictions take sides on the issue.<sup>96</sup>

and Rodenticide Act of 1947, S.D. Codified Laws Ann. §§ 38-20A-1 to -53 was to protect farmers "from the consequences of the sale, delivery, and use of falsely labeled pesticides." This aided the court in finding that the exclusion of consequential damages was unconscionable. The court in *Hanson* did not state whether the damages were U.C.C. § 2-714(1) damages or U.C.C. § 2-715 damages, and did not refer to the South Dakota or Federal Seed Laws for a declaration of policy. See cases cited *supra* note 34.

89. Comment 1 also states that "it is of the very essence of a sales contract that at least minimum adequate remedies be available." Apparently the subsequent reference in the same comment is to "at least a fair quantum of remedy." The Comment invites the courts to strike clauses that purport to limit "the remedial provisions of this Article in an unconscionable manner." It is not specifically stated whether less than a fair quantum or below minimum adequate is per se unconscionable.

90. Perhaps counsel did not equate the dollar figure of the price with the liquidated damages concept.

91. The opinion relies on *Durham*, 315 N.W.2d at 696, 33 U.C.C. Rep. Serv. (Callaghan) at 588. The terms of U.C.C. § 2-316 (1978) are not discussed.

92. 373 N.W.2d at 35, 41 U.C.C. Rep. Serv. (Callaghan) at 1251.

93. See dissent of Justices Miller and Wollman, 373 N.W.2d at 37, 41 U.C.C. Rep. Serv. (Callaghan) at 1252.

94. U.C.C. § 2-714 (1978) refers to loss resulting in ordinary course from the breach. U.C.C. § 2-715 (1978) purports to define incidental and consequential damages, but it is not clear when damages "resulting from general . . . needs of which the seller at time of contracting had reason to know" pass from ordinary damages into consequential damages.

95. That is, both kinds are under "unconscionability" control with respect to limitations. A sticky question remains, however: Where does an exclusion of consequential damages begin to take hold if there is no exclusive stated remedy?

96. See, e.g., *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814, 40 U.C.C. Rep. Serv. (Callaghan) 1721 (1984) (consequential damages recoverable); *R. W. Murray Co. v. Shatter-*



### THIRD-PARTY BENEFICIARIES

Perhaps the most interesting case in the period under review is Judge Pollock's opinion in *Spring Motors Distributors, Inc. v. Ford Motor Co.*<sup>97</sup> for the Supreme Court of New Jersey. Reversing the New Jersey Appellate Division, the court first held that recovery of economic loss between sophisticated parties could not be had in New Jersey in an action for strict liability in tort or negligence. Warranty liability was the sole source for any such recovery. It then stated that absence of vertical privity between the ultimate buyer and the maker of a defective transmission would not bar warranty recovery. Since plaintiff did not, however, file for a review of the dismissal of its warranty claims as time-barred under U.C.C. section 2-725, there was no recovery.

### TITLE, CREDITORS—GOOD FAITH PURCHASERS AND ENTRUSTING

A case of great potential significance is *Placer Coal, Inc. v. Rhondale Coal Services Co., Inc.*<sup>98</sup> In *Placer*, coal sold to Rhondale was delivered to Placer for processing and shipment to buyers nominated by Rhondale. In due course, Rhondale found itself indebted to Placer in the approximate amount of \$24,000 and unable to pay sellers from whom it had purchased coal on credit. Placer filed suit against Rhondale and at the same time sought a prejudgment attachment of the coal in Placer's possession. Before the coal was lawfully seized pursuant to Placer's attachment, Rhondale informed its sellers that it could not

proof Glass Corp., 758 F.2d 266, 40 U.C.C. Rep. Serv. (Callaghan) 1283 (8th Cir. 1985) (same); Fiorito Bros., Inc. v. Fruehauf Corp., 747 F.2d 1309; 39 U.C.C. Rep. Serv. (Callaghan) 1298 (9th Cir. 1984) (same); Carboline Co. v. Oxmoor Centers, 40 U.C.C. Rep. Serv. (Callaghan) 1728 (Ky. Ct. App. (1985)) (exclusion remains enforceable in a commercial setting, but a limitation on incidental damages disappears); Milgard Tempering, Inc. v. Selas Corp. of Am., 761 F.2d 553, 40 U.C.C. Rep. Serv. (Callaghan) 1714 (9th Cir. 1985) and AgriStor Credit Corp. v. Schmidlin, 601 F. Supp. 1307, 41 U.C.C. Rep. Serv. (Callaghan) 1653 (D. Ore. 1985) (both requiring full trial before such determination can be made).

97. 98 N.J. 555, 489 A.2d 660, 40 U.C.C. Rep. Serv. (Callaghan) 1184 (1985). While, due to the time bar of U.C.C. § 2-725 (1978), no warranty issues were technically raised, it is of interest that the court stated that one issue was "whether the Code provides the exclusive remedies" to the plaintiff who had suffered only "economic" losses. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) and *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305, 2 U.C.C. Rep. Serv. (Callaghan) 599 (1965) were distinguished as based on factual situations occurring before New Jersey adopted the U.C.C. and related to consumer transactions. Later strict-liability cases were also found to relate to consumer transactions. In *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145, 2 U.C.C. Rep. Serv. (Callaghan) 915 (1965) the court noted that it had rejected *Santor* and had emerged as representing the majority view, well liked by various commentators. The court discusses at length the difference between vertical privity and horizontal privity, concluding that the Code drafters have left the courts to determine whether vertical privity should be required in a warranty action, citing among other cases abolishing the vertical privity bar *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968). Judge Handler concurred, arguing that the majority did not need to go as far on privity as they had done because the plaintiff had specified to Ford who should make the transmissions, and this should have resulted in privity between plaintiff and its designated party to supply transmissions.

98. 684 S.W.2d 25, 39 U.C.C. Rep. Serv. (Callaghan) 1697 (Ky. Ct. App. 1984).

pay for the coal and that they were free to take it back. It was following this renunciation by Rhondale of its interest in the coal that the attachment on behalf of Placer became effective.

In a conversion suit brought by the sellers against Placer, recovery was allowed. The court conceded that title had passed to Rhondale when the coal was delivered to Placer's dock<sup>99</sup> and that the sellers had failed to comply with section 2-702(2).<sup>100</sup> But as the court saw it, there is section 2-401(4) that will cause a reversion of title in the seller upon "[a] rejection or other refusal by the buyer to receive or retain the goods, whether or not justified."<sup>101</sup> The court believed that because Rhondale told the sellers to come and get it before the coal was taken pursuant to Placer's attachment, it was no longer the property of Rhondale, and hence, the attachment was wrongful.<sup>102</sup> The dissent, on the other hand, saw things differently. Judge Gudgel believed that section 2-401(4) applies only when the goods are rejected because they are in some way deficient, not when the deficiency relates to the buyer's ability to pay, as here.<sup>103</sup>

Because the majority never acknowledged the possibility that the subsection's scope might be anything other than readily apparent from its language, the potential effect of the decision is ignored. While it is certainly true that a buyer has the right to return goods to the seller and that there is a point in the course of their return when they will no longer be subject to the claims of the buyer's other creditors, it is questionable whether that point is reached before the goods leave the buyer's control. To sanction an interest in the seller that is secret so far as the rest of the world is concerned could have an untoward impact on those who subsequently deal with the buyer<sup>104</sup> and is at odds with the drafters' approach in other U.C.C. sections.<sup>105</sup>

A case involving a related issue is *Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc.*<sup>106</sup> The Fire Co. contracted to purchase a fire truck and paid \$48,000 toward a purchase price of approximately \$52,000. The seller, who was assembling the truck, had ordered the chassis from Lowe & Moyer. Before completing the truck, but after painting the Fire Co.'s name on the cab, the

99. The contracts between Rhondale and the sellers provided for delivery of the coal F.O.B. Placer's dock. Title, therefore, passed to Rhondale when the coal was delivered to Placer. *See* U.C.C. § 2-401(2) (1978).

100. U.C.C. § 2-702(2) (1978) gives a credit seller the right to reclaim goods from an insolvent buyer if demand for their return is made within 10 days following their receipt by buyer.

101. U.C.C. § 2-401(4) (1978).

102. For the attachment to be valid, the property seized must be property of the debtor. *See* Ky. Rev. Stat. § 425.301 (1984 Cum. Supp.). This would not be the case if title to the coal had returned to the sellers by operation of U.C.C. § 2-401(4) (1978).

103. 684 S.W.2d at 30-31, 39 U.C.C. Rep. Serv. (Callaghan) at 1704.

104. For this reason the law, in the guise of fraudulent conveyance law, has historically condemned those arrangements resulting in a separation of ownership and possession. *See generally* 1 G. Glenn, *Fraudulent Conveyances and Preferences* §§ 342-363 (rev. ed. 1940).

105. *See, e.g.*, U.C.C. § 2-402(2) (1978) (permitting under certain circumstances the application of state fraudulent conveyance law to a buyer who leaves sold goods with the seller); § 2-326(3) (penalizing a consignor's secret interest); § 9-301 (penalizing a secured party's secret interest).

106. 338 Pa. Super. 257, 487 A.2d 953, 40 U.C.C. Rep. Serv. (Callaghan) 1691 (1985).

seller found itself unable to pay for the chassis and surrendered the partially completed truck to Lowe & Moyer. The Fire Co. then filed suit seeking to replevy the truck.

The Pennsylvania Superior Court correctly observed that the Fire Co. had to prove that it had a better right to possess the truck than Lowe & Moyer but incorrectly concluded that that right depended on it being a buyer in ordinary course under section 2-403(2).<sup>107</sup> Because Lowe & Moyer had passed title to the chassis to the seller upon delivery to seller, section 2-403(2) was not needed to create in the seller any power to transfer any interest of Lowe & Hammer to a third party.<sup>108</sup> They had no interest until they received the surrender. Nevertheless, the opinion nicely summarized the conflicting views on when buyer in ordinary course status attaches and is for this reason worth reading. The court eventually decided that identification of the good to the contract is what triggers buyer status, and the Fire Co. thus qualified when its name was put on the cab.<sup>109</sup> Confusing the concepts of replevin from the seller and replevin from a third party, the court then remanded the case to determine whether any effort to cover by the Fire Co. would have been unavailing.<sup>110</sup> The case again indicates the conceptual difficulties facing attempts to secure protection for the interests of a financing buyer outside of compliance with article 9.

### RISK OF LOSS

Although at this stage in the life of the U.C.C. it is a bit unusual to find cases of universal first impression, they still manage to arise. In *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.*,<sup>111</sup> the novel issue facing the Seventh Circuit was whether section 2-509(2)(b), which provides that when "goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer . . . (b) on *acknowledgment* by the bailee of the buyer's right to possession of the

107. U.C.C. § 2-403(2) (1978) provides: "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." Here, however, title and possession had passed from Lowe & Moyer, the return was voluntary and would be subject to any rights of the Fire Co.

108. A better approach would have applied U.C.C. § 2-402(1), which, subject to certain exceptions, makes the rights of seller's creditors subject to the buyer's rights to recover the goods under U.C.C. §§ 2-502 and 2-716 (1978). The court does mention § 2-402(1) but rejects its application because the Fire Co. never raised this theory of recovery. 338 Pa. Super. at 268 n.5, 487 A.2d at 959 n.5, 40 U.C.C. Rep. Serv. at 1698 n.5.

109. Because the truck was not in existence when the contract was made, it was a "future good" whose identification occurred when it was designated by the seller as "[the good] to which the contract refers." U.C.C. § 2-501(1)(b) (1978).

110. U.C.C. § 2-716 (1978) permits replevin "for goods identified to the contract if after reasonable effort [the buyer] is unable to effect cover . . . or the circumstances reasonably indicate that such effort will be unavailing." Because ability to cover is only relevant if U.C.C. § 2-716 is, there is no reason for the court to consider its availability in this case. Because U.C.C. § 2-402(1) (1978) played no role in the decision, *see supra* note 108, and replevin was not being sought from the seller, the question of cover seems entirely misplaced.

111. 774 F.2d 214, 41 U.C.C. Rep. Serv. (Callaghan) 1287 (7th Cir. 1985).

goods,”<sup>112</sup> is satisfied if the acknowledgment is made to the seller.<sup>113</sup> In this case, the subject of the sale, pork ribs, was to be delivered by a transfer of the ribs from the seller’s account in an independent warehouse to the buyer’s account. On January 13, the change was made pursuant to the seller’s instruction, but a new warehouse receipt was not mailed to the buyer until January 17 or January 18. It was not until the buyer received the receipt on January 24 that it knew the transfer had taken place. Unfortunately, the ribs were destroyed by a fire at the warehouse on January 17. In a suit by the seller to recover the contract price, the trial court entered summary judgment for the buyer because, at the time of the fire, the risk of loss had not yet passed.

Unable to justify a result in favor of either party on policy grounds,<sup>114</sup> the Seventh Circuit affirmed in an opinion characterized by Judge Posner as “a rather dry textual analysis.”<sup>115</sup> Relying on the language of section 2-509(2)(b) and its surrounding subsections,<sup>116</sup> the U.C.C. comments, and section 2-503(4)(a),<sup>117</sup> the court thought that the risk of loss clearly did not pass when the book transfer was made, even though the seller knew of the transfer. Because the seller had never raised the point, the court refused to decide when the risk did pass to the buyer; that is, did “acknowledgment” to the buyer take place when the receipt was mailed or when it was received? Regardless, the case serves as stern warning that risk of loss, not the location of title, should control the decision to insure.<sup>118</sup> It is, therefore, sometimes wise to insure against goods not owned and perhaps even against goods one does not know are owned.

Section 2-509(1) sets forth the risk of loss rules that govern if the seller is required or authorized to ship goods by carrier. Which of its rules apply will, in turn, depend on the parties’ agreement.<sup>119</sup> Frequently they will express their intention by using standard trade terms or symbols, the consequences of many of which are spelled out in U.C.C. section 2-320, which instructs that when the

112. U.C.C. § 2-509(2)(b) (1978) (emphasis added).

113. Because the alleged acknowledgment was to the seller, the court raised but did not decide the question of whether acknowledgment to a third party may ever suffice. 774 F.2d at 217–18, 41 U.C.C. Rep. Serv. (Callaghan) at 1290.

114. The court thought the position of both parties equal from the standpoint of their ability to prevent or insure against the loss. *Id.* at 218, 41 U.C.C. Rep. Serv. (Callaghan) at 1292.

115. *Id.* 774 F.2d at 218, 41 U.C.C. Rep. Serv. at 1291.

116. U.C.C. § 2-509(2)(b) (1978).

117. This section permits a seller to tender delivery of goods by obtaining the bailee’s acknowledgment when the goods are to be delivered without being moved.

118. At the time of the fire, title to the ribs had passed to the buyer. 774 F.2d at 217, 41 U.C.C. Rep. Serv. (Callaghan) at 1290. *See* U.C.C. § 2-401(3)(b) (1978). Another case decided during the survey period with the same message was *Taylor & Martin, Inc. v. Hiland Dairy, Inc.*, 676 S.W.2d 359, 39 U.C.C. Rep. Serv. (Callaghan) 1672 (Mo. Ct. App. 1984). There it was held that risk of loss passed even though there was noncompliance with the state certificate of title act and, as a result, title might not have passed.

119. U.C.C. § 2-509(1) (1978).

term "C.I.F." is used, the risk of loss passes to the buyer upon shipment.<sup>120</sup> But, as a recent case illustrates, this presumed agreement is always subject to an actual agreement otherwise.

In *Kumar Corp. v. Nopal Lines, Ltd.*,<sup>121</sup> the goods were to be shipped from Miami to Venezuela, C.I.F. Maracaibo, Venezuela. Following their delivery to the freight handler and their disappearance to ports unknown, the seller brought suit against the handler, the carrier, and the carrier's shipping agent. The defendants' position was that the risk of loss had passed to the buyer and that therefore the buyer, not the seller, was the real party in interest with standing to sue. Because a C.I.F. contract is ordinarily a shipment contract with the risk of loss passing to the buyer once the goods are delivered for shipment, the trial court agreed and granted the defendants' motion for summary judgment.<sup>122</sup>

According to Florida's Third District Court of Appeals, the case was more complicated. Contradicting the usual effect of a C.I.F. term was a statement in the contract that the buyer would not pay until the goods were actually sold in Venezuela.<sup>123</sup> Because this time-of-payment term made the parties' intentions ambiguous, the court thought the summary judgment improper.<sup>124</sup> The question for the trier of fact was whether payment was required only if the goods arrived in Venezuela<sup>125</sup> or whether it was nonetheless due on the date when the goods would have arrived had they not been lost.<sup>126</sup> One curious feature of the case is the failure of the seller to procure insurance. This alone should have prevented the risk from shifting to the buyer.<sup>127</sup>

120. U.C.C. § 2-320 (1978), Official Comment 1 ("The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods").

121. 462 So. 2d 1178, 41 U.C.C. Rep. Serv. (Callaghan) 69 (Fla. Dist. Ct. App. 1985).

122. *Id.* at 1183-84, 41 U.C.C. Rep. Serv. (Callaghan) at 73. The trial court also rejected the seller's argument that it had standing to sue as the buyer's agent. It held that the buyer's purported ratification of the suit came too late because it was made when an independent claim by the buyer was time-barred under the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(6) (1982).

123. *Id.* at 1184, 41 U.C.C. Rep. Serv. (Callaghan) at 75. U.C.C. § 2-320(4) (1978) provides: "Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents."

124. The court, assuming the risk of loss had passed, also saw no reason why the seller could not maintain the action as agent of the buyer notwithstanding that the original filing was unauthorized. In the court's opinion any ratification would relate back and supply the needed authority. *Id.* at 1185, 41 U.C.C. Rep. Serv. (Callaghan) at 77.

125. A result inconsistent with the nature of a C.I.F. contract.

126. A result consistent with the nature of a C.I.F. contract. *See* U.C.C. § 2-321(3) (1978).

127. A C.I.F. contract requires the seller to obtain insurance. *See* U.C.C. § 2-320(2)(c) (1978). The court did not decide whether an agreement that the buyer could have the goods on consignment would affect the risk of loss in transit.

## *TENDER, CURE, AND NOTICE OF BREACH*

Are attorneys' fees recoverable in an indemnity action by a retailer against the manufacturer of defective goods? The answer apparently is in dispute.<sup>128</sup> The Mississippi Supreme Court held that the retailer's attorneys' fees were not recoverable in *Contractor's Lumber & Supply Co. v. Champion International Corp.*<sup>129</sup> In that case the retailer incurred attorneys' fees defending a claim against it by its customer. The manufacturer, who had also been sued by the customer, settled the customer's claims against both itself and the retailer. The trial court then dismissed the retailer's indemnity claim. The supreme court affirmed the dismissal upon the ground that the retailer had failed to tender defense of the customer's claim against it to the manufacturer under section 2-607(5)(a).<sup>130</sup>

## *REPUDIATION AND EXCUSE*

In *Commonwealth Edison Co. v. Decker Coal Co.*,<sup>131</sup> a federal district court stated that a repudiation must be clear and unequivocal. Buyer had the contractual right to accelerate the delivery date of a coal installment from 1990 to 1985. The buyer demanded acceleration of the delivery date to 1984. The seller responded that buyer could accelerate the delivery to a date no earlier than 1986. The seller's response also asked buyer to contact it to discuss the dispute and agreed to buyer's demand for accelerated delivery of coal under another contract. According to the court, the seller's response was not an anticipatory repudiation of its obligation to deliver the coal in 1985. The court reasoned that even though the seller's response claimed more than the seller was permitted under the contract, the overall accommodating tone of the letter made it less than a positive and unequivocal repudiation.<sup>132</sup> Consequently the court denied buyer's motion for judgment on the pleadings.

In *International Minerals and Chemical Corp. v. Llano, Inc.*,<sup>133</sup> the buyer agreed to pay for certain minimum quantities of natural gas for its fertilizer plant whether or not it actually used such minimum quantities. Subsequently, the state promulgated environmental regulations requiring buyer to alter its manufacturing process so as to use less than the contracted minimum quantities of gas. In reversing a \$3.4-million judgment for seller, the Court of Appeals for the Tenth Circuit held that the buyer was excused by a contract clause from its obligation to pay for the contracted minimum quantities. The clause provided in

128. See cases cited in *George E. Jensen Contractor, Inc. v. Quality Mill Works, Inc.*, 431 So. 2d 1232 (Ala. 1983).

129. 463 So. 2d 1084; 40 U.C.C. Rep. Serv. (Callaghan) 481 (Miss. 1985).

130. The court's reliance upon U.C.C. § 2-607(5)(a) is puzzling. That subsection does not deal with the substantive right to bring an indemnity action. It deals only with the procedure of binding the indemnitor to relevant facts found in the claim against the indemnitee. See U.C.C. § 2-607(5)(a), Comment 7 (1978); see also U.C.C. § 3-803, Comment (1978).

131. 612 F. Supp. 978, 41 U.C.C. Rep. Serv. (Callaghan) 1703 (N.D. Ill. 1985).

132. See also U.C.C. § 2-610, Comment 2.

133. 770 F.2d 879, 41 U.C.C. Rep. Serv. (Callaghan) 347 (10th Cir. 1985).

relevant part, "[I]n the event that . . . [b]uyer is 'unable to receive gas as provided in this Contract for any reason beyond the reasonable control of the parties . . . an appropriate adjustment in the minimum purchase requirements . . . shall be made.'"<sup>134</sup> The court construed the word "unable" in the clause to mean "impracticable" under U.C.C. section 2-615. It then concluded that compliance with a supervening state environmental regulation rendered impracticable the buyer's obligation to receive the contracted minimum quantities, thus triggering an appropriate reduction of the buyer's minimum purchase obligation under the quoted clause.<sup>135</sup> The court rejected the seller's argument that buyer's voluntary early compliance with the regulation did not constitute supervening legal impracticability.

A forty percent decrease in the market price of pinto beans was held as a matter of law not to excuse under U.C.C. section 2-615 a buyer from its fixed price obligation to purchase such beans in *Lawrance v. Elmore Bean Warehouse, Inc.*<sup>136</sup> There the contract was between a bean warehouse and grower. The Idaho Court of Appeals ruled that U.C.C. section 2-615 applied to buyers. The nonoccurrence of a decline in market price was ruled not a basic assumption upon which this contract was made, however. The court stated that the basic assumption test was a question of foreseeability. It reasoned that since changing market conditions were the norm, they usually were foreseeable unless the party seeking excuse could show that it could operate only at a loss if it were not excused and that the loss would be so severe and unreasonable that failure to excuse would result in a grave injustice. The buyer's mere assertion that it would be driven to bankruptcy if it were not excused was rejected by the court as not supported by specific facts.<sup>137</sup>

## REMEDIES

### REJECTION AND REVOCATION OF ACCEPTANCE

Does the failure to include a spare tire with a new automobile constitute a substantial impairment in the value of the automobile so that the buyer can revoke acceptance of the automobile? The Michigan Supreme Court said it did in *Colonial Dodge, Inc. v. Miller*.<sup>138</sup> In reversing both the trial and intermediate appellate courts, the supreme court applied a subjective test of substantial impairment<sup>139</sup> and concluded that the test was satisfied on the facts.

The buyer has properly revoked his acceptance for nonconformity under U.C.C. section 2-608(1)(b). Does the seller have the right to an opportunity to cure the nonconformity? The Alabama Supreme Court held that the seller had

134. *Id.* at 882, 41 U.C.C. Rep. Serv. (Callaghan) at 350.

135. *Id.* at 887, 41 U.C.C. Rep. Serv. (Callaghan) at 356-57. See U.C.C. § 2-615(a), Comment 10 (1978).

136. 108 Idaho 892, 702 P.2d 930, 41 U.C.C. Rep. Serv. (Callaghan) 358 (1985).

137. *Id.* at 894-95, 702 P.2d at 933, 41 U.C.C. Rep. Serv. (Callaghan) at 362.

138. 420 Mich. 452, 362 N.W.2d 704, 40 U.C.C. Rep. Serv. (Callaghan) 1 (1984).

139. See U.C.C. § 2-608, Comment 2 (1978).

no such right of opportunity to cure in *American Honda Motor Co., Inc. v. Boyd*.<sup>140</sup> There, an automobile damaged en route to the United States was repaired at the port of entry by the manufacturer, then shipped to the dealer who unwittingly sold the automobile as “new” to the plaintiff. In affirming a judgment against the manufacturer on an *inter alia* theory of breach of warranty, the court held that the manufacturer had no right to an opportunity to cure under U.C.C. section 2-608(1)(b). The court reasoned that because the subsection said nothing about an opportunity to cure, the manufacturer’s claim that it had a right to attempt cure was not well founded.<sup>141</sup>

In a related statutory development, Arizona amended and reenacted the U.C.C. Among the amendments, a fourth subdivision was added to U.C.C. section 2-608 providing that the provisions of that section do not apply to a new motor vehicle subject to Arizona’s “lemon law.”<sup>142</sup> The effect of this amendment apparently is to allow a buyer to revoke acceptance only if so permitted under the lemon law.

## RECLAMATION

The Ninth Circuit Court of Appeals, in *Collingwood Grain, Inc. v. Coast Trading Co.*,<sup>143</sup> discussed several questions relative to a seller’s U.C.C. section 2-702 reclamation rights in bankruptcy. Buyer contracted with three stockyards to supply them with grain, then entered into two contracts with seller for eight carloads of grain to fulfill its obligations to the stockyards. The grain was shipped directly to the stockyards. Buyer paid for the grain with drafts, which were later dishonored. Within ten days of the seller’s deliveries to the stockyards, the buyer petitioned for bankruptcy. Seller obtained payment for two carloads. It sent notification to the stockyards that it was reclaiming the remaining grain. The stockyards, in response to competing claims by seller and buyer, deposited the money owed for the grain with the bankruptcy court. That court held that seller was entitled to the money. On appeal, the Ninth Circuit reversed on all but one carload of grain.

First, the court held that U.C.C. section 2-702 applies to ostensible cash sales.<sup>144</sup> Then it held that the stockyards were bona fide purchasers for value who took free of seller’s reclamation rights pursuant to U.C.C. sections 2-702(3) and 2-403(1)(b)(c). That the seller delivered directly to the stockyards did not affect the application of 2-403(1), said the court. Finally, the court held that the

140. 475 So. 2d 835, 41 U.C.C. Rep. Serv. (Callaghan) 410 (Ala. 1985).

141. *Id.* at 841, 41 U.C.C. Rep. Serv. (Callaghan) at 413. In his dissent, Chief Justice Torbert noted that there appears to be a split of opinion, nationwide, on this question. *Id.* at 841, 41 U.C.C. Rep. Serv. at 414. The cases are collected in 4 R. Anderson, Uniform Commercial Code § 2-608: 14 & 15 (3d ed. 1983 and Supp. 1985). See also U.C.C. § 2-711, Comment 1 (1978).

142. Ariz. Rev. Stat. Ann. § 47-2608D (1985 Special Pamphlet). The citation for Arizona’s “lemon law” is Ariz. Rev. Stat. Ann. §§ 44-1261 to -1265 (1985 Supp. Pamphlet).

143. 744 F.2d 686, 39 U.C.C. Rep. Serv. (Callaghan) 753 (9th Cir. 1984).

144. *Id.* at 689-90, 39 U.C.C. Rep. Serv. (Callaghan) at 356. See U.C.C. § 2-507, Comment 3 (1978).



seller was not entitled to reclaim under U.C.C. section 2-702 the proceeds of the grain sales deposited by the stockyards with the bankruptcy court.<sup>145</sup> It held that the seller's reclamation rights under that section extended only to the goods themselves, not proceeds of the goods.<sup>146</sup>

In *In re Storage Technology Corp.*,<sup>147</sup> a bankruptcy court held that an unpaid seller seeking reclamation of goods in bankruptcy under Bankruptcy Code section 546(c)<sup>148</sup> and U.C.C. section 2-702 must show that the debtor was "insolvent" as that term is defined in the Bankruptcy Code,<sup>149</sup> not as it is defined in the U.C.C.<sup>150</sup> Section 546(c) protects a reclaiming seller's statutory or common-law rights from avoidance by the bankruptcy trustee provided, inter alia, that the debtor received the goods while "insolvent." This language is similar to that of U.C.C. section 2-702, the seller's statutory right of reclamation. Thus arose the question of whether the drafters used "insolvency" in section 546(c) in the sense in which it was used in U.C.C. section 2-702 or in the sense in which it is generally used in the Bankruptcy Code. The court applied the Bankruptcy Code definition.<sup>151</sup>

### SELLER'S MONEY REMEDIES

Sellers who finance the acquisition of goods they sell fare poorly in recovering additional finance charges they incur when their buyers do not pay on time. Three cases denied recovery, although on different theories.<sup>152</sup>

In *Associated Metals & Minerals Corp. v. Sharon Steel Corp.*,<sup>153</sup> the parties made two contracts for the sale of large quantities of steel slabs for a total price of approximately \$7.4 million. The contracts contained no provisions for inter-

145. *Id.* at 690-91, 39 U.C.C. Rep. Serv. (Callaghan) at 756-59. The seller was held entitled to an administrative priority for the proceeds of one carload of grain because the obligation to deliver that carload had been executory at the time of bankruptcy. *Id.* at 692, 39 U.C.C. Rep. Serv. (Callaghan) at 760.

146. The court noted that seller had not argued, and so the court did not decide, whether U.C.C. § 2-702 creates a security interest cognizable under article 9. *Id.* at 691, 39 U.C.C. Rep. Serv. (Callaghan) at 759. See U.C.C. § 9-113 (1978). Presumably, had the seller so argued, it could then have argued that it was entitled to the proceeds under U.C.C. § 9-306 (1978).

147. 48 Bankr. 862, 40 U.C.C. Rep. Serv. (Callaghan) 1178 (Bankr. D. Colo. 1985).

148. 11 U.S.C. § 546(c) (1982).

149. The Bankruptcy Code adopts the so-called balance-sheet definition of insolvency (debts greater than assets) as the sole definition of insolvency. 11 U.S.C. § 101(29) (Supp. II 1984).

150. The U.C.C. includes the Bankruptcy Code's definition of insolvency in its definition but also adds the so-called equity definition of insolvency (ceasing to pay debts in ordinary course of business or inability to pay debts as they become due). See U.C.C. § 1-201(23) (1978).

151. See also *In re Furniture Distribs., Inc.*, 45 Bankr. 38, 40 U.C.C. Rep. Serv. (Callaghan) 1276 (Bankr. D. Mass. 1984) (dictum); *contra* *International Crude Corp.*, Case No. 1-82-00085 (Bankr. N.D. Tex.) (unpublished opinion discussed in the principal case); see generally Mann & Phillips, *Section 546(c) of the Bankruptcy Reform Act: An Imperfect Resolution of the Conflict Between the Reclaiming Seller and the Bankruptcy Trustee*, 54 Am. Bankr. L.J. 239 (1980).

152. For cases permitting recovery, see the federal district court's opinion in *Associated Metals & Minerals Corp. v. Sharon Steel Corp.*, 590 F. Supp. 18, 39 U.C.C. Rep. Serv. (Callaghan) 892 (S.D.N.Y. 1983), *aff'd mem.* 742 F.2d 1431 (2d Cir. 1983).

153. *Id.*

est on late payments. Seller financed its acquisition of the steel apparently at interest rates far above the legal prejudgment interest rate. Seller delivered the steel. Buyer paid the contract price, but late. Seller sued to recover \$104,000 of additional financing charges it incurred as a result of buyer's late payments. On cross-motions for summary judgment, the district court held buyer liable for only \$35,000, the amount of interest on the late payments computed at the legal prejudgment interest rate. The court, in effect, ruled out recovery of the additional financing charges as incidental damages under U.C.C. section 2-710 because the buyer already paid the contract price. The court stated that incidental damages were available under section 2-710 only in conjunction with specific rights of action recognized by article 2, including a price action. The court concluded that seller had no such rights of action. A price action was ruled out by the court on the ground that buyer already had paid the contract price.<sup>154</sup> Next the court held the additional financing charges to be unrecoverable as consequential damages on the ground that sellers are not entitled to consequential damages under the U.C.C. The court then found buyer liable for prejudgment interest at the legal rate under U.C.C. section 1-103 and applicable Pennsylvania law.<sup>155</sup> The Second Circuit Court of Appeals affirmed the judgment without opinion.<sup>156</sup>

In *MH & H Implement, Inc. v. Massey-Ferguson, Inc.*,<sup>157</sup> the parties were a farm implement manufacturer and a dealer who sold and serviced the manufacturer's products. The dealer encountered financial trouble and went out of business. The resulting termination of the dealership agreement between the parties triggered a statutory obligation of the manufacturer to repurchase the dealer's inventory of parts. The dealer returned its parts to the manufacturer and, anticipating the manufacturer's payment, borrowed money to wind up its affairs.<sup>158</sup> The parties disagreed on the amount owed by the manufacturer. The dealer sued the manufacturer for damages, including the additional interest on its borrowing that accrued as a result of manufacturer's alleged failure to make timely payment for the parts. The trial court resolved the payment dispute in dealer's favor and awarded damages including the additional interest. On appeal, the Idaho Court of Appeals reversed that part of the judgment awarding as damages the dealer's additional interest. The court concluded that the interest

154. *Id.* at 20–21, 39 U.C.C. Rep. Serv. (Callaghan) at 895–96. It is possible that the seller should have a price action entitling it to incidental damages even when the buyer pays the price late, for then the buyer has failed “to pay the price as it becomes due.” U.C.C. § 2-709(1) (1978). Otherwise, the situation may arise in which the seller who sues for his or her price is entitled to incidental damages, but the seller who accepts a late payment of the price before suit forgoes his or her right to incidental damages caused by the late payment.

155. *Id.* at 22–23, 39 U.C.C. Rep. Serv. (Callaghan) at 897–98. The court rejected under U.C.C. § 2-202 buyer's proffered evidence of a course of dealing not to charge interest on late payments as being inconsistent with specific payment terms set forth in the written contracts.

156. 742 F.2d 1431 (2d Cir. 1983).

157. 108 Idaho 879, 702 P.2d 917, 41 U.C.C. Rep. Serv. (Callaghan) 467 (1985).

158. The dealer secured its loan by assigning to the lender its right to payment for parts returned to the manufacturer. *Id.* at 882, 702 P.2d at 920, 41 U.C.C. Rep. Serv. (Callaghan) at 469.

expense was not an incidental damage under U.C.C. section 2-710.<sup>159</sup> It distinguished cases cited by the dealer permitting recovery of interest charges arising when sellers borrowed money to produce or purchase the goods sold. In those cases, said the court, there was a direct link between the buyer's breach and the seller's cost. It declared that no such link existed in the principal case because the dealer borrowed not to acquire the parts sold but to defray general expenses of winding up the business. The court also concluded that the additional interest was not recoverable as consequential damages because they were not shown to have been within the reasonable contemplation of the parties at the time they entered into the dealership agreement.<sup>160</sup>

In *Afram Export Corp. v. Metallurgiki Halyps, S.A.*,<sup>161</sup> the parties negotiated for the sale of a large quantity of shredded scrap iron at a fixed price. The market price declined and the sale was never consummated. The seller resold the scrap and sued for damages, including interest paid on money it had borrowed to finance the acquisition of junk cars that it shredded to produce the scrap iron in question. The federal district court found that the parties had entered into a valid contract that buyer had breached by refusing to take the scrap. It awarded seller resale damages under U.C.C. section 2-706(1) but declined to grant seller recovery for interest paid on the money it had borrowed to finance the acquisition of the scrap. It stated that the interest was not a consequential damage because the borrowing was not something contemplated by the parties or foreseen by buyer. The court characterized the interest as merely a cost of doing business, not an item of incidental damages.

Suppose that a buyer does not cover and its actual loss is much less than U.C.C. section 2-713 market damages. Are such a buyer's damages limited to its actual loss? A California Court of Appeals so limited the buyer's damages in *Allied Cannery & Packers, Inc. v. Victor Packing Co.*<sup>162</sup> There a packing company contracted to sell raisins to an exporter at a fixed price. The exporter had entered into two fixed-price resale contracts. Before delivery, the raisin crop was adversely affected by rains, thus causing an increase in market price. Packer was unable to obtain raisins from its supplier and breached its contract with the exporter. Exporter did not cover; however, it managed to have one of the resale contracts rescinded. The other resale buyer demanded delivery but never sued the exporter nor did the exporter voluntarily pay any damages to it. Thus exporter's actual loss was only \$4400, its lost profits on the two resale contracts. Exporter sued packer for approximately \$150,000, the market-con-

159. *Id.* The court found that the manufacturer's obligation to repurchase was a sale under U.C.C. § 2-106(1) (1978) so that article 2 applied even though the repurchase obligation was created by statute.

160. The court did not discuss the rule that sellers are not entitled to consequential damages under the U.C.C., e.g., *Associated Metals & Minerals Corp. v. Sharon Steel Corp.*, 590 F. Supp. 18, 399 U.C.C. Rep. Serv. (Callaghan) 892 (S.D.N.Y. 1983), *aff'd mem.*, 742 F.2d 1431 (2d Cir. 1983).

161. 592 F. Supp. 446, 40 U.C.C. Rep. Serv. (Callaghan) 911 (E.D. Wis. 1984).

162. 162 Cal. App. 3d 905, 209 Cal. Rptr. 60, 39 U.C.C. Rep. Serv. (Callaghan) 1567 (1984).

tract price differential under U.C.C. section 2-713. The court affirmed the trial court's judgment limiting the exporter's recovery to its actual loss.<sup>163</sup>

Can a buyer recover compensation for the goodwill of its customers lost as a result of the seller's breach? One case permitted recovery; one case denied it.<sup>164</sup>

Damages for buyer's lost customer goodwill were permitted by the Massachusetts Supreme Judicial Court in *Delano Growers' Cooperative Winery v. Supreme Wine Co.*<sup>165</sup> There a winery sold tainted wine to a bottler who resold it. Later the bottler received complaints from its customers. Eventually the bottler liquidated. The winery sued the bottler for the price of the wine and the bottler counterclaimed for breach of contract. After a bench trial, the court dismissed the winery's complaint and awarded damages on the bottler's counterclaim, including an amount for loss of goodwill. The case was affirmed on appeal. The Supreme Judicial Court stated that lost goodwill was a recoverable item of consequential damages under U.C.C. section 2-715 and concluded that the loss had been proved with sufficient specificity.

Damages for lost goodwill were denied by a bankruptcy court in *In re Lifeguard Industries, Inc.*<sup>166</sup> There a manufacturer sold defective aluminum siding to an installer. Later the manufacturer went bankrupt and a turnover complaint was filed against the installer for money owed the manufacturer. The installer counterclaimed for breach of warranty, seeking as an item of damage an amount for lost customer goodwill. The court concluded that the claim of lost goodwill had not been sufficiently proved and in any event was not a recoverable item even if proved.

*Reynolds Metals Co. v. Westinghouse Electric Corp.*<sup>167</sup> involved the measure of damages for the defective installation of a large electric transformer. The transformer was sold and delivered to buyer, who stored it for almost two years. Buyer then installed the transformer. Seller's engineer then inspected the transformer and supervised its start-up. Apparently at this time the engineer did not properly install a system for detecting internal problems in the transformer. Less than a year after installation the transformer failed. Buyer paid the seller \$109,000 to repair it. About two years later buyer sued seller based upon the failure of the transformer. Buyer's claims in negligence, strict liability, and breach of warranty as to the goods were all dismissed because the applicable statutes of limitation had expired. Buyer's claim of breach of warranty as to the services was also dismissed based on what the court found to be an effective warranty disclaimer. That left only buyer's breach of contract claim as to the services, which the trial court left to the jury. The jury found for the buyer on that claim and the court awarded as damages the buyer's cost of repair.

163. See generally Simon & Novack, *Limiting the Buyer's Market Damages to Lost Profits: A Challenge to the Enforceability of Market Contracts*, 92 Harv. L. Rev. 1395 (1979).

164. See 4 R. Anderson Uniform Commercial Code § 2-715:42 (3d ed. 1983).

165. 393 Mass. 666, 473 N.E.2d 1066, 40 U.C.C. Rep. Serv. (Callaghan) 93 (1985).

166. 42 Bankr. 734, 39 U.C.C. Rep. Serv. (Callaghan) 1268 (Bankr. S.D. Ohio 1983).

167. 758 F.2d 1073, 40 U.C.C. Rep. Serv. (Callaghan) 1702 (5th Cir. 1985).

On appeal, the Fifth Circuit Court of Appeals affirmed the liability theory but reversed on the measure of damages. In affirming the liability theory submitted to the jury, the court distinguished between an improper performance of service obligations and a complete failure to perform any service obligations. The former, the court said, was covered by the services warranty disclaimer; the latter was not.<sup>168</sup> On the measure of damages issue, the court concluded that cost of repair was not a proper measure of damage here. First, there was a causation problem. Buyer's own evidence showed that a portion of the transformer damage was caused by a design defect for which seller was no longer liable.<sup>169</sup> Second, even without the causation problem, the court found that the proper measure of damage was not cost of repair to restore the failed transformer to working condition but only what it would have cost to have had the services in question performed properly in the first place. The court concluded this first by applying U.C.C. section 2-714 by analogy (because the breach involved services not goods). It then found the cost of restoring the transformer to be an unrecoverable consequential damage because of a clause in the contract excluding liability for consequential damages, rather than the measure of damage under that subsection.

### STATUTES OF LIMITATIONS

The statute of limitations begins to run for most breach of warranty claims when tender of delivery is made; however, if the warranty "explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance," the statute of limitations begins to run only "when the breach is or should have been discovered."<sup>170</sup> The distinction between ordinary warranties and "future performance" warranties has produced much litigation. This year has been no different. A sampling of the more interesting cases follows.

In *Allis-Chalmers Credit Corp. v. Herbolt*,<sup>171</sup> an Ohio Appeals Court decided inter alia that the usual "repair or replace" limitation of remedy clause was not a future performance warranty.<sup>172</sup> The case involved a breach of warranty claim by a farmer against a combine manufacturer, apparently to recover for economic loss, not personal injuries or property damage.

168. Seller argued that the contract term mandating seller's inspection and start-up services had been included for the seller's benefit so that it was seller's "right," not an "obligation." The court commented favorably upon this argument. Ultimately the court did not entertain the argument, because it had not been raised at trial. *Id.* at 1078, 40 U.C.C. Rep. Serv. (Callaghan) at 1710-11.

169. *Id.* at 1077 n.6, 40 U.C.C. Rep. Serv. (Callaghan) at 1709 n.6.

170. U.C.C. § 2-725(2) (1978); *see also* U.C.C. § 2-725(1) (1978).

171. 17 Ohio App. 3d 230, 479 N.E.2d 293, 41 U.C.C. Rep. Serv. (Callaghan) 485 (1984).

172. The cases are not in agreement on this point. For a collection of some of the conflicting cases *see* 5 R. Anderson, Uniform Commercial Code § 2-725:95 (3d ed. 1983 and Supp. 1985).

In *Economy Housing Co. v. Continental Forest Products, Inc.*,<sup>173</sup> the Eighth Circuit Court of Appeals applied a Nebraska Supreme Court decision<sup>174</sup> that held that the description of goods as “siding” created a warranty that extended explicitly to future performance. In reversing summary judgment for the seller, the Eighth Circuit ruled that in light of the buyer’s description of the goods in its complaint, there was a genuine issue of material fact as to whether the limitations period had run.

The statute of limitations for warranty actions other than future performance warranty actions begins to run “when tender of delivery is made.”<sup>175</sup> When a consumer sues a remote seller such as a distributor the question arises whether the statute begins to run upon the distributor’s tender of delivery to its buyer or upon the tender of delivery to the consumer. In *Heller v. United States Suzuki Motor Corp.*,<sup>176</sup> the New York State Court of Appeals held that the statute begins upon the distributor’s tender of delivery to its buyer. In that case, the consumer sued in warranty<sup>177</sup> a distributor and the retailer three years and seven months after the consumer was injured in a motorcycle accident. The consumer had purchased the motorcycle from the retailer three years and ten months prior to the suit. The distributor had tendered delivery to its immediate purchaser four years and ten months before suit.<sup>178</sup> The distributor asserted the statute of limitations as a defense. It moved for summary judgment arguing that the relevant tender of delivery was its tender to its immediate purchaser, and Special Term denied the motion and dismissed the distributor’s statute of limitations defense. The Appellate Division reversed and dismissed the consumer’s claim against the distributor.

On appeal, the court of appeals affirmed<sup>179</sup> the order of the Appellate Division. The court held the relevant tender under U.C.C. section 2-725(2) to be the distributor’s tender to its immediate purchaser. Thus, the consumer’s claim against the distributor was time-barred.<sup>180</sup>

In *Dowling v. Southwestern Porcelain, Inc.*,<sup>181</sup> the Kansas Supreme Court held that the statute of limitations began to run only upon installation of a silo, not upon delivery of its component parts to the buyer.<sup>182</sup> There the buyer

173. 757 F.2d 200, 40 U.C.C. Rep. Serv. (Callaghan) 823 (8th Cir. 1985).

174. *Moore v. Puget Sound Plywood, Inc.*, 214 Neb. 14, 332 N.W.2d 212, 36 U.C.C. Rep. Serv. (Callaghan) 82 (1983).

175. U.C.C. § 2-725(2) (1978).

176. 64 N.Y.2d 407, 477 N.E.2d 434, 40 U.C.C. Rep. Serv. (Callaghan) 917 (1985).

177. The consumer’s tort claims were barred by the applicable statute of limitations. *Id.* at 409, 477 N.E. 2d at 435, 40 U.C.C. Rep. Serv. (Callaghan) at 917.

178. This distributor tendered delivery to another distributor who in turn sold the motorcycle to the retailer. *Id.* at 409–10, 477 N.E.2d at 435, 40 U.C.C. Rep. Serv. (Callaghan) at 918.

179. Two judges dissented.

180. For cases holding that the statute does not begin to run until tender of delivery to the consumer, see Judge Meyer’s dissent. 64 N.Y.2d at 417, 477 N.E.2d at 440, 40 U.C.C. Rep. Serv. (Callaghan) at 925.

181. 237 Kan. 536, 701 P.2d 954, 41 U.C.C. Rep. Serv. (Callaghan) 127 (1985).

182. The case law apparently is not in accord on this point. See the cases discussed in the principal case.

purchased a high-moisture grain silo from a dealer who was also to install it. The manufacturer shipped the silo directly to the buyer. Two months later the dealer completed installation. Subsequently the dealer went bankrupt and was dissolved. The silo leaked, so the manufacturer had another of its dealers attempt to repair the leaks, apparently unsuccessfully. Buyer sued the manufacturer on a variety of theories, including breach of warranty. Suit was filed within four years of the silo's installation but not within four years of its delivery. The trial court granted summary judgment for the manufacturer upon the grounds that the installing dealer was not an agent of the manufacturer and that the statute of limitations had expired.

On appeal, the Kansas Supreme Court reversed and remanded the case. It concluded that the buyer's warranty suit had been timely filed, because U.C.C. section 2-725(1) had begun to run only upon the installation of silo. The court gave essentially three reasons for its decision. First, the buyer had contracted for an installed silo. Second, the manufacturer had an interest in the quality and control of the installation.<sup>183</sup> Third, the buyer could not test the silo to determine whether it was acceptable until after installation.

Buyers often argue that unsuccessful repair attempts extend the time within which the buyers must sue.<sup>184</sup> Their arguments have been about as successful as their seller's repair attempts. Of five such cases, only one permitted the buyer to recover.

In *Ranker v. Skyline Corp.*,<sup>185</sup> the Pennsylvania Superior Court did not permit recovery. The buyer had purchased a travel trailer that leaked. Seller made several good faith attempts at repair over a two- to three-year period. Buyer filed suit against the manufacturer four years and one month after he had taken initial delivery of the trailer. The manufacturer demurred asserting the statute of limitations. The trial court accepted the demurrer and dismissed buyer's complaint. On appeal the superior court affirmed. First, the court stated that the manufacturer's standard repair warranty did not constitute a future performance warranty. Next, it held that even if the repair warranty had been a future performance warranty, dismissal was proper because the buyer had not sued until more than four years after he had discovered the defect. Finally, the court held that the manufacturer's unsuccessful attempts at repair did not estop it from asserting the statute of limitations. Two elements were necessary for estoppel, said the court: attempts at repair and a representation that the repairs would correct the defect. The buyer failed to aver that the manufacturer had

183. The manufacturer's interest in the quality and control of the installation was evidenced by several facts: the installing dealer was commencing business in territory in which a competitor was already entrenched. The dealership agreement had provided for the purchase by the dealer of expensive erection equipment from the manufacturer and for training of the dealer's erection and service people by the manufacturer. 237 Kan. at 543-44, 701 P.2d at 960, 41 U.C.C. Rep. Serv. (Callaghan) at 132.

184. See generally, Kanovitz, *The Seller Fiddles and the Clock Ticks: Seller's Cure and the U.C.C. Statute of Limitations*, 60 Notre Dame L. Rev. 318 (1985).

185. 342 Pa. Super. 510, 493 A.2d 706, 41 U.C.C. Rep. Serv. (Callaghan) 476 (1985).

made any such representation. Thus the complaint was defective and properly dismissed.

In *Laurita v. International Harvester*,<sup>186</sup> the only case to permit the buyer to avoid the statute of limitations, a Pennsylvania Common Pleas court found both elements of estoppel to be alleged. Thus the court denied the manufacturer's motion for judgment on the pleadings.

In *New England Power Co. v. Riley Stoker Corp.*,<sup>187</sup> the manufacturer designed, built, and installed two sophisticated boilers for buyer. The boilers did not function properly. Eventually after several years of repeated repair attempts, the manufacturer ceased to make attempts to repair. Two years after this, and at least five years after delivery of the last boiler, the buyer sued the manufacturer for inter alia breach of warranty. The manufacturer asserted the statute of limitations and moved for summary judgment. The trial court granted that motion. On appeal, the Massachusetts Appeals Court affirmed. It held, as had the *Ranker* court, that the manufacturer's repair warranty did not extend the time within which the buyer had to sue. On the estoppel issue, the court characterized the manufacturer's efforts to repair as nothing more than "honest, genuine repair efforts" and as such insufficient to work an estoppel.

In *Nelligan v. Tom Chaney Motors, Inc.*,<sup>188</sup> the consumer buyer of a defective automobile argued that the seller's conduct in attempting to repair was a warranty explicitly extending to future performance. Her warranty claims were dismissed as time-barred. On appeal, an Illinois appellate court affirmed. It stated that the repair conduct could, at best, give rise only to an implied, not an explicit warranty.

In *Peerless Pump v. Blythe-Vanguard Construction Corp.*,<sup>189</sup> the U.S. District Court for the Southern District of New York held a buyer's warranty counterclaim to be time-barred under New York law. The case involved the manufacture of effluent pumps to buyer's specifications. The court held the contract to be one for goods, not services, so that the U.C.C. four-year, not the general contract six-year, statute of limitations applied. It further held the contract to be for delivery only, not installation, so that buyer's claim accrued upon delivery. In passing, the court noted that attempts to repair did not, as a matter of law, toll the statute of limitations.

## BULK SALES

Article 6 of the U.C.C. has not produced much litigation in the period under review. The Texas Court of Civil Appeals in San Antonio was, however, faced with deciding Texas's stand on the issue of what constitutes the "concealment" that would toll the six-month statute of limitations in U.C.C. section 6-111 until

186. 32 Pa. D. & C. 3d 563, 41 U.C.C. Rep. Serv. (Callaghan) 133 (Pa. Court Common Pleas, Fayette Co. 1983).

187. 20 Mass. App. Ct. 25, 477 N.E.2d 1054, 40 U.C.C. Rep. Serv. (Callaghan) 1735 (1985).

188. 133 Ill. App. 3d 798, 479 N.E.2d 439, 41 U.C.C. Rep. Serv. (Callaghan) 480 (1985).

189. 40 U.C.C. Rep. Serv. (Callaghan) 494 (S.D.N.Y. 1985).



the discovery of the transfer.<sup>190</sup> One set of authorities has held that affirmative efforts to conceal the transfer must be shown.<sup>191</sup> The contrary rulings find concealment in a complete failure to comply with the notice provisions of article 6.<sup>192</sup> In the Texas case, the record showed three occasions within a month of the transfer on which the party claiming "concealment" had dealt with the transferee, and on one occasion its employee had been requested to change an invoice to reflect the transferee as the purchaser.<sup>193</sup> The court rejected "the notion that mere failure to give the written notice required by the Act [article 6] amounts to concealment as a matter of law." The court held "that concealment as contemplated by § 6-111 occurs when the record discloses affirmative efforts at concealing the transaction and when there has been complete and total failure to comply with the notice provisions of the statute."<sup>194</sup>

The timing here is close. Exact dates are not given in the opinion, the court merely stating that suit was filed when "almost seven months had elapsed from the date of the transfer."<sup>195</sup> Hence the court, in referring to posttransfer transactions, must have treated them as indicating no affirmative effort to conceal.

The committee to propose a redraft of article 6 to the National Conference of Commissioners on Uniform State Laws<sup>196</sup> has been meeting. While no decisions have been made, discussions indicate some desire on the part of some members to expand the coverage to include voluntary liquidations, and to impose some duties on auctioneers who conduct bulk sales. There is also discussion of exempting small transactions. Instead of limiting coverage to enterprises selling goods from stock, there is discussion of defining a bulk sale in terms of a sale of moveable assets of the transferor. Moveable assets would by definition include

190. *SVM Invs. v. Mexican Exporters, Inc.*, 685 S.W.2d 424, 40 U.C.C. Rep. Serv. (Callaghan) 1017 (Tex. Ct. App. 1985).

191. The court cited *Aluminum Shapes, Inc. v. K-A Liquidating Co.*, 290 F. Supp. 356, 5 U.C.C. Rep. Serv. (Callaghan) 1194 (W.D. Pa. 1968); *Chas. Adler & Son, Inc. v. DiNunzio*, 5 U.C.C. Rep. Serv. (Callaghan) 743 (Pa. Court Common Pleas 1967); *Areolineas Argentinas v. Hansen & Yorke Co., Inc.*, 12 U.C.C. Rep. Serv. (Callaghan) 329 (N.Y. City Civ. Ct. 1973) (dictum); *cf. Lang v. Graham (In re Borba)*, 736 F.2d 1317, 38 U.C.C. Rep. Serv. (Callaghan) 1714 (9th Cir. 1984); *Chartered Bank of London v. Diamant (In re Del Norte Depot, Inc.)*, 716 F.2d 557, 36 U.C.C. Rep. Serv. (Callaghan) 1415 (9th Cir. 1983). Also cited was 2 W. Hawkland, *A Transactional Guide to the Uniform Commercial Code* § 3.03 at 846 (1964).

192. Cited were *E. J. Trum, Inc. v. Blanchard Parfums, Inc.*, 33 A.D.2d 689, 306 N.Y.S.2d 316, 6 U.C.C. Rep. Serv. (Callaghan) 1261 (1969); *see also McKissick v. Foremost-McKesson, Inc.*, 441 F.2d 811, 8 U.C.C. Rep. Serv. (Callaghan) 301 (5th Cir. 1971) (dictum); *Columbian Rope Co. v. Rinek Cordage Co.*, 314 Pa. Super. 585, 461 A.2d 312, 36 U.C.C. Rep. Serv. (Callaghan) 922 (1983). As supporting this result, the court referred to 3A R. Dusenbery & L. King, *Sales and Bulk Transfers Under the Uniform Commercial Code* § 15.07 (1984); J. White & R. Summers, *Uniform Commercial Code* § 19-3 (2d ed. 1980).

193. *SVM Investments v. Mexican Importers*, 685 S.W.2d at 429, 40 U.C.C. Rep. Serv. (Callaghan) at 1021.

194. *Id.* at 428, 40 U.C.C. Rep. Serv. (Callaghan) at 1021.

195. *Id.*, 40 U.C.C. Rep. Serv. (Callaghan) at 1019.

196. Following its usual procedure, the National Conference has appointed Chancellor William Hawkland as reporter, a committee of commissioners, and a group of advisers.

such things as customer lists, accounts, and the like. Thus, if these views prevail, all sales of any business would be included, unless coming within one of several exemptions.<sup>197</sup>

## DOCUMENTS OF TITLE

The cases under article 7, only occasionally discussed in this survey, did cover five areas worth mentioning briefly.

Two cases discussed whether, in interstate shipments, the U.C.C. supplied a source for federal law.<sup>198</sup> Judge Haight in the Southern District of New York held that the Carmack Amendment<sup>199</sup> to the I.C.A. Act applied to freight forwarders and required dismissal of claims against a carrier for negligent actions. All such must be in contract and hence subject to tariff limitations unless the shipper can identify a general duty not dependent on the contract, and a breach thereof. The Eighth Circuit<sup>200</sup> held that the recent deregulation of air carriers did not make the U.C.C. a source of federal law for interstate shipments in which well-developed pre-U.C.C. federal law provided a rule for decision. Hence an exclusion of liability in a shipper's contract with Federal Express did not enure to the benefit of Great Western Air Lines, an agent carrier. For this to happen pre-U.C.C. federal law required that the agent carrier be expressly made a beneficiary of that contract or be a party to it.<sup>201</sup>

Shortened contractual times for filing claims and instituting legal action were involved in three cases. Unlike the rule in New York that an action for conversion is not subject to contractual time bars,<sup>202</sup> the cases in the Fourth Circuit applying Maryland law,<sup>203</sup> Seventh Circuit under Illinois law,<sup>204</sup> and in the New Jersey Court of Appeals<sup>205</sup> held that, although conversion was ex-

197. In addition to the exemption of small transactions under consideration, attention is being given to transactions in which a solvent buyer assumes all debts of which the buyer has notice. Various measures are being discussed to protect those whose debts are not assumed by the buyer.

198. *Arkwright-Boston Mfrs. Mutual Ins. Co. v. Great W. Airlines, Inc.*, 767 F.2d 425, 41 U.C.C. Rep. Serv. (Callaghan) 962 (8th Cir. 1985) and *Starmakers Publishing Corp. v. Acme Fast Freight, Inc.*, 615 F. Supp. 787, 41 U.C.C. Rep. Serv. (Callaghan) 967 (S.D.N.Y. 1985).

199. 49 U.S.C. § 11707, amending the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982).

200. *Arkwright*, 767 F.2d at 425, 41 U.C.C. Rep. Serv. (Callaghan) at 962.

201. *Id.* at 427, 41 U.C.C. Rep. Serv. at 965, citing *Robert C. Herd & Co. v. Krawill Mach. Co.*, 359 U.S. 297, 303, 305 (1959).

202. *I.C.C. Metals Inc. v. Municipal Warehouse Co.*, 50 N.Y.2d 657, 409 N.E.2d 849, 431 N.Y.S.2d 372, 29 U.C.C. Rep. Serv. (Callaghan) 217 (1980).

203. *Phillips Bros. v. Locust Indus., Inc.*, 760 F.2d 523, 40 U.C.C. Rep. Serv. (Callaghan) 606 (4th Cir. 1985).

204. *Refrigerator Sales Co., Inc. v. Mitchell-Jackson, Inc.*, 770 F.2d 98, 41 U.C.C. Rep. Serv. (Callaghan) 955 (7th Cir. 1985).

205. *Amenip Corp. v. Ultimate Distrib. Sys., Inc.*, 200 N.J. Super. 100, 490 A.2d 371, 40 U.C.C. Rep. Serv. (Callaghan) 1367 (1985). Applying New Jersey law, the Second Circuit, in *Natural Resources Trading, Inc. v. Trans Freight Lines*, 766 F.2d 65, 41 U.C.C. Rep. Serv. (Callaghan) 948 (2d Cir. 1985), ruled that New Jersey law created a presumption of conversion, but U.C.C. § 7-204(3) (1978) was not involved.

cluded from damage limitation under U.C.C. section 7-204(2),<sup>206</sup> no such exclusion was specified in U.C.C. section 7-204(3) on shortening the time for suit. The holdings were that actions for damage or nondelivery were necessarily based on the bailment.<sup>207</sup>

While U.C.C. section 7-204(2) permits limitation of liability for negligence unless a higher fee is paid for greater declared value, in *Allstate Insurance Co. v. Winnebago County Fair Ass'n, Inc.*<sup>208</sup> the court first held a county fair to be a warehouse as to equipment stored. In the holding, combining U.C.C. section 1-102(3) with U.C.C. section 7-204(2), the ruling was that liability for negligence could not be totally disclaimed as the court below had ruled. Since there was no stated monetary limit, would full negligence damages be recoverable on demand? For monetary limits, will courts develop some theory requiring a "fair quantum" of damages?<sup>209</sup>

When there is an unexplained disappearance from the warehouse, and hence a failure to deliver, Judge Posner, in *Refrigeration Sales Co. v. Mitchell-Jackson, Inc.*,<sup>210</sup> noted a difference in the resulting presumption. Some courts, led by New York, presume conversion<sup>211</sup> and thus eliminate limitations of liability due to the more culpable nature of that tort. Others, presuming negligence,<sup>212</sup> then permit limitation of liability.

It is not clear whether the distinction has any effect on the evidence necessary to overcome the presumption. Judge Posner's Seventh Circuit panel apparently opted for negligence but stated that even if the presumption were conversion, the warehouseman's evidence was enough to rebut the presumption. Since the lower court granted summary judgment because the action was time-barred by the clause just discussed, it is difficult to see why the rebutting of the presumption

206. U.C.C. § 7-204(2) (1978) excludes from the clause permitting warehouseman to limit damages only when a warehouse converts to its own use. In the examples of conversion in Judge Posner's opinion in *Refrigerator Sales Co., Inc.*, 770 F.2d at 98, 41 U.C.C. Rep. Serv. at 955, the learned judge, although he does not say so, appears to emphasize the "to his own use." Hence he would only presume negligence in the event of an unexplained failure to deliver.

207. The limiting words in U.C.C. § 7-204(3) (1978) on shortening the time for bringing actions require that the actions be "based on the bailment." In *I.C.C. Metals, Inc.*, 50 N.Y.2d at 657, 409 N.E.2d at 849, 431 N.Y.S.2d at 372, 29 U.C.C. Rep. Serv. (Callaghan) at 217, the New York court felt that a conversion to one's own use destroyed the bailment and the action was based on the tort.

208. 131 Ill. App. 3d 225, 475 N.E.2d 230, 40 U.C.C. Rep. Serv. (Callaghan) 1361 (1985).

209. See U.C.C. § 2-719, Comment 1 (1978).

210. See 50 N.Y.2d at 657, 409 N.E.2d at 849, 431 N.Y.S.2d at 372, 29 U.C.C. Rep. Serv. (Callaghan) at 217.

211. Citing *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*, *id.* *Joseph H. Reinfeld, Inc. v. Griswold & Bateman Warehouse, Inc.*, 189 N.J. Super. 141, 458 A.2d 1341, 36 U.C.C. Rep. Serv. (Callaghan) 262 (1983) and *National Resources Trading, Inc. v. Trans Freight Lines*, 766 F.2d at 65, 41 U.C.C. Rep. Serv. (Callaghan) at 948.

212. *Lerner v. Brettschneider*, 123 Ariz. 152, 598 P.2d 515 (Ct. App. 1979); *Sanfisket, Inc. v. Atlantic Cold Storage Corp.*, 347 So. 2d 647, 21 U.C.C. Rep. Serv. (Callaghan) 1155 (Fla. App. 1977); *Adams v. Ryan & Christie Storage, Inc.*, 563 F. Supp. 409, 36 U.C.C. Rep. Serv. (Callaghan) 930 (E.D. Pa. 1982) *aff'd mem.*, 725 F.2d 666 (3d Cir. 1983). See also *Frissell v. John W. Rogers, Inc.*, 141 Conn. 308, 106 A.2d 162 (1954).

was discussed. As summarized by Judge Posner as “barely enough in the case of the missing goods,” that evidence was “an explanation, not implausible in the circumstances—a large warehouse, a reputable owner, some goods returned damaged, a long course of dealing between the parties.”<sup>213</sup>

Elsewhere it appears that the employee in charge stated that “he thought . . . [that the missing containers] had been returned . . . as empties” to the depositor.<sup>214</sup>

Far more stringent is the Connecticut rule for rebutting the presumption of negligence as applied by New York’s Appellate Division, First Department,<sup>215</sup> holding that Connecticut law required the warehouseman to prove something more than circumstances indicating the immediate cause of the damage. “The proof must go so far as to establish what, if any, human conduct materially contributed to that immediate cause.”<sup>216</sup> Thus plaintiff, the assignee of the depositor, won a summary judgment on liability.

Each of the last two cases has one other facet. The Seventh Circuit panel ruled that the time-bar clause in the warehouse receipt also protected the warehouseman’s employee in charge from individual liability.<sup>217</sup>

In the New York case, the matter was remanded so “that plaintiff should be given an opportunity to present additional facts, if there should be any, that would raise a factual issue as to whether there was a legally binding contractual agreement limiting liability.”<sup>218</sup> This despite a signed warehouse receipt for art objects containing a clause limiting liability to thirty cents per pound.

The Innocent Agent rule of U.C.C. section 7-404, in *United States v. New Holland Sales Stable, Inc.*,<sup>219</sup> even if applicable, would not have protected commission merchants from liability to FmHA, a secured party, as they had not observed reasonable commercial standards in that they “never conducted a lien search or even contacted the County Supervisor Freeman to determine the status of the cattle sold despite the fact that the Nolls’ [the actual sellers] name was on a list circulated by the FmHA”.<sup>220</sup> “Commercial standards” apparently equal

213. 770 F.2d at 102, 41 U.C.C. Rep. Serv. (Callaghan) at 960.

214. *Id.* at 100, 41 U.C.C. Rep. Serv. (Callaghan) at 956.

215. *Hacohen v. Bolliger, Ltd.*, 108 A.D.2d 357, 489 N.Y.S.2d 75, 41 U.C.C. Rep. Serv. (Callaghan) 1404 (1st Dept. 1985).

216. *Id.* 108 A.D.2d at 361, 489 N.Y.S.2d at 78, 41 U.C.C. Rep. Serv. (Callaghan) at 1406, citing *Griffin v. Nationwide Moving & Storage Co.*, 187 Conn. 405, 446 A.2d 799, 802, 34 U.C.C. Rep. Serv. (Callaghan) 970 (1982).

217. *See Refrigeration Sales Co., Inc.*, 770 F.2d at 103, 41 U.C.C. Rep. Serv. (Callaghan) at 961. The rationale was,

The bailee would indemnify its employee for any judgment paid in such a suit, or if not would have to pay the employee a higher wage to compensate him for bearing the risk of such a suit and either way the burden of the suit would come to rest on the bailee despite the limitation clause.

The reasoning is that of “law and economics” and not very realistic.

218. 108 A.D.2d at 362, 489 N.Y. Supp. 2d at 79, 41 U.C.C. Rep. Serv. (Callaghan) at 1407.

219. 603 F. Supp. 1379, 40 U.C.C. Rep. Serv. (Callaghan) 715 (E.D. Pa. 1985).

220. *Id.* at 1387, 40 U.C.C. Rep. Serv. (Callaghan) at 725.

the conduct expected of a lawyer giving an opinion. Is U.C.C. section 7-404 to have the fate of U.C.C. section 3-419(3)?

The New York Truth in Storage Act,<sup>221</sup> awarding successful plaintiffs treble damages and recovery of attorneys' fees, applies only to unlawful detention and not to loss by negligence, according to the New York City court.<sup>222</sup>

221. N.Y. Gen. Bus. Law § 605-610 (McKinney 1984).

222. *Copeland v. Schwartz Moving & Storage Corp.*, 483 N.Y.S.2d 945, 40 U.C.C. Rep. Serv. (Callaghan) 605 (1985).

*Editor's note:* Don L. Baker, of Austin, Texas, and Fairfax Leary, Jr. are cochairmen of the Subcommittee on General Provisions, Sales, Bulk Transfers and Documents of Title. Members of the Subcommittee are Anthony Adams, William K. Bachelder, Marvin E. Barkin, John P. Bermingham, Bernard D. Broeker, Donald E. Cassling, George M. Cheever, Kendall B. Coffey, Calvin Corman, David C. Corujo, James J. Cunningham, Lanny J. Davis, Richard W. Duesenberg, Robert W. Foster, Roy N. Freed, Henry C. Friend, David Frisch, Joseph J. Gazzoli, Eugene M. Harrington, Steven L. Harris, Malcolm D. Hawk, William D. Hawkland, Keith J. Hey, John O. Honnold, Jeffrey A. Horwitz, Lawrence B. Hunt, Kathleen A. Hurren, Daniel E. Johnson, Alvin G. Kalmanson, Dennis S. Kayes, Robert A. Lester, Ann Lousin, Susan M. Mann, John D. Meader, D. Kent Meyers, John E. Murray, Leo J. Pircher, Harris P. Quinn, Peter C. Quittmeyer, Jeffrey L. Raney, Herbert Rubin, Frederick W. Runge, Jr., Alan R. Sachs, Linda D. Sartin, Gerald Solk, Alphonse M. Squillante, Michael D. Strohbehn, John L. Utz, Victor A. Vilaplana, William R. Waddell, William J. Wellman, Robert T. Williams, John D. Wladis.