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# Uniform Commercial Code Survey, Sales

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# Sales

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This Survey reviews significant case decisions involving Article 2 (Sales of Goods) of the Uniform Commercial Code (U.C.C.). Revisions to Article 2 were proposed, but rejected, by the National Conference of Commissioners of Uniform State Laws (NCCUSL) during 2002.[1]

## SCOPE

During the survey period, courts were called upon to determine whether the U.C.C. applied to various transactions. In *Kane v. Federal Express Corp.*,[2] the Superior Court of Connecticut was faced with a question of who would bear the loss of a set of transparencies, valued at $67,000, that were shipped via Federal Express. The defendant had asked the plaintiff, the owner of the transparencies, to send the transparencies so that the defendant could decide whether to obtain a license from the plaintiff to use the transparencies in the defendant's greeting card collection. Arguing that the U.C.C. should apply either directly or by analogy, the plaintiff asserted that the U.C.C. risk of loss rule shifted liability to the defendant.[3] The court flatly rejected the argument that the U.C.C. applied directly. Noting that the risk of loss rules of section 2-509(1), through the references to "contract," "buyer," and "seller,"[4] apply only to sales, the court went on to observe that there was no sale of goods in the transaction at issue.[5] The court then declined to apply the U.C.C. by analogy, stating that it could find no

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1. For a discussion of the actions of NCCUSL, see the Introduction to this Survey. Stephen L. Sepinuck, Robyn L. Meadows & Russell A. Hakes, *The Uniform Commercial Code Survey: Introduction*, 57 BUS. LAW. 1667 (2002).

2. Kane v. Fed. Express Corp., No. CV990078971S, 2001 WL 1178350, 45 U.C.C. Rep. Serv. 2d (West) 729 (Conn. Super. Ct. Aug. 28, 2001).

3. *Id.* at *2, 45 U.C.C. Rep. Serv. 2d (West) at 731 (citing CONN. GEN. STAT. ANN. § 42A-2-509(1) (West 1990 & Supp. 2002)).

4. *See* U.C.C. §§ 2-103(a), (d), 2-106(1) (2002).

5. *Kane*, 2001 WL 1178350, at *2, 45 U.C.C. Rep. Serv. 2d (West) at 731; *see* U.C.C. § 2-106(1) (defining sale as "the passing of title from the seller to the buyer for a price").

precedent for applying U.C.C. principles to transactions that did not involve goods. The court reasoned that although the transparencies were goods within the definition of the U.C.C., the "essence of" the contract in question concerned the use of the images on the transparencies, i.e., intangibles, rather than the tangible transparencies themselves.[6]

Courts decided three cases involving the potential application of the U.C.C. to a distributorship. In each, the court looked at the predominant purpose of the contract to determine the applicability of the U.C.C. In *Watkins & Son Pet Supplies v. Iams Co.*,[7] the plaintiff alleged that Iams orally promised that it would make plaintiff the exclusive distributor of its products in a Michigan territory if plaintiff agreed in writing to sell only Iams products. The plaintiff so agreed, but Iams later made one of plaintiff's competitors its exclusive distributor in the territory in question.

Because the U.C.C.'s parol evidence rule and rule governing oral modification and rescission differ from the jurisdiction's common-law rules, the U.S. Court of Appeals for the Sixth Circuit had to determine whether the U.C.C. was applicable to determine the appropriateness of the district court's grant of summary judgment.[8] Noting the parties did not dispute the point and that under the majority rule distributorship contracts are treated as sale of goods contracts, the court held that the contract in question was predominantly for the sale of goods and the U.C.C. should apply.[9] In so doing, the court acknowledged the possibility that the service component could predominate over the goods component in some distributorship contracts and thus, those contracts would not be governed by the U.C.C.[10]

In *SMR Technologies Inc. v. Aircraft Parts International Combs, Inc.*,[11] a manufacturer of aircraft de-icing products, SMR, sued its parts distributor, Aircraft Parts International Combs (API), for nonpayment of parts it had delivered under the distributorship contract. API counterclaimed for breach of the contract, alleging SMR failed to provide services necessary for the resale of the parts. Viewing this as a contract involving the sale of both goods and services, the court considered whether to apply the U.C.C. The court noted that the majority of jurisdictions have adopted the "predominant purpose test," while a minority takes the position that the U.C.C. applies only to the portions of a hybrid contract that involve the sale of goods.[12]

6. *Kane*, 2001 WL 1178350, at *3, 45 U.C.C. Rep. Serv. 2d (West) at 732. On a separate issue of whether the parties had agreed that Article 2 of the U.C.C. should apply to the contract, the court concluded that summary judgment was inappropriate and denied both motions for summary judgment. *Id.* at *5, 45 U.C.C. Rep. Serv. 2d (West) at 735.

7. 254 F.3d 607, 44 U.C.C. Rep. Serv. 2d (West) 708 (6th Cir. 2001).

8. Watkins & Son Pet Supplies v. Iams Co., 107 F. Supp. 2d 883 (S.D. Ohio 1999).

9. *Watkins & Son Pet Supplies*, 254 F.3d at 612, 44 U.C.C. Rep. Serv. 2d (West) at 712 (citing Sally Beauty Co. v. Nexxus Prods. Co., 801 F.2d 1001, 1005-06, 2 U.C.C. Rep. Serv. 2d (Callaghan) 82 (7th Cir. 1986); Paulson, Inc. v. Bromar, Inc., 775 F. Supp. 1329, 1333, 17 U.C.C. Rep. Serv. 2d (CBC) 690 (D. Haw. 1991)).

10. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 712.

11. 141 F. Supp. 2d 923, 44 U.C.C. Rep. Serv. 2d (West) 738 (W.D. Tenn. 2001).

12. *Id.* at 930, 44 U.C.C. Rep. Serv. 2d (West) at 743 (citing Bonebrake v. Cox, 499 F.2d 951, 960

The court began its analysis by seeming to apply the predominant purpose test, stating that the sale of aircraft parts was the "predominant purpose" of the agreement in question and holding that the U.C.C. therefore governed the agreement, "but not exclusively."[13] The court then reasoned that because the U.C.C. falls silent regarding the duty to render services, the court could not decide the case without reference to non-U.C.C. law on those parts of the case. Thus, although the court appeared to espouse the majority view, its reasoning more closely resembled the minority position; it applied the U.C.C. to the sale of goods portion of the distributorship agreement and to other matters expressly covered by Article 2, such as the parol evidence rule of section 2-202.[14] It then applied the common law to the sale of services portion.[15]

In *Continental Casing Corp. v. Siderca Corp.*,[16] the Court of Appeals of Texas decided whether the U.C.C applied to a distributorship agreement for pipe and mechanical tubing. Because Continental produced no writing signed by Siderca, if the U.C.C. statute of frauds applied, the agreement would be unenforceable against Siderca. The court noted that under Texas law, the U.C.C. applies to contracts having a mix of goods and services if the predominant purpose or "essence" of the contract is the sale of goods.[17] Observing that "the overwhelming majority of jurisdictions that have considered the question have concluded that distributorship agreements are subject to the UCC," the court found that the predominant aspect of the contract was the sale of goods and held that the U.C.C. governed the contract.[18]

In two cases not involving a distributorship, courts were called on to decide the applicability of U.C.C. Article 2 to hybrid transactions involving sales of goods and services. Both courts applied the predominant purpose test to determine the result. In *Villette v. Sheldorado Aluminum Products, Inc.*,[19] the court considered whether the U.C.C. applied to the sale and installation of an aluminum awning used as a carport, which had collapsed on the plaintiff's new Mercedes. The court began by noting that in a hybrid sale of goods/provision of services transaction,

(8th Cir. 1974) (majority view); Glover Sch. & Office Equip. Co. v. Dave Hall, Inc., 372 A.2d 221, 223 (Del. Super. 1977) (majority view); Novamedix, Ltd. v. NDM Acquisition Corp., 166 F.3d 1177, 1182 (Fed. Cir. 1999) (majority view); 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-1, at 4 (4th ed. 1995) (discussing minority view)).

13. *Id.* at 931, 44 U.C.C. Rep. Serv. 2d (West) at 743.

14. *Id.* at 931, 933-35, 44 U.C.C. Rep. Serv. 2d (West) at 743, 747-49.

15. *Id.* at 931, 44 U.C.C. Rep. Serv. 2d (West) at 743-44. The case was decided under Delaware law, and the court distinguished *Wang Labs., Inc. v. Lee*, an earlier Delaware Superior Court case. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 743-44 (citing Wang Labs., Inc. v. Lee, 1989 WL 40916, 44 U.C.C. Rep. Serv. 2d (West) 470 (Del. Super. Ct. Apr. 19, 1989)). In *Wang*, the issue was determining the appropriate statute of limitations to apply to a distributorship contract. The *SMR* court stated that, unlike the situation in *Wang*, there were issues in the instant case on which the U.C.C. was silent. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 743-44.

16. 38 S.W.3d 782, 43 U.C.C. Rep. Serv. 2d (West) 800 (Tex. App. 2001).

17. *Id.* at 787, 43 U.C.C. Rep. Serv. 2d (West) at 803 (citing WesTech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 197 (Tex. App. 1992)).

18. *Id.* at 788, 43 U.C.C. Rep. Serv. 2d (West) at 804-05.

19. Index No. 521/01, 2001 N.Y. Misc. LEXIS 509, 45 U.C.C. Rep. Serv. 2d (West) 470 (N.Y. Civ. Ct. 2001).

the critical inquiry is which component predominates.[20] Since there was no written "contract," the court looked to the "order/bill" to determine "how the parties saw their transaction."[21] Observing that the invoice purported to be for the sale of a carport with installation services "included," the court held that the sale of goods was the predominant component of the contract.[22] Therefore, the court held the U.C.C. applicable to the agreement.[23] This allowed the plaintiff to recover on an implied warranty claim under section 2-314.

In *Lucid, Inc. v. DiSanto Technology*,[24] the Superior Court of Connecticut similarly applied the predominant purpose test, but reached the opposite result. The contract in question called for Lucid to machine posts and bases and to assemble parts *from materials and blueprints provided by DiSanto*. Because DiSanto asserted several claims based on the U.C.C., the court was called to decide the applicability of the U.C.C. After noting that Connecticut looked to the predominant purpose of the contract to determine the issue, the court reasoned that the arrangement was not a sale of goods by Lucid, but a contract for the rendition of services.[25] After all, ownership of the materials never changed. The court therefore ruled that the U.C.C. was inapplicable.[26]

In a case involving personal injuries resulting from a car accident when the car had not been sold, a court had to determine the applicability of the U.C.C.'s warranty provisions. In *Evans v. Chrysler Financial Corp.*,[27] a dealer was injured while shopping for cars at the defendant automobile auctioneer's lot. The dealer had paid a fee for the privilege of shopping for cars on the lot, and was injured when he started one of the cars and it lurched forward, striking another vehicle. The dealer sued based in part on a breach of the implied warranty of merchantability.

The Superior Court of Massachusetts granted the defendant's motion for summary judgment, holding that no implied warranty of merchantability existed.[28] The court reasoned that a warranty of merchantability is implied in contracts for the sale of goods where the seller is a merchant in goods of that kind.[29] In the instant case, there was neither a sale of goods, which the court noted was a

20. *Id.* at *2-*3, 45 U.C.C. Rep. Serv. 2d (West) at 471-72 (citing Milau Assocs. v. N. Ave. Dev. Corp., 42 N.Y.2d 482, 486, 22 U.C.C. Rep. Serv. (Callaghan) 561 (N.Y. 1977)).

21. *Id.* at *6, 45 U.C.C. Rep. Serv. 2d (West) at 473.

22. *Id.* at *7, 45 U.C.C. Rep. Serv. 2d (West) at 473.

23. *Id.* at *7-*8, 45 U.C.C. Rep. Serv. 2d (West) at 473. The court's reference to how the parties viewed their transaction is interesting. It suggests that the court applied the predominant purpose test in a somewhat subjective manner, rather than an objective manner. If so, that would be strange, for it implies that parties have the freedom to opt in or out of Article 2 at will. Nothing in the Code or the case law supports such a proposition.

24. CV980060934S, 2000 Conn. Super. LEXIS 3119, 43 U.C.C. Rep. Serv. 2d (West) 1083 (Conn. Super. Ct. 2000).

25. *Id.* at *9, 43 U.C.C. Rep. Serv. 2d (West) at 1086.

26. *Id.*, 43 U.C.C. Rep. Serv. 2d (West) at 1086.

27. No. 99-01574J, 2001 Mass. Super LEXIS 3119, 44 U.C.C. Rep. Serv. 2d (West) 1003 (Mass. Super. Ct. 2001).

28. *Id.* at *6, 44 U.C.C. Rep. Serv. 2d (West) at 1006.

29. *Id.* at *3-*4, 44 U.C.C. Rep. Serv. 2d (West) at 1005 (citing MASS. GEN. LAWS ANN. ch 106, § 2-314 (West 1999 & Supp. 2002)).

"passing of title from the seller to the buyer for a price," nor was there a contract to sell goods in the future.[30] The court held that the payment of a fee to enter the lot and shop could not be construed as a contract to buy goods in the future, because the dealer was under no obligation to buy a car and because no possessory interest was transferred to the dealer.[31]

## TERMS OF THE CONTRACT

Three courts addressed the issue of whether an arbitration provision in one party's form materially alters a contract for purposes of U.C.C. section 2-207(2).[32] In *J.J.'s Mae, Inc. v. H. Warshow & Sons, Inc.*,[33] the New York appellate court held that an arbitration clause in a seller's invoice materially alters the parties' agreement, and thus did not become a term of the contract under section 2-207(2).[34] It ruled that inclusion of an arbitration provision without the express awareness of the buyer would cause surprise and hardship, thus constituting a material alteration.[35] The court relied on an earlier New York Court of Appeals case which had held that an arbitration clause materially alters an agreement and does not become a term of the contract unless both parties explicitly agree to arbitration.[36] In that earlier case, the Court of Appeals had noted that in New York, the long-standing rule was that parties will not be compelled to arbitrate disputes without "an express, unequivocal agreement" to arbitrate.[37]

Despite these New York cases, in *Aceros Prefabricados v. Tradearbed, Inc.*,[38] the U.S. Court of Appeals for the Second Circuit, applying New York law, concluded that an arbitration provision was not a material alteration, thus was a term included in the parties' contract.[39] The defendant, Tradearbed, agreed to sell steel to the plaintiff, Aceros, accepting the buyer's orders using three confirmation forms, all of which incorporated by reference a provision requiring arbitration of

30. *Id.* at *4, 44 U.C.C. Rep. Serv. 2d (West) at 1005 (citing MASS. GEN. LAWS ANN. ch 106, § 2-106(1) (West 1999 & Supp. 2002)).

31. *Id.* at *6-*7, 44 U.C.C. Rep. Serv. 2d (West) at 1006. The court also noted that a lease also gives rise to an implied warranty of merchantability, however, the court held that there was no lease in the instant case, again because there was no transfer of a possessory interest to the dealer. *Id.* at *5-*6, 44 U.C.C. Rep. Serv. 2d (West) at 1005-06 (citing Back v. Wickes Corp., 378 N.E.2d 964, 970, 24 U.C.C. Rep. Serv. (Callaghan) 1164 (Mass. 1978); Marques v. Bellofram Corp., 550 N.E.2d 145, 148, 11 U.C.C. Rep. Serv. 2d (West) 38 (1990); Nickerson v. Nautilus Plus II, Inc., No. 921697, 1993 WL 818703 (Mass. Super. Nov. 24, 1993); Bonaccoloto v. Coca-Cola Enters., Inc., No. 97-11710, 1999 WL 528816 (D. Mass. Feb. 11, 1999)).

32. U.C.C. section 2-207 provides that additional terms in an acceptance become part of the contract, if both parties are merchants, unless the offer was limited to its terms, the term materially alters the contract, or the offeror objects to the terms. U.C.C. § 2-207(2) (2002).

33. 717 N.Y.S.2d 37, 43 U.C.C. Rep. Serv. 2d (West) 1107 (N.Y. App. Div. 2000).

34. *Id.* at 38, 43 U.C.C. Rep. Serv. 2d (West) at 1107.

35. *Id.*, 43 U.C.C. Rep. Serv. 2d (West) at 1108.

36. *Id.*, 43 U.C.C. Rep. Serv. 2d (West) at 1107 (citing Marlene Indus. Corp. v. Carnac Textiles, 308 N.E.2d 239, 24 U.C.C. Rep. Serv. (Callaghan) 257 (N.Y. 1978)).

37. Marlene Indus. Corp. v. Carnac Textiles, 380 N.E.2d 239, 242, 24 U.C.C. Rep. Serv. (Callaghan) 257, 261 (N.Y. 1978).

38. 282 F.3d 92, 46 U.C.C. Rep. Serv. 2d (West) at 596 (2d Cir. 2002).

39. *Id.* at 102, 46 U.C.C. Rep. Serv. 2d (West) at 608-09.

disputes. When the district court denied Tradearbed's motion to stay pending arbitration, Tradearbed appealed. The Court of Appeals first rejected the district court's holding that, under New York law, arbitration provisions materially alter a contract as a matter of law.[40] The court noted that while arbitration provisions require a higher level of proof under New York law, such disparate treatment of arbitration provisions compared to other contractual provisions was not permitted under the Federal Arbitration Act.[41] Therefore, the issue could not be decided as a matter of law, but had to be considered on a case-by-case basis. The court then turned to whether the arbitration provision in this instance materially altered the contract.[42]

The court concluded that the provision did not materially alter the contract.[43] Because the U.C.C. presumes additional terms in forms become part of the contract between merchants unless an exception is met, the court began its analysis by noting that the party opposing inclusion, the buyer in this case, had the burden of proving that the proposed term materially altered the parties' agreement.[44] The court next considered the standards for determining material alteration found in the Official Comments to section 2-207, whether inclusion of the term would cause surprise or hardship to the other party.[45] "Surprise includes both a subjective element of what a party actually knew and an objective element of what a party should have known [based on the circumstances]."[46] To meet its burden, the court found that the buyer would have to show that it cannot be presumed that a reasonable merchant would have agreed to the provision.[47] The court held that the buyer did not meet its burden because it failed to offer any evidence on the issue, other than an affidavit of its general manager that simply stated that the term caused surprise and hardship.[48] Additionally, the court noted that the seller had submitted evidence that arbitration provisions such as the ones provided by its confirmation forms were commonplace in the steel industry. The court determined that even under New York law, arbitration provisions which are consistent with the custom and practice of the relevant industry do not cause surprise or hardship.[49] The court explained that it is difficult for a merchant in an industry to complain of surprise or hardship caused by a provision that is standard in that industry.[50] Because the buyer did not meet its burden to establish surprise or

40. *Id.* at 99-100, 46 U.C.C. Rep. Serv. 2d (West) at 605.

41. *Id.* at 100, 46 U.C.C. Rep. Serv. 2d (West) at 605 (relying on Perry v. Thomas, 482 U.S. 483 (1987)).

42. The buyer had expressly accepted one of the seller's confirmation forms by writing "acceptado" and signing the form. The forms in the other transactions were not expressly accepted and therefore, the court had to decide the material alteration issue. *Id.* at 98-99, 46 U.C.C. Rep. Serv. 2d (West) at 603-05.

43. *Id.* at 102, 46 U.C.C. Rep. Serv. 2d (West) at 608-09.

44. *Id.* at 100, 46 U.C.C. Rep. Serv. 2d (West) at 606.

45. *Id.*, 46 U.C.C. Rep. Serv. 2d (West) at 606; *see* U.C.C. § 2-207 cmt. 4 (2002).

46. *Id.*, 46 U.C.C. Rep. Serv. 2d (West) at 606.

47. *Id.*, 46 U.C.C. Rep. Serv. 2d (West) at 606.

48. *Id.* at 100-01, 46 U.C.C. Rep. Serv. 2d (West) at 606.

49. *Id.* at 101, 46 U.C.C. Rep. Serv. 2d (West) at 607 (citing Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co., 189 F.3d 289, 296 (2d Cir. 1999)).

50. *Id.*, 46 U.C.C. Rep. Serv. 2d (West) at 607.

hardship so as to support a finding that the arbitration provision materially altered the contract, the provision became a term of the parties' contract and Tradearbed was entitled to arbitration.

The U.S. District Court for the Southern District of New York reached a similar conclusion on the inclusion of an arbitration clause, albeit for a different reason. In *Deer Stags, Inc. v. Garrison Industries, Inc.*,[51] the parties had engaged in over fifty sales over a one-year period. In a substantial number of these sales, the seller confirmed the order using a form that included an arbitration clause. Because the parties had engaged in so many transactions with the same form during the previous year and the buyer had never objected to the arbitration term, the court held the buyer could not claim surprise or hardship caused by the inclusion of the arbitration clause.[52] Accordingly, the court granted the seller's motion to compel arbitration.[53] This reasoning seems highly questionable. While course of dealing and usage of trade are undoubtedly relevant to a claim of "surprise,"[54] no course of dealing exists if section 2-207 would have kept the arbitration clause out of the first transaction and the parties in fact never arbitrated a prior dispute. Moreover, to support its conclusion, the court relied on a prior case that completely failed to discuss—or even cite to—section 2-207.[55]

Parties to sales contracts frequently seek to introduce extrinsic evidence to prove a term that was not included in the written contract between the parties. Despite the clear language of U.C.C. section 2-202 and the Official Comments,[56] courts continue to apply the parol evidence rule based on the common-law concept of ambiguity. In *Mies Equipment, Inc. v. NCI Building Systems, L.P.*,[57] the plaintiff, Mies Equipment, retained Cornerstone Construction to serve as general contractor on a project to upgrade the plaintiff's showroom. Cornerstone purchased pre-engineered commercial buildings from the defendants, NCI Building Systems and Metallic Buildings ("Metallic"). Metallic was selected for the project because it had the shortest delivery time. When Metallic failed to deliver the buildings in the agreed upon time, Mies Equipment sought damages for lost profits allegedly caused by the delay. Mies Equipment then sued Metallic for breach of contract, alleging it had a direct contract with Metallic and that it was a third-party beneficiary of Metallic's contract with Cornerstone Construction. Dismissing the direct contract theory, the district court turned to whether there was a breach of the Cornerstone-Metallic contract based on the alleged late delivery.

51. No. 00 Civ. 0267, 2000 U.S. Dist. LEXIS 17453, 43 U.C.C. Rep. Serv. 2d (West) 525 (S.D.N.Y. 2000).

52. *Id.* at *15, 43 U.C.C. Rep. Serv. 2d (West) at 530-31.

53. *Id.*, 43 U.C.C. Rep. Serv. 2d (West) at 531.

54. *See, e.g.*, Dale R. Horning Co. v. Falconer Glass Indus., Inc., 730 F. Supp. 962, 966, 11 U.C.C. Rep. Serv. 2d (West) 536, 542 (S.D. Ind. 1990).

55. *Deer Stags, Inc.*, 2000 U.S. Dist. LEXIS 17453, at *15, 43 U.C.C. Rep. Serv. 2d (West) at 531 (citing Infinity Indus., Inc. v. Rexall Sundown, Inc., 71 F. Supp. 2d 168 (E.D.N.Y. 1999)).

56. *See* U.C.C. § 2-202 (determining admissibility of evidence based on finality of writing and nature of the evidence) & cmt. 1 (2002) (providing that section "definitely rejects" requirement that language used be ambiguous before parol evidence admissible).

57. 167 F. Supp. 2d 1077, 44 U.C.C. Rep. Serv. 2d (West) 1017 (D. Minn. 2001).

The contract was formed through the use of a purchase order provided by Metallic and a confirmation form sent by Metallic. The confirmation form did not state a delivery date, however the purchase order listed a requested delivery date and provided that any delivery schedule was "approximate and subject to delays due to causes beyond [the] control of Seller."[58] In analyzing the problem, the court first noted that the contract, as evidenced by the purchase order and confirmation, was not ambiguous.[59] The court then rejected plaintiff's contention that the evidence was admissible to explain the parties' agreement because the court found no ambiguity.[60] The court found that the purchase order was a "final and integrated expression of the parties' agreement."[61] Based on this finding, the court rejected any evidence of the delivery term.[62]

The court misapplied the parol evidence rule in two important ways. First, the court's finding that the purchase order was fully integrated is unsupportable. In fact, the purchase order may not have formed the contract. Although the opinion is a bit unclear on the sequence of events, the court itself seems to assume that the subsequent confirmation was issued as part of the contract formation process. Moreover, it would be unusual for a form issued by one party during the negotiation process and never signed by the other to constitute a fully integrated expression of the parties' agreement. Indeed, nothing in the opinion indicates that the purchase order even contained a merger clause.

Second, the court's reliance on ambiguity as the basis for admission of explanatory evidence is misguided. The language of section 2-202 places no such requirement on the admissibility of parol evidence. The Official Comments also indicate a shift away from the assumption that a writing must be ambiguous before parol evidence is admissible or that a writing is necessarily inclusive of all terms.[63]

Nevertheless, the court may have stumbled into the correct result. Because the court concluded that the proffered delivery term would have *contradicted* the purchase order,[64] it need not have ruled that the writings were fully integrated. As long as they were a *final* expression of the parties' agreement, rather than a *complete and exclusive* statement of the agreement, evidence of contradictory terms is properly excluded.[65] Moreover, there was an apparently independent basis for rejecting the plaintiff's claim; the purchase order disclaimed all liability for consequential damages, such as lost profits.[66]

In another case, *Kirkwood Motors, Inc. v. Conomon*,[67] the court correctly excluded the proffered parol evidence, although it misstated the rule in doing so. The

58. *Id.* at 1080, 44 U.C.C. Rep. Serv. 2d (West) at 1018.

59. *Id.* at 1082, 44 U.C.C. Rep. Serv. 2d (West) at 1021.

60. *Id.* at 1083, 44 U.C.C. Rep. Serv. 2d (West) at 1022.

61. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 1022.

62. *See* U.C.C. § 2-202(b) (2002) (prohibiting evidence of a consistent additional term if the court finds the writing is intended by the parties to be "a complete and exclusive statement of the terms of the agreement").

63. *Id.* cmt. 1.

64. *Mies Equip., Inc.*, 167 F. Supp. 2d at 1084, 44 U.C.C. Rep. Serv. 2d (West) at 1023.

65. *See* U.C.C. § 2-202 (2002).

66. 167 F. Supp. 2d at 1084-85, 44 U.C.C. Rep. Serv. 2d (West) at 1024.

67. No. 00A-05-001-PLA, 2001 Del. Super LEXIS 15, 44 U.C.C. Rep. Serv. 2d (West) 355 (Del. Super. Ct. 2001).

Conomons purchased a van from Kirkwood Motors, trading in a used van as part of the deal. The written contract allocated $300 for the trade-in. The Conomons claimed, as the basis for their action, that the trade-in allowance was supposed to be $3,000 based on oral representations made by the salesman. The buyers prevailed at trial, and the seller appealed. The Delaware Superior Court reversed the decision of the trial court[68] and held that the testimony about the alleged oral agreement should have been excluded.[69] The court stated that when parties to a contract reduce the agreement to writing, parol evidence is admissible only under limited circumstances, such as when the terms are ambiguous or there is fraud or mutual mistake.[70] In general, the court continued, parol evidence should not be admitted when a writing is clear and unambiguous. Finding the contract unambiguous as to the amount allowed for the trade-in, the court held the evidence should have been excluded.[71]

The court made only passing reference, through a mere citation in a footnote, to section 2-202, the governing law. Nevertheless, the evidence was inadmissible under section 2-202, absent a showing of fraud or mutual mistake. Section 2-202 provides that terms of a writing intended to be final cannot be contradicted by evidence of a prior or contemporaneous agreement.[72] Because the buyers relied on prior statements made during negotiations as the "agreement" to provide $3,000 for the trade-in, this evidence that contradicted the writing was inadmissible under section 2-202. Unfortunately, the court's discussion reflects one of the same misunderstandings that the *Mies Equipment* case does: the notion that the writing must be ambiguous before parol evidence may be admitted. Nothing in section 2-202 or in the *Restatement (Second) of Contracts* imposes such a requirement.

## Breach of the Duty of Good Faith

One interesting case addressed the requirement of good faith in requirements and exclusive dealings contracts. In *Diversified Products, Inc. v. Tops Markets, Inc.*,[73] the defendant, Tops Markets d/b/a Vix, entered into a contract to buy sunglasses, reading glasses, and other optical products for resale in its grocery stores from the plaintiff, Diversified. The contract was a two-year requirements contract wherein Vix agreed to maintain a sufficient inventory of products to provide a maximum return to Vix on resale using reasonable business judgment. Vix also agreed that Diversified would be its exclusive provider of these products during the contract. During the contract negotiations, Diversified informed Vix that it

68. Conomon v. Kirkwood Motors, Inc., No. 98-11-058, 2000 Del. C.P. LEXIS 73 (Del. C.P. Apr.17, 2000).

69. 2001 Del. Super LEXIS 15, at *6, 45 U.C.C. Rep. Serv. 2d (West) at 358.

70. *Id.* at *7, 44 U.C.C. Rep. Serv. 2d (West) at 358.

71. *Id.* at *9, 44 U.C.C. Rep. Serv. 2d (West) at 359. Additionally, the court found that there was no basis for a finding of fraud or mutual mistake. The court believed that this was an instance where the buyer should have read the contract more carefully before signing it. *Id.* at *10, 44 U.C.C. Rep. Serv. 2d (West) at 359.

72. U.C.C. § 2-202 (2002).

73. No. 99-CV-0457E(F), 2001 U.S. Dist. LEXIS 7642, 45 U.C.C. Rep. Serv. 2d (West) 101 (W.D.N.Y. 2001).

would be difficult for Diversified to make a profit during the first year of the contract due to substantial up-front cost and low profit margins. Approximately one month after entering into the contract, Tops hired an investment banking firm to locate a buyer for the Vix stores and assets. The stores were ultimately sold to Drug Emporium a year after the formation of the requirements contract. Despite a provision in the contract that the contract was binding on the parties' successors, Tops did not provide for the contract in the sale of the stores to Drug Emporium. Fourteen months into the contract, the former Vix stores ceased purchasing all products from Diversified. Drug Emporium refused to honor the requirements contract with Diversified. Diversified sued Tops alleging claims for breach of contract and breach of the implied duty of good faith and fair dealing.

The court first discussed the implied covenant of good faith and fair dealing in all contracts under the U.C.C.[74] While the court noted that this obligation prevents one party from engaging in conduct that would deprive the other party of the benefits of the contract, it nevertheless ruled that lack of good faith does not by itself constitute actionable conduct.[75] In other words, there is no independent cause of action for bad faith. This ruling is in line with the majority of courts and is probably correct.[76]

With respect to Diversified's breach of contract claims, Tops argued that it did not breach the contract because it was permitted to cease purchasing products for legitimate business reasons. The court agreed that a buyer under a requirements contract may cease to purchase the product and the seller assumes that risk, but ruled that this right was limited to decisions made in good faith and in accordance with reasonable commercial standards of fair dealing.[77] Diversified's allegations that Tops had entered into the requirements contract knowing that Diversified would not profit until the second year while simultaneously seeking to sell the business coupled with Tops' failure to provide for the requirements contract in the sale of the stores were sufficient to permit a jury to determine that the defendant breached its duty of good faith, and thus, the contract.[78] Therefore, the court denied the defendant's motion for summary judgment.[79]

## REMEDIES

One case raised interesting questions on both lost profits and incidental damages. In *Mexamerican Hides S.A. v. Central International Co.,*[80] Mexamerican had paid a deposit to Central for the purchase of cow hides. The buyer proved unable

74. *Id.* at *12-*13, 45 U.C.C. Rep. Serv. 2d (West) at 106; *see* U.C.C. § 1-203 (imposing obligation of good faith in every contract under the U.C.C.).

75. 2001 U.S. Dist. LEXIS 7642, at *15, 45 U.C.C. Rep. Serv. 2d (West) at 107.

76. *See* U.C.C. § 1-304 cmt. 1 (Proposed Official Draft 2001). A close reading of the old (i.e., currently enacted) version of Article 1 yields the same conclusion. Section 1-203 imposes a requirement of good faith on duties created by law or contract. It does not purport to be an independent source of a duty. *See also* Permanent Editorial Board for the Uniform Commercial Code, *Commentary No. 10* (Feb. 10, 1994) (indicating that § 1-203 does not create an independent cause of action).

77. 2001 U.S. Dist. LEXIS 7642, at *19-*20, 45 U.C.C. Rep. Serv. 2d (West) at 109.

78. *Id.* at *21 , 45 U.C.C. Rep. Serv. 2d (West) at 109-10.

79. Id. at *22, 45 U.C.C. Rep. Serv. 2d (West) at 110.

80. 2000 Mass. App. Div. LEXIS 120, 43 U.C.C. Rep. Serv. 2d (West) 587 (Mass. App. Ct. Dec. 19, 2000).

to carry out its duties and repudiated the agreement. The seller resold the hides for less than the contract price and refused to return any of the deposit, claiming that its damages exceeded the deposit. The trial court ruled that part of the deposit had to be returned to the buyer,[81] but did not include damages for interest charges incurred between the date of breach and the date of resale on the amount due under the contract.[82] The appellate court affirmed, holding that lost interest charges were consequential damages, rather than incidental, and thus unrecoverable.[83] The seller argued that the damages would be recoverable under section 2-708(2) as an element of lost profits. In response, the appellate court affirmed the trial court's use of section 2-706 (contract-resale damages) rather than section 2-708(2), holding that section 2-708(2) applies only when the seller is a manufacturer of the goods under contract.[84]

The decision is rather a mixed bag. Certainly the court was right to deny recovery of consequential damages.[85] The Code does not allow consequential damages unless they are specifically provided for,[86] and Article 2 does not give sellers, as opposed to buyers, the right to consequential damages.[87] The question is one of characterization. Courts have split badly on this point. Most treat interest as incidental on the grounds that it is incurred directly by the breach.[88] Others treat it as consequential, either because it arises only indirectly—that is, as a result of contracts with a third party, the lender—or because it has nothing to do with mitigating loss, but rather are costs intended to make the contract possible.[89]

If incidental damages generally focus on avoiding loss, then it is hard to fit interest costs in.[90] Indeed, in this case the interest charges were apparently not

81. The buyer has a right of restitution, subject to any claims of the seller and perhaps to the statutory minimum figure. U.C.C. § 2-718(2), (3) (2002).

82. *Mexamerican Hides*, 2000 Mass. App. Div. LEXIS 120, at *4-*5, 43 U.C.C. Rep. Serv. 2d (West) at 589.

83. *Id.* at *7, 43 U.C.C. Rep. Serv. 2d (West) at 590.

84. *Id.* at *8, 43 U.C.C. Rep. Serv. 2d (West) at 591.

85. Though Professors White and Summers contend that, as the common law allows for consequential damages, we should read sections 1-103 and 1-106 together to allow sellers to recover consequential damages. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 7-16(b) (4th ed. 1995). There is much justice to this argument, but it renders nugatory the Code's distinction between sellers' and buyers' remedies on this point. Unless we assume error on the part of the drafters, it is hard to reach their conclusion.

86. U.C.C. § 1-106(1) (2002).

87. None of the sellers' remedies sections gives a right to consequentials, though all do for incidentals. U.C.C. §§ 2-706, 2-708, 2-709 (2002). In contrast, all of the sections giving damages to buyers expressly allow for consequentials. U.C.C. §§ 2-712, 2-713, 2-714 (2002).

88. *See, e.g.*, Sobiech v. Int'l Staple & Mach. Co., 867 F.2d 778, 781, 7 U.C.C. Rep. Serv. 2d (Callaghan) 1487, 1491 (2d Cir. 1989); Berg v. Hogan, 322 N.W.2d 448, 453-54, 34 U.C.C. Rep. Serv. (Callaghan) 505, 511 (N.D. 1982); Gray v. West, 608 S.W.2d 771, 781, 31 U.C.C. Rep. Serv. (Callaghan) 568, 571 (Tex. App. 1980); *see also* 1 ROY RYDEN ANDERSON, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE § 4:27 (2001).

89. *See, e.g.*, Firwood Mfg. Co. v. Gen. Tire, Inc., 96 F.3d 163, 169-72, 30 U.C.C. Rep. Serv. 2d (CBC) 789, 797-801 (6th Cir. 1996); Petroleo Brasileiro, S.A. v. Ameropan Oil Corp., 372 F. Supp. 503, 508-09, 14 U.C.C. Rep. Serv. (Callaghan) 661, 667 (E.D.N.Y. 1974); *see also* 1 WHITE & SUMMERS, *supra* note 85, § 7-16, at 413.

90. Compare another recent case, in which the costs of inspecting damaged cargo were properly held to be incidental damages under section 2-715(1). Mitsui O.S.K. Lines, Ltd. v. Consol. Rail Corp., 743 A.2d 362, 364, 43 U.C.C. Rep. Serv. 2d (West) 897, 900 (N.J. Super. Ct. App. Div. 2000).

tied to the hides, the subject of the sale; instead they were accruing on a general business loan. On the other hand, the seller might well have paid down the loan earlier if the buyer had performed. In that sense the interest could be said to avoid default on the loan, which would have made mitigation impossible. Perhaps a third approach makes more sense. In *Afram Export Corp. v. Metallurgiki Halyps, S.A.*,[91] Judge Posner suggested that the distinction should be according to which party was better able to avoid loss.[92] There, perhaps as here, he concluded that the breaching buyer was in the better position to avoid interest expenses incurred until resale, and thus that it would be appropriate to classify them as incidental.[93]

There is another problem, though: the suggestion that had the plaintiff been a manufacturer seeking lost profits under section 2-708(2), the outcome in this case might have been different.[94] Though the opinion is not clear on this matter, the court attempted to distinguish an earlier case allowing recovery of interest to a lost profits seller under section 2-708(2).[95] The court's effort is troubling. It seems to be suggesting that the recoverability of interest as incidental damages somehow depends on whether the seller is a manufacturer or on which provision of the Code—section 2-706 or section 2-708—applies. However, neither suggestion is supported by the text or comments to the Code.

Turning briefly to buyers' remedies, one decision used a strained interpretation of a damages measure to avoid a remedy limitation. *Triple E, Inc. v. Hendrix & Dail, Inc.*,[96] concerned the sale of a chemical fumigant. The fumigant was advertised to prevent certain crop diseases if applied at a certain concentration. Triple E purchased it and used it at the advertised level, but its crop nevertheless developed the disease. This suit resulted and the jury returned a verdict for Triple E. After the appellate court ruled that the jury could reasonably have treated the advertisement as creating an express warranty, it dealt with the seller's argument that its contractual exclusion of incidental and consequential damages limited Triple E's recovery to the cost of the fumigant itself. The court held that it did not.[97] It acknowledged that section 2-714(2) provides the measure of damages for breach of warranty—namely, the difference in value between the goods as warranted and the goods as delivered.[98] Relying on higher South Carolina authority,[99] though, it held that failures of crop treatments are different; the damages include the lost value of the crop, not the difference in value of the treatment.[100]

91. 772 F.2d 1358, 41 U.C.C. Rep. Serv. (Callaghan) 1709 (7th Cir. 1985).

92. *Id.* at 1368, 41 U.C.C. Rep. Serv. (Callaghan) at 1713.

93. *Id.* at 1368-70, 41 U.C.C. Rep. Serv. (Callaghan) at 1712-15.

94. *Mexamerican Hides*, 2000 Mass. App. Div. LEXIS 120, at *8, 43 U.C.C. Rep. Serv. 2d (West) at 591. The court relied on another of its opinions. *Id.* at *7-*8, 43 U.C.C. Rep. Serv. 2d (West) at 590-91 (citing Cesco Mfg. Corp. v. Norcross, Inc., 391 N.E.2d 270, 27 U.C.C. Rep. Serv. (Callaghan) 126 (Mass. App. Ct. 1979)).

95. *Id.* at *7-*9, 43 U.C.C. Rep. Serv. 2d (West) at 590-91.

96. 543 S.E.2d 245, 43 U.C.C. Rep. Serv. 2d (West) 533 (S.C. Ct. App. 2001).

97. *Id.* at 248, 43 U.C.C. Rep. Serv. 2d (West) at 538.

98. *Id.*, 43 U.C.C. Rep. Serv. 2d (West) at 538.

99. *Id.*, 43 U.C.C. Rep. Serv. 2d (West) at 538 (citing Hill v. BASF Wyandotte Corp., 311 S.E.2d 734, 38 U.C.C. Rep. Serv. (Callaghan) 1254 (S.C. 1984)).

100. *Id.*, 43 U.C.C. Rep. Serv. 2d (West) at 538.

Despite being bound by precedent, the court's reasoning is flawed. Section 2-714 specifically provides for consequential damages.[101] If these are disclaimed properly, then they should simply be unavailable. Recharacterizing these damages as direct is subterfuge. True, section 2-714(2) contains a loophole, permitting proximate damages not measured by the simple difference in value formula if special circumstances so require. Herbicide and fungicide cases would seem particularly sympathetic; defects in the goods normally are not detectible until well after they are used, cure is impossible, and the harms caused can be well out of proportion to the price of the goods. Those considerations would seem more appropriate to an attack on the disclaimer under section 2-719(2) or (3) than for evading the Code's mechanism for dealing with disclaimers. In fact, a number of courts have struck down limitations on consequential damages in the agricultural context.[102] The *Triple E* court should have looked to these. Instead, by corrupting the section 2-714 formula, it may have left knowledgeable contracting parties with no way to draft around this result and limit recovery for consequential damages.

This year's cases on remedy limitations were dominated by a hardy perennial—the relation between subsections (2) and (3) of section 2-719. One view, perhaps predominant, was exemplified this year by *Rheem Manufacturing Co. v. Phelps Heating & Air Conditioning, Inc.*[103] There the court was faced with a suit by a contractor, Phelps, against a furnace manufacturer, Rheem. Rheem had provided an express, limited warranty with a remedy confined to providing replacement parts and, if no replacements were available, a credit toward the purchase of a new furnace. The contract disclaimed all labor costs as well as all incidental and consequential damages. Phelps' customers had problems with the furnaces and Phelps obtained some service labor credits from the distributor from which it had purchased the goods, but eventually Rheem announced that it would grant no more service credits. Faced with a great deal of uncompensated-for time, Phelps sued Rheem.

On appeal, the parties did not question that the remedy failed of its essential purpose, thus invalidating the remedy limitation under section 2-719(2). The question was whether this invalidation affected the consequential damages disclaimer, or whether that disclaimer was still valid unless unconscionable, as provided by section 2-719(3). The court held that the two tests are independent.[104] Though it found the statute facially ambiguous, it thought the presence of distinct legal standards applied by different entities—the finder of fact under subsection (2), the finder of law under subsection (3)—suggested that the sections were independent.[105] Furthermore, reading them as dependent would make the

101. U.C.C. § 2-714(3) (2002).

102. *See, e.g.*, Herrick v. Monsanto Co., 874 F.2d 594, 596, 9 U.C.C. Rep. Serv. 2d (Callaghan) 828, 831-32 (8th Cir. 1989); Majors v. Kalo Labs., Inc., 407 F. Supp. 20, 22-23, 18 U.C.C. Rep. Serv. (Callaghan) 592, 594-96 (M.D. Ala. 1975); Mullis v. Speight Seed Farms, Inc., 505 S.E.2d 818, 820-22, 37 U.C.C. Rep. Serv. 2d (West) 88, 90-93 (Ga. Ct. App. 1998) (collecting cases).

103. 746 N.E.2d 941, 44 U.C.C. Rep. Serv. 2d (West) 751 (Ind. 2001) (3-1 decision).

104. *Id.* at 946-47, 44 U.C.C. Rep. Serv. 2d (West) at 758-59.

105. *Id.* at 948, 44 U.C.C. Rep. Serv. 2d (West) at 759-60.

unconscionability test meaningless, which violates a canon of interpretation. The independent view was also the modern trend, so adopting it would advance uniformity. Finally, interpreting these sections to be independent gives effect to sound commercial practice by giving effect to freedom of contract. The court felt that parties should be allowed to agree to an independent consequential damages disclaimer, which a strict dependent interpretation would not permit.[106] It then went on to reject an overlay of commercial reasonableness required by the intermediate appellate court[107] and adopted the pure independent approach.[108]

In contrast, a federal judge sitting in diversity concluded that Pennsylvania would adopt the dependent approach. In *Caudill Seed & Warehouse Co. v. Prophet 21, Inc.*,[109] the defendant Prophet 21 was to supply computer software to the plaintiff. The software allegedly failed to perform. The licensing agreement limited the seller's liability to the cost of the software and also disclaimed all "direct, indirect, consequential or resulting damages or injury due to failure of, or otherwise arising out of the Software, or for any lost profits . . . or other monetary damages."[110] Caudill's sole remedy was to have Prophet 21 correct inoperative software. Caudill sued for damages, and Prophet 21 moved to dismiss. The court began by holding that Prophet 21's alleged failure to repair or replace the software meant that the limited remedies failed of their essential purpose, thus invalidating the exclusive remedy.[111] It then considered the validity of the damages limitations, first by noting the absence of controlling authority and the tendency of other courts in the Circuit to adopt the independent approach.[112] However, it then rejected the independent approach, pointing first to the language in section 2-719(2) that gives the buyer the right to a remedy "as provided in this title," which would include consequential damages under section 2-715(2).[113] As damages disclaimers and exclusive remedies are usually found together, said the court, the statutory language means that when the remedy falls, so does the disclaimer.[114] In addition, the parties would logically intend the terms to be dependent. Otherwise, "a limitation on liability clause constitutes unilateral disarmament on the part of the buyer."[115] It thus predicted that the Pennsylvania Supreme Court would adopt the dependent view and denied the motion to dismiss.[116]

106. *Id.* at 950, 44 U.C.C. Rep. Serv. 2d (West) at 762.

107. Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc., 714 N.E.2d 1218, 1228, 39 U.C.C. Rep. Serv. 2d (West) 436, 450 (Ind. Ct. App. 1999).

108. 746 N.E. 2d at 951-52, 44 U.C.C. Rep. Serv. 2d (West) at 764-65.

109. 123 F. Supp. 2d 826, 43 U.C.C. Rep. Serv. 2d (West) 1 (E.D. Pa. 2000).

110. *Id.* at 828, 43 U.C.C. Rep. Serv. 2d (West) at 2-3.

111. *Id.* at 829, 43 U.C.C. Rep. Serv. 2d (West) at 5.

112. *Id.* at 830-31, 43 U.C.C. Rep. Serv. 2d (West) at 6-7.

113. *Id.* at 831-32, 43 U.C.C. Rep. Serv. 2d (West) at 8. The court did not explain why the reference to the remedies otherwise available under Article 2 would not include the express right of the parties under section 2-719(1) to limit the remedies available.

114. *Id.* at 832, 43 U.C.C. Rep. Serv. 2d (West) at 9.

115. *Id.* at 832-33, 43 U.C.C. Rep. Serv. 2d (West) at 9.

116. *Id.* at 833, 43 U.C.C. Rep. Serv. 2d (West) at 9-10. It also denied a motion to reconsider. Caudill Seed & Warehouse Co. v. Prophet 21, Inc., 126 F. Supp. 2d 937, 939, 43 U.C.C. Rep. Serv. 2d (West) 849, 852 (E.D. Pa. 2001).

Whatever can be said about the close reading applied by these courts, ultimately both decisions, and most of the decisions in this area, turn on the imputed intent of the parties. The courts and commentators supporting the independent test think limited remedies and damages disclaimers are separate, while those supporting the dependent test think they come in tandem. Perhaps it is not necessary to assume either. Some courts and commentators favor a case-by-case analysis that seeks to give effect to the parties' intended risk allocation, looking at such things as the relative bargaining power of the parties, the precise language of the agreement, and the types of goods.[117] This is not as bright a line as that provided by either of the other tests, but it is likely to do violence to contractual intent less often.

This year brought a good deal of statute of limitations litigation, most of it routine.[118] Two cases, though, merit some attention. First, in *Ouellette Machinery Systems, Inc. v. Clinton Lindberg Cadillac Co.*,[119] the court was faced with the trial court's grant of summary judgment on a claim for breach of express warranty. The seller[120] warranted that it would repair any vehicle defect related to materials or workmanship for four years or 50,000 miles, whichever came first. Ouellette purchased the auto more than four years before it brought the action for breach, but less than four years before it discovered the defect. Relying on its earlier case law,[121] the court held that this warranty unambiguously extended to future performance and thus that section 2-725(2)'s discovery exception applied.[122] For the purposes of a motion for summary judgment, the court concluded that it could not be said as a matter of law that Ouellette should have discovered the defect more than four years before it brought its action. As a result, it affirmed the grant of summary judgment only for any defects that Ouellette discovered or should have discovered more than four years before it filed suit and reversed and remanded for the balance.[123]

One can sympathize with Ouellette—after all, the seller did promise to repair the car and did not do so. This may even be the correct result. But the court erred

117. *See, e.g.*, Sunny Indus., Inc. v. Rockwell Int'l Corp., No. 98-2824, 1999 WL 220109, *12, 38 U.C.C. Rep. Serv. 2d (West) 827, 843-44 (7th Cir. 1999) (per curiam); Waters v. Massey-Ferguson, Inc., 775 F.2d 587, 591-92, 41 U.C.C. Rep. Serv. (Callaghan) 1553, 1557-59 (4th Cir. 1985); Fiorito Bros., Inc. v. Fruehauf Corp., 747 F.2d 1309, 1315, 39 U.C.C. Rep. Serv. (Callaghan) 1298, 1305-07 (9th Cir. 1984); AES Tech. Sys., Inc. v. Coherent Radiation, 583 F.2d 933, 941, 24 U.C.C. Rep. Serv. (Callaghan) 861, 871-72 (7th Cir. 1978); John D. Wladis et al., *Sales*, 55 Bus. Law. 1951, 1966-68 (2000).

118. *See, e.g.*, Int'l Periodical Distrib. v. Bizmart, Inc., No. 77787, 2001 WL 104920, at *3, 43 U.C.C. Rep. Serv. 2d (West) 1173, 1177 (Ohio Ct. App. Feb. 1, 2001) (causes of action for failure to pay for various deliveries on account accrue separately for each delivery, not all on the date of the last delivery).

119. 60 S.W.3d 618, 45 U.C.C. Rep. Serv. 2d (West) 163 (Mo. Ct. App. 2001).

120. Actually, the seller, an auto dealer, and General Motors Corporation, the auto's manufacturer, made the warranty because the warranty ran from General Motors.

121. Most notable cases include *Wienberg v. Independence Lincoln-Mercury, Inc.*, 948 S.W.2d 685, 32 U.C.C. Rep. Serv. 2d (West) 851 (Mo. Ct. App. 1997) and *Black Leaf Prods. Co. v. Chemsico, Inc.*, 678 S.W.2d 827, 39 U.C.C. Rep. Serv. (Callaghan) 508 (Mo. Ct. App. 1984).

122. *Ouellette Mach. Sys., Inc.*, 60 S.W.3d at 621-22, 45 U.C.C. Rep. Serv. 2d (West) at 166.

123. *Id.* at 622, 45 U.C.C. Rep. Serv. 2d (West) at 166.

by calling the promise in question a warranty. A warranty is a statement going to the nature or quality of the goods. The promise here was not directly about the goods. Rather, the seller merely undertook to repair the goods if they proved defective. It made a remedial promise, to use the term found in the current draft of Amended Article 2.[124] A remedial promise is breached, not when the goods fail, but when the seller breaches its promise to repair—a time necessarily after when the buyer discovers the defect giving rise to the spurned repair demand. Accordingly, the statute of limitations would run from that breach.[125] This is what the exception in section 2-725(2) says. The *Ouellette* court thus applied too restrictive a limitations period—doing so, paradoxically, in its attempt to avoid the harshness of the normal accrual on tender of delivery.[126]

*Gus' Catering, Inc. v. Menusoft Systems*[127] looked at the other end of the statute of limitations—whether the statute is tolled because of acts by the promissor. Gus' Catering contended that Menusoft, a manufacturer and distributor of computer systems, provided it with defective computer software and hardware. Several service calls over the next two years did nothing to remove the problems. After Menusoft ended its distributorship, Gus' Catering went to another distributor which solved all the problems at once. About two years later, Gus' Catering sued Menusoft, alleging that its improper installation of the system caused the problems. Its suit was filed about two years after the successful repair, but more than four years after the initial sale. The trial court granted Menusoft's motion for summary judgment, holding that the Article 2's four-year statute of limitations had run.[128] The appeal turned on whether the seller's unsuccessful repair attempts tolled the statute of limitations. The court thought not. Following one of its recent decisions on a recall notice for a defective motor home, it held that an offer to repair was not itself a warranty, but amounted merely to a promise to repair.[129] As the original sales contract was not modified, the limitations period ran from the date of delivery and hence had expired by the time of suit.[130]

It is hard to disagree with the notion that a remedial effort is not a warranty and does not modify a warranty associated with the sale. Still, the court could have found that the attempted repairs equitably tolled the statute of limitations.

124. U.C.C. § 2-103(m) & preliminary cmts. (Proposed Official Draft 2001).

125. *See, e.g.*, Long Island Lighting Co. v. Imo Indus., Inc., 6 F.3d 876, 888-89, 22 U.C.C. Rep. Serv. 2d (CBC) 205, 218-19 (2d Cir. 1993); Cosman v. Ford Motor Co., 674 N.E.2d 61, 68, 33 U.C.C. Rep. Serv. 2d (West) 1118, 1126 (Ill. App. Ct. 1996); Keller v. Volkswagen of Am., Inc., 733 A.2d 642, 646, 39 U.C.C. Rep. Serv. 2d (West) 118, 122-23 (Pa. Super. Ct. 1999).

126. The *Ouellette* court was not alone this year in mistaking a remedial promise for a warranty. In *Gianakakos v. Commodore Home Sys. Inc.*, 727 N.Y.S.2d 806, 808, 45 U.C.C. Rep. Serv. 2d (West) 815, 816 (N.Y. App. Div. 2001), the court similarly stated that a promise to repair or replace defective parts was a warranty. This, however, did not affect the result. Although the plaintiff's furnace blew up, the remedial promise was not breached because the defendant replaced it. *Id.* at 807, 45 U.C.C. Rep. Serv. 2d (West) at 815. The court's affirmance of summary judgment for the defendant was thus appropriate, albeit for different reasons.

127. 762 A.2d 804, 43 U.C.C. Rep. Serv. 2d (West) 1163 (Vt. 2000).

128. *Id.* at 806, 43 U.C.C. Rep. Serv. 2d (West) at 1164.

129. *Id.* at 807, 43 U.C.C. Rep. Serv. 2d (West) at 1166 (citing Paquette v. Deere & Co., 719 A.2d 410, 412 (Vt. 1988)).

130. *Id.*, 43 U.C.C. Rep. Serv. 2d at 1166.

Tolling is contemplated in the Article 2 statute of limitations, though it is left to state-by-state development.[131] Indeed, some jurisdictions have held that repair attempts do toll the statute of limitations, at least until the buyer has a reasonable time after the attempts have stopped for filing suit.[132] This is, to be sure, the minority position.[133] There is, nevertheless, something to be said for it. If continued attempts to repair do not toll the statute of limitations, then the statute could run while the seller is still attempting to mend the defective goods. To protect its rights, the buyer would thus have to sue, which hardly seems consistent with informal, cooperative problem-solving. This problem may not be germane here; about two years passed from both the seller's attempted repairs and another party's successful repairs before Gus' Catering filed its complaint—more than merely a reasonable time for suit. This case might thus be distinguishable should the more troubling facts arise.

## Economic Loss Doctrine

Courts continue to be faced with the interaction between contract and tort claims in economic transactions in light of the economic loss doctrine. The economic loss doctrine provides that a party is limited to contract remedies when the damages suffered are merely economic in nature, that is, when there is no personal injury or property damage involved. A frequent question is what constitutes property damage so as to permit a claim in tort. Two courts considered this issue in cases where a defective component damaged the good of which it was a part.

In *Alcan Aluminum Corp. v. BASF Corp.*,[134]Alcan sued BASF under a number of theories, including negligence, for damages caused to aluminum panels Alcan manufactured using a foam insulating system supplied by BASF.[135] The panels allegedly "bubbled" and were not suitable for their intended use because of the defective foam. Alcan sought reimbursement from BASF for warranty claims it paid its customers and other expenses incurred to repair and replace defective panels. BASF challenged Alcan's negligence claim on the basis of the economic loss doctrine. Acknowledging that Texas law prohibits recovery of economic damages without accompanying personal injury or property damage on a negligence claim for a defective product, the court explained, however, that damage

131. U.C.C. § 2-725(4) (2002).

132. *See, e.g.*, Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152, 1155, 33 U.C.C. Rep. Serv. (Callaghan) 965, 969-70 (D. Colo. 1981); Biocraft Labs., Inc. v. USM Corp., 395 A.2d 521, 522, 25 U.C.C. Rep. Serv. (Callaghan) 484, 485-86 (N.J. Super. Ct. App. Div. 1978); Keller v. Volkswagen of Am., Inc., 733 A.2d at 646, 39 U.C.C. Rep. Serv. 2d (West) at 122.

133. *See, e.g.*, Ludwig v. Ford Motor Co., 510 N.E.2d 691, 699, 5 U.C.C. Rep. Serv. 2d (Callaghan) 361, 371 (Ind. Ct. App. 1987); Zahler v. Star Steel Supply Co., 213 N.W.2d 269, 270, 13 U.C.C. Rep. Serv. (Callaghan) 1043, 1044 (Mich. Ct. App. 1973); Grus v. Patton, 790 S.W.2d 936, 940, 14 U.C.C. Rep. Serv. 2d (CBC) 135, 139 (Mo. Ct. App. 1990).

134. 133 F. Supp. 2d 482, 44 U.C.C. Rep. Serv. 2d (West) 432 (N.D. Tex. 2001).

135. The system consisted of chemicals that mixed together to create the insulating foam and a mixing gun. *Id.* at 488, 44 U.C.C. Rep. Serv. 2d (West) at 433.

to property other than the defective product itself could be the basis for a tort recovery.[136] The court then had to determine whether the aluminum panels constituted "other property." The court considered prior Texas cases that had held that damage to a good as a whole caused by a component did not constitute damage to "other property" in situations where the component was not purchased separate from the whole.[137] The district court noted, while Texas had not addressed the issue of damage to an assembled product caused by a component obtained separately, other jurisdictions had held that damage to the assembled product as a whole was not damage to other property sufficient to avoid application of the economic loss doctrine.[138] Other courts have extended the rule such that even property used in connection with the defective product was not considered "other property" for purposes of the rule.[139] The court explained that the rationale for this approach is that damage to other components, to the good as a whole, or even to goods used in conjunction with the product sold is a foreseeable commercial risk associated with a product's failure to perform.[140] Because parties can protect themselves from foreseeable damages in the contract, contract remedies are more appropriate.[141] The district court also noted that other courts had reached the same result by focusing on the manner in which the damage occurred. If the damage were caused by failure of a product to live up to expectations, and not by a sudden or calamitous occurrence, the damage is appropriately characterized as an economic loss within the contemplation of a contract.[142] The district court held, therefore, that Texas courts would treat the damage to the panels caused by the foam as economic loss for which recovery cannot be had in negligence.[143]

In *McLaughlin v. Denharco, Inc.*, the U.S. District Court for Maine took a similar approach in ruling that damage to a tree delimbing machine allegedly caused by a defect in its chassis or in the connection of the boom to the chassis did not constitute damage to other property to prevent application of the economic loss doctrine.[144] The plaintiff, McLaughlin, was therefore limited to his breach of warranty claims. McLaughlin had purchased the tree delimbing machine from defendant Denharco, which had installed its delimbing boom on a chassis manufactured by defendant Deere. The court held that in determining whether the damaged property constituted "other property," the appropriate focus is the

136. *Id.* at 503, 44 U.C.C. Rep. Serv. 2d (West) at 441.

137. *Id.* at 503-04, 44 U.C.C. Rep. Serv. 2d (West) at 441-42.

138. *Id.* at 504, 44 U.C.C. Rep. Serv. 2d (West) at 442 (citing Sea-Land Serv., Inc. v. General Elec. Co., 134 F.3d 149, 154-55 (3d Cir. 1998); Am. Home Assurance Co. v. Major Tool & Mach., Inc., 767 F.2d 446, 446-48 (8th Cir. 1985); Northland Power v. Gen. Elec. Co., 105 F. Supp. 2d 775, 790-92 (S.D. Ohio 1999)).

139. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 442-43 (citing Palmetto Linen Serv., Inc. v. U.N.X., Inc., 205 F.3d 126, 128-30 (4th Cir. 2000); Agristor Leasing v. Guggisberg, 617 F. Supp. 902, 907-08 (D. Minn. 1985)).

140. *Id.* at 504-05, 44 U.C.C. Rep. Serv. 2d (West) at 443.

141. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 443.

142. *Id.* at 505, 44 U.C.C. Rep. Serv. 2d (West) at 443.

143. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 444.

144. 129 F. Supp. 2d 32, 36, 43 U.C.C. Rep. Serv. 2d (West) 1122, 1124 (D. Maine 2001).

product the plaintiff bought, not the product the defendant manufactured or sold.[145] Because McLaughlin had purchased a tree delimbing machine, and not a boom and a separate chassis, the damage to the machine was economic loss and thus, recovery in tort was barred.[146]

On a related issue, the court in *Paracelsus Healthcare Corp. v. Philips Electronics North America*, held that the provisions of the North Dakota Product Liability Act, which prohibits product liability actions against a non-manufacturing seller, if certain conditions to bring the manufacturer into the suit are met, did not supplant the warranty provisions of the U.C.C.[147] The plaintiff, Paracelsus, had purchased a cardiac imaging device from defendant, DMS, which was manufactured by defendant Philips Electronics. The device overheated and shut down while doctors were using it to locate a stint in a patient's heart, forcing the doctors to perform surgery. Paracelsus sued the seller and manufacturer alleging breach of warranty and negligence. Having complied with the provisions of the products liability statute, the seller, DMS, moved to dismiss all claims against it. In determining whether the statute prohibited warranty actions against the seller, the court looked at the economic loss doctrine and its application to product liability actions.

Despite the broad language of the statute, the court ruled that U.C.C. warranty actions against a seller are not generally viewed as "products liability actions" and thus survived under the statute.[148] A previous decision of the North Dakota Supreme Court had held that this statute did not abolish the economic loss doctrine and reflected a recognition that there is a line between contract law, which provides remedies for economic losses, and tort law, which does not. Continuing that reasoning, the district court held in the instant case that the Act did not apply to U.C.C. or contract warranty claims for solely economic loss.[149] Put simply, this case is the flip side of the economic loss doctrine. If traditional contract damages—economic losses—are not available in tort, then any restriction on tort actions should have no bearing on a contract claim for such damages.

## Article Two and Other Law

Three cases addressed the relationship between Article 2 and other law, in particular, motor vehicle certificate of title legislation. In each case, there was a dispute as to whether or when title passed to purchasers. The courts in Vermont and Georgia determined that title passed under the rules of Article 2. The court in Ohio disagreed and held that Ohio's Certificate of Motor Vehicle Title Law controlled over the U.C.C. provisions in determining competing title claims.

In *Concord General Mutual Insurance Co. v. Sumner*,[150] each of two insurers claimed that the other's insured was the owner of a vehicle involved in an

145. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 1124.
146. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 1124.
147. 2001 WL 627428, 45 U.C.C. Rep. Serv. 2d (West) 51, 53-54 (D. N.D. 2001).
148. *Id.*, 45 U.C.C. Rep. Serv. 2d (West) at 54.
149. *Id.*, 45 U.C.C. Rep. Serv. 2d (West) at 54.
150. 762 A.2d 849, 43 U.C.C. Rep. Serv. 2d (West) 875 (Vt. 2000).

automobile accident. Concord's insured, Carey's Auto Sales, had purchased the car from Acadia Insurance Company's insured, Automaster. An employee of Carey's went to Automaster, paid for the car with a Carey's check, put Carey's plate on the car and drove it away. Automaster did not immediately assign the certificate of title to Carey's. The employee was involved in an accident on the way back to Carey's lot. Automaster assigned the certificate of title to Carey's several days after the accident. Concord maintained that without the certificate of title, Carey's was not the owner of the vehicle at the time of the accident, Automaster was. The court rejected this argument.

Reasoning that the Certificate of Title Act was enacted to prevent automobile theft and to protect secured creditors, not to determine ownership claims,[151] and noting that many aspects of the Act do not apply to sales between dealers, the court looked to the provisions of U.C.C. section 2-401 to determine whether title had passed prior to the accident.[152] The court then ruled that section 2-401(2), which provides that title passes when the seller completes its performance as to physical delivery of the goods, applied and not section 2-401(3), which governs title passage when goods are covered by a document of title and will be delivered without moving the goods.[153] Because seller had completed its performance with respect to delivery by giving the buyer's employee possession and permitting the employee to take the car, title had passed and Carey's was the owner. Accordingly, Concord was the appropriate insurer.

In *Right Touch of Class, Inc. v. Superior Bank, FSB*[154] a used car dealership, Right Touch, sold a used car to another dealership whose check was later dishonored. The seller, therefore, withheld the certificate of title. The purchasing dealership sold the car to Ironkwe, who financed the purchase with the plaintiff, Superior Bank.[155] When Right Touch refused to surrender the certificate of title, Superior Bank filed suit to compel it to do so. The court, also relying on section 2-401(2), held that title passed when Right Touch delivered the car to the other dealership because Right Touch had completed its performance with respect to delivering the car.[156] The court further held that ownership of the car did not require the transfer of the certificate of title.[157] The court was additionally persuaded by the fact that Right Touch sold the car to the other dealership with the express purpose of resale of the vehicle to Ironwke and thus, Right Touch's remedy was on the dishonored check against the other dealership.[158] Alternatively, the court noted

151. *See* VT. STAT. ANN. tit. 23, § 2018(d) (1999) (a certificate contains prima facie evidence—not conclusive proof—of the facts appearing on it) (modeled on UNIF. MOTOR VEHICLE CERTIFICATE OF TITLE AND ANTI-THEFT ACT § 9d, 11A U.L.A. 193 (1995)).

152. *Concord Gen. Mut. Ins. Co.*, 762 A.2d at 850-51, 43 U.C.C. Rep. Serv. 2d (West) at 876-78.

153. *Id.* at 851, 43 U.C.C. Rep. Serv. 2d (West) at 877-78.

154. 536 S.E.2d 181, 44 U.C.C. Rep. Serv. 2d (West) 1055 (Ga. Ct. App. 2000).

155. In fact, the entire transaction was arranged by Right Touch, which had attempted to sell the car directly to Ironkwe, but was unable to arrange financing. Right Touch then sold the car to the second dealership, which arranged financing and sold the car to Ironkwe. *Id.* at 182-83, 44 U.C.C. Rep. Serv. 2d (West) at 1056.

156. *Id.* at 183, 44 U.C.C. Rep. Serv. 2d (West) at 1056-57.

157. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 1057.

158. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 1056.

that Right Touch had entrusted the car to the purchasing dealership, which could then transfer good title to a buyer in ordinary course under section 2-403(2).[159]

In *Saturn of Kings, Automall, Inc. v. Mike Albert Leasing, Inc.*, the Ohio Supreme Court held that title had not passed when a selling dealership retained the certificates of title to five cars pending payment, even though the buying dealership had taken possession and, in some instances, had resold the vehicles.[160] Because the buying dealership filed for bankruptcy, the court had to determine whether the original dealership or the subsequent purchaser was the owner of the disputed vehicles.[161]

The court looked at the language of the Ohio Certificate of Motor Vehicle Title Law, which is apparently not based on the Uniform Certificate of Title and Anti-Theft Act and which prevents a transferee from acquiring any rights to a car prior to receiving the certificate of title therefor,[162] and the provisions of Article 2 governing entrusting of goods to merchants.[163] The court apparently considered these statutes as in conflict, even though nothing in Article 2's entrusting rules really indicates that the entrustee acquires property rights in entrusted goods, merely a power to convey such rights. The court also considered the purposes of the Certificate of Title Law, which included the creation of an instrument evidencing title to, and ownership of, motor vehicles. Holding that the certificate of title law was designed to apply to disputes between rival claimants to title to motor vehicles, the court concluded that its provisions determined ownership in this case and not the U.C.C.[164] Accordingly, the unpaid seller, who still retained the certificates of title to the vehicles, was the rightful owner of the vehicles.[165]

159. *Id.*, 44 U.C.C. Rep. Serv. 2d (West) at 1057.

160. 751 N.E.2d 1019, 1025, 45 U.C.C. Rep. Serv. 2d (West) 478, 486 (Ohio 2001).

161. *Id.* at 1021, 45 U.C.C. Rep. Serv. 2d (West) at 480.

162. *See* OHIO REV. CODE ANN. § 4505.04(A) (Anderson 1999) ("No person acquiring a motor vehicle from its owner, whether the owner is a manufacturer, importer, dealer, or any other person, shall acquire any right, title, claim, or interest in or to the motor vehicle until there is issued to the person a certificate of title to the motor vehicle").

163. *See* U.C.C. § 2-403(2) (2002) (providing one who entrusts a merchant with goods gives the merchant power to transfer the entruster's rights to a buyer in the ordinary course of business).

164. *Saturn of Kings Automall, Inc.*, 751 N.E. 2d at 1025, 45 U.C.C. Rep. Serv. 2d (West) at 486.

165. *Id.*, 45 U.C.C. Rep. Serv. 2d (West) at 486.