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## Uniform Commercial Code Survey, Sales

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## Uniform Commercial Code Survey—Sales

By Jennifer S. Martin and Robyn L. Meadows\*

### SCOPE OF ARTICLE 2

Article 2 applies to “transactions in goods”<sup>1</sup> and defines “goods” to include tangible personal property that is movable at the time it is identified to the contract.<sup>2</sup> Courts tend to read section 2-102 more narrowly than its text invites, applying Article 2 only to present sales of goods and to contracts for the future sale of goods.<sup>3</sup>

In mixed-sales transactions, such as those involving goods and services, most courts apply a predominant purpose test, under which Article 2 applies if the transaction is predominantly about the sale of goods but Article 2 does not apply if the transaction is predominantly about the provision of services.<sup>4</sup> Several courts struggled with this issue over the past year.

In *Franklin Publications, Inc. v. General Nutrition Corp.*,<sup>5</sup> the court determined whether a contract for the publication and distribution of health and nutrition magazines was one for the sale of goods.<sup>6</sup> General Nutrition Corp. (“GNC”) contracted with Franklin Publications, Inc. (“Franklin”), to publish two magazines and distribute them to certain GNC customers. GNC supplied Franklin with the customer names and addresses. Franklin sold advertising space in the magazines to companies whose products were sold in GNC stores. The contract required Franklin to prepare editorial content, design the magazines, and print them.

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1. See U.C.C. § 2-102 (2002). Neither Article 2 nor Article 1 defines “transaction.” Citations to U.C.C. Article 2 are to the version of Article 2 prior to the amendments promulgated in 2003.

2. See *id.* § 2-105(1).

3. While the term “transactions” appears to include more than just present and future sales, the courts’ approach is not without support in Article 2. Section 2-106 begins, “In this Article unless the context otherwise requires ‘contract’ and ‘agreement’ are limited to those relating to the present or future sale of goods.” *Id.* § 2-106(1). Because most of the substantive provisions in Article 2 apply to contracts or agreements, it is logical for courts to focus on contracts or agreements for the present or future sale of goods.

4. See, e.g., *Brandt v. Boston Scientific Corp.*, 792 N.E.2d 296, 299 (Ill. 2003).

5. 63 U.C.C. Rep. Serv. 2d (West) 662 (S.D. Ohio 2007).

6. See U.C.C. § 2-105(1) (2002) (noting “‘goods’ means all things . . . which are movable at the time of identification to the contract”).

*Associated Home and RV Sales, Inc. v. R. Vision, Inc.*,<sup>26</sup> considered a claim by Associated Home and RV Sales, Inc. ("AHI"), that several orders for recreational vehicles on RV Sales, Inc. ("RVI"), order forms satisfied this merchants-must-read-their-mail exception to the statute of frauds. The court concluded that the orders did not qualify for this exception because they did not confirm the existence of an underlying contract.<sup>27</sup> Rather, the forms were merely an offer made by AHI.<sup>28</sup> Moreover, the admissions exception under section 2-201(3) did not apply because the admission was made by an employee after he had been laid off by RVI.<sup>29</sup>

Although the statute of frauds normally requires a written reference to quantity, there are exceptions to the quantity requirement as well as the writing requirement.<sup>30</sup> In *Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*,<sup>31</sup> the court considered contract claims brought by a wallpaper distributor against the manufacturer-seller, who claimed the oral contract was unenforceable both on grounds of the statute of frauds and because it lacked a quantity term. The court disagreed.<sup>32</sup> First, the court rejected the manufacturer's argument that the agreement was unenforceable because it lacked a specific quantity term.<sup>33</sup> The court regarded the agreement as a requirements contract, which section 2-306 validated because the agreement called for a quantity measured by the buyer's historic purchases from the manufacturer's predecessor and the buyer's ongoing good-faith requirements of products.<sup>34</sup> The court then rejected the statute of frauds defense for two reasons. First, it noted that there is an exception to Article 2's statute of frauds exists if the defendant admits in court that a contract was made, which the seller had done in this case.<sup>35</sup> Second, the court concluded that correspondence between the parties taken collectively recognized the existence of the oral contract.<sup>36</sup>

## CONTRACT FORMATION

Sections 2-204 through 2-207 govern contract formation under Article 2. While much attention centers on 2-207, *Scoular Co. v. Denney*<sup>37</sup> turned on the application of sections 2-205 and 2-206. Denney, a grain farmer, discussed a forward contract

26. 62 U.C.C. Rep. Serv. 2d (West) 180 (D.N.M. 2006).

27. *Id.* at 191.

28. *Id.* at 192.

29. *Id.* at 194.

30. See U.C.C. § 2-201(1) (2002).

31. 864 N.E.2d 518 (Mass. App. Ct. 2007).

32. *Id.* at 532-33.

33. *Id.* at 533.

34. See *id.*; see also *Corning Inc. v. VWR Int'l, Inc.*, 62 U.C.C. Rep. Serv. 2d (West) 448, 455 (W.D.N.Y. 2007) (holding statute of frauds satisfied by requirements contract for reusable glass).

35. *Brewster Wallcovering*, 864 N.E.2d at 534 (relying on U.C.C. section 2-201(3)(b) (2002)). But see *Hopper Dev., Inc. v. John T. Arnold & Assocs., Inc.*, 63 U.C.C. Rep. Serv. 2d (West) 557, 560 (Kan. Ct. App. 2007) (holding admissions exception to statute of frauds was unavailable where broker died before proceedings, even if broker would have made admission if alive).

36. *Brewster Wallcovering*, 864 N.E.2d at 535. Under the merchant's exception, Blue Mountain failed to object to the memorandum provided by Brewster. *Id.* at 534 n.42.

37. 151 P3d 615 (Colo. Ct. App. 2007).

for millet with Scoular whereby Denney would deliver the millet to the grain elevator at a later date for a price of \$5 per hundredweight. Although Scoular told Denney that the \$5 price was not available, Scoular nevertheless relied on Denney's asking price and entered into a resale contract for the grain. After unsuccessfully trying several times to reach Denney by telephone, Scoular finally spoke with Denney a month later and followed up on that conversation by mailing Denney a signed contract. Denney did not check his mail and eventually sold the millet to another grain operator after the market price had trebled. Scoular sued for breach of contract.<sup>38</sup>

Scoular argued that Denney's price quotation constituted the offer, which Scoular accepted by arranging to sell the millet.<sup>39</sup> The court of appeals agreed with the trial court that, although Denney had not made a firm offer within the meaning of section 2-205 because his offer was not in writing, his offer could nevertheless have formed the basis of a valid contract if timely accepted.<sup>40</sup> The court, though, rejected the argument that Scoular had accepted the contract when it sold the millet.<sup>41</sup> Instead, the court ruled that even if the sale to the thirty-party buyer was the beginning of acceptance under section 2-206(2), Scoular had not earmarked Denney's millet as the source of the millet sold to that buyer.<sup>42</sup> The court noted that the U.C.C. does not generally alter the rule that the offeree must communicate its acceptance to the offeror, except where such notice can be delayed because the beginning of performance is the acceptance.<sup>43</sup> The court then remanded the case back to the trial court to determine whether Scoular accepted Denney's offer during their telephone conversation.<sup>44</sup> If so, the court noted, the merchants-must-read-their-mail exception to the statute of frauds would apply.<sup>45</sup>

In *Corestar International Pte. Ltd. v. LPB Communications, Inc.*<sup>46</sup>—a case hinging on section 2-207—the court held that a seller's e-mail price quotation for radio transmitters was an offer, which the buyer accepted by sending a purchase order for the quoted quantity and price.<sup>47</sup> Employing three arguments, the seller sought to avoid the application of provisions contained in the buyer's purchase order, including one allowing cancellation.<sup>48</sup> First, the seller argued that its price quotation expressly limited acceptance to the terms of the offer by stating that "the price and terms on the quotation are not subject to verbal changes or other agreements

38. *Id.* at 617.

39. *Id.* at 618.

40. *Id.* (citing U.C.C. § 2-205 cmt. 2 (2002)).

41. *Id.* at 619.

42. *Id.* at 620.

43. *Id.* at 619.

44. *Id.* at 618.

45. *Id.* at 621 (citing U.C.C. § 2-201(2) (2002)).

46. 513 F. Supp. 2d 107 (D.N.J. 2007).

47. *See id.* at 116–17; *see also* *BCH Am., Inc. v. DEKO Int'l Co., Ltd.*, 62 U.C.C. Rep. Serv. 2d (West) 99, 103 (Conn. Super. Ct. 2007) (holding inclusion of additional term specifying brand "Habei Welcome" did not prevent the seller's confirmation from operating as an acceptance under U.C.C. section 2-207(1)).

48. *Corestar Int'l*, 513 F. Supp. 2d at 116–17.

unless approved in writing by the Seller."<sup>49</sup> The court disagreed, holding that the seller's language prohibited changes to the seller's terms, not additional terms.<sup>50</sup> Second, the seller argued that the buyer's terms requiring reference to the purchase order and reserving the right to cancel the order if not delivered in the time specified were material alterations of its offer.<sup>51</sup> The court disagreed, concluding that these were consistent additions to the offer because the price quotation did not address cancellation and had included a delivery schedule and specifications.<sup>52</sup> Finally, the court found that the seller had not objected to the additional terms in the purchase order.<sup>53</sup> As a result, the additional terms became part of the parties' contract.<sup>54</sup>

In *Fiser v. Dell Computer Corp.*,<sup>55</sup> Fiser ordered a Dell computer on Dell's web site. The terms and conditions, accessible by a hyperlink on the web site that Fiser used to purchase the computer and by hyperlinks in an e-mail sent to Fiser, included an arbitration clause. Dell also sent the terms and conditions when it shipped the computer. After a dispute arose, Fiser sued to recover, inter alia, for breach of contract and breach of express and implied warranties. Dell moved to compel arbitration. Dell argued that Fiser accepted the terms in its offer because Fiser had notice of the arbitration clause through the hyperlinks and e-mail and thus the court should enforce the arbitration provision. The court granted Dell's motion and the appellate court affirmed.<sup>56</sup>

The court of appeals left open the issue of whether "browse wrap" agreements of the type used by Dell constitutes sufficient notice and assent by the buyer since Fiser's conduct in keeping the computer after receiving the terms and conditions was his acceptance. Siding with courts that have concluded that section 2-207 does not apply to disputes where terms accompany the goods, the court concluded that section 2-204 governed contract formation where buyers accept contract terms by keeping goods after receiving written terms and conditions.<sup>57</sup> The court stated, "A consumer who purchases goods and is informed of the contractual terms when the product is delivered, and is given a specified number of days in which to return the product, is deemed to have accepted the terms unless the product is returned."<sup>58</sup> Then, the court rejected Fiser's argument that a contract was formed when Dell accepted the order<sup>59</sup> and, instead, viewed Fiser's act of retaining the Dell computer after receiving the terms and conditions as the

49. See *id.* at 110; see also *DTE Energy Techs., Inc. v. Briggs Elec., Inc.*, 62 U.C.C. Rep. Serv. 2d (West) 530, 537 (E.D. Mich. 2007) (rejecting seller's argument that similar provisions constituted an express rejection).

50. *Corestar Int'l*, 513 F. Supp. 2d at 118.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. 165 P.3d 328 (N.M. Ct. App. 2007).

56. *Id.* at 331.

57. *Id.* at 335 (citing *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997)).

58. *Id.*

59. *Id.*

acceptance of the contract.<sup>60</sup> The court therefore joined the majority of jurisdictions that uphold arbitration provisions when delivered with the product.

### CONTRACT MODIFICATION

Article 2 expressly recognizes both the enforceability of a clause prohibiting subsequent oral modification<sup>61</sup> and the possibility that the parties may waive such a clause.<sup>62</sup> In *Italverde Trading, Inc. v. Four Bills of Lading Numbered LRNNN 120950, LRNNN 122950, LRNN 123580, and MLSNV 254064*,<sup>63</sup> the court found a question of material fact existed and denied summary judgment as to whether the parties to a pasta sales contract waived the no-oral-modification provision in their written agreement and orally modified their contract. After the freight forwarder seized the pasta and claimed it in payment of a debt to the forwarder's subsidiary, the manufacturer, Delverde SpA ("Delverde"), sought to establish that title had passed to the buyer, Italverde Trading, Inc. ("Italverde"), upon delivery to the shipper.<sup>64</sup> The contract provided that Italverde would not gain title to the pasta until Italverde received it, but Italverde argued that the parties waived this provision.<sup>65</sup> First, Italverde noted that Delverde shipping invoices used the delivery term "CIF."<sup>66</sup> The court found this evidence inconclusive because the effect of the CIF term depended on whether the parties understood the term as being used under the International Commercial Terms ("INCOTERMS"), which do not govern title, or the U.C.C., which would.<sup>67</sup> Second, the Italverde chief executive officer ("CEO") testified that he understood that Italverde had title to the pasta when it was positioned on the ship.<sup>68</sup> The court concluded that the inclusion of the CIF term on invoices, the lack of objection by Italverde, and the testimony of the CEO were insufficient to establish as a matter of law that the parties had waived the no-oral-modification provision.<sup>69</sup> At trial, Italverde and Delverde would have the burden of proof to show the parties waived the transfer-of-title provision.<sup>70</sup>

### OPEN PRICE TERM

Section 2-305 allows parties to contract before they have agreed upon a price.<sup>71</sup> If the agreement gives either party the right to fix the price, the party so authorized

60. *Id.* at 336.

61. See U.C.C. § 2-209(2) (2002); see also *Jackson & Perkins Wholesale, Inc. v. Smith Rose Nursery, Inc.*, 63 U.C.C. Rep. Serv. 2d (West) 115, 119 (D. Or. 2007) (upholding express clause against oral modifications).

62. U.C.C. § 2-209(4) (2002).

63. 485 F. Supp. 2d 187 (E.D.N.Y. 2007).

64. *Id.* at 190–91.

65. *Id.* at 196.

66. *Id.* at 199.

67. See *id.* at 200; see also U.C.C. § 2-320 cmt. 1 (2002) (stating that "[d]elivery to the carrier is delivery to the buyer for purposes of risk and title").

68. *Id.* at 201.

69. *Id.*

70. *Id.*

71. U.C.C. § 2-305(1) (2002).

must fix the price in good faith.<sup>72</sup> In *Exxon Mobil Corp. v. Gill*,<sup>73</sup> the court ruled that the trial court properly certified a class of buyers who alleged that Exxon's practice of adding its cost of rebates back into the price charged to buyers amounted to a failure to set the price of goods in good faith.<sup>74</sup> The buyers, Exxon service station dealers, alleged that Exxon added its cost of certain rebates—based on sales volume and hours of operation—back into the price for the gasoline under the open price term, thereby depriving the station owners of the benefit of the rebate programs.<sup>75</sup> The court held that, if this was found to constitute "a commercial injury distinct from the price increase itself," it would be a violation of the seller's obligation to set the price in good faith.<sup>76</sup>

## WARRANTIES

### WARRANTY OF TITLE

Section 2-312's warranty of title obliges merchants to warrant goods against rightful claims by third parties of infringement.<sup>77</sup> The court in *Big Lots Stores, Inc. v. Luv N' Care*<sup>78</sup> considered this less litigated provision of the U.C.C. Luv N' Care sold Beatrix Potter products to Big Lots Stores, Inc. ("Big Lots"), after the expiration of its license from Frederick Warne & Co., Inc. Big Lots brought suit for breach of warranty and Luv N' Care counterclaimed to recover on unpaid invoices.<sup>79</sup> Although Luv N' Care tried to cast the sale as within the license period, the court granted summary judgment to Big Lots on the issue of infringement and required Luv N' Care to indemnify Big Lots on any damages from the sale of the infringed products.<sup>80</sup> The court did allow Luv N' Care's claim for set off of the unpaid invoices.<sup>81</sup>

### EXPRESS WARRANTIES

In *Brothers v. Hewlett-Packard Co.*,<sup>82</sup> the question for the court on a motion for summary judgment was whether Hewlett-Packard ("HP") made an Article 2 express warranty when it made available to the public a technical specification document and maintenance and service brochures regarding its Pavilion computer ("HP statements"). The HP statements indicated that the computer was compatible with certain graphics cards allowing users to attain a certain level of graphics functions on their computers. Other statements made by HP were that the computer

72. *Id.* § 2-305(2).

73. 221 S.W.3d 841 (Tex. App. 2007).

74. *Id.* at 864-65.

75. *Id.* at 846.

76. *Id.* at 851 (internal quotation marks omitted).

77. U.C.C. § 2-312(3) (2002).

78. 62 U.C.C. Rep. Serv. 2d (West) 522 (S.D. Ohio 2007).

79. *Id.* at 527-28.

80. *Id.* at 529.

81. *Id.*

82. 62 U.C.C. Rep. Serv. 2d (West) 76 (N.D. Cal. 2007).

would provide the “most cinematic graphics and special effects.”<sup>83</sup> The plaintiffs alleged that the graphics cards proved to be incompatible with their computers, rendering them inoperable.<sup>84</sup> The court not only found that the plaintiffs sufficiently made out a case for breach of express warranties but also concluded that HP could not argue that it had disclaimed the express warranties in the brochures because that would be unfair.<sup>85</sup>

### IMPLIED WARRANTIES

In several interesting cases, courts had to determine whether the seller had breached an implied warranty. In *Townsend v. Boat and Motor Mart*,<sup>86</sup> the court considered the case of an Osprey 30 boat sold as new but with substandard hull patches that could have resulted in catastrophic failure and which created a substantial likelihood that they would leak or pop out in the future.<sup>87</sup> The court found the sale violated the implied warranties of merchantability and fitness for particular purpose because the boat was neither fit for the ordinary purpose of sports fishing nor for the plaintiff's particular sports fishing needs.<sup>88</sup> In *Hoyte v. Yum! Brands, Inc.*,<sup>89</sup> the court held that KFC food did not violate the implied warranty of merchantability, rejecting a physician's claims that the food was not fit for human consumption due to the trans fats in the food. The court concluded that the presence of such fats might be within the reasonable expectations of consumers and, in any event, the physician had not suffered injury.<sup>90</sup> Finally, in *Bodie v. Purdue Pharma Co.*,<sup>91</sup> the Eleventh Circuit affirmed the trial court's grant of summary judgment for the pharmaceutical company on Bodie's claims that OxyContin, a narcotic prescribed for his back pain, violated the warranty of merchantability due to its addictive nature. The court ruled as it did because the drug was fit for its intended pharmacological purpose of treating pain.<sup>92</sup>

### PRIVITY OF CONTRACT

Many courts require privity of contract for a successful breach of implied warranty claim. In *Jensen v. Bayer AG*,<sup>93</sup> the court ruled that the plaintiffs who took a prescription cholesterol drug that was later removed from the market could not

83. *Id.* at 81.

84. *Id.*

85. *Id.* at 82.

86. 62 U.C.C. Rep. Serv. 2d (West) 726 (Cal. Ct. App. 2007).

87. *Id.* at 729–30.

88. *See id.* at 736.

89. 489 F. Supp. 2d 24 (D.D.C. 2007).

90. *Id.* at 27–28. Additionally, KFC statements that it served the “best food” were non-actionable puffery. *See id.* at 30; *see also In re McDonald's French Fries Litig.*, 503 F. Supp. 2d 953, 957 (N.D. Ill. 2007) (holding there was no warranty of merchantability claim for French fries because they satisfied their ordinary purpose).

91. *Bodie v. Purdue Pharma Co.*, 236 F. App'x 511 (11th Cir. 2007).

92. *Id.* at 524.

93. 862 N.E.2d 1091 (Ill. App. Ct. 2007).



assert an action based on the implied warranty of merchantability against the manufacturer because they bought the drug from the pharmacy and, therefore, lacked privity with the defendant.<sup>94</sup>

### ENTRUSTING GOODS TO A MERCHANT

The Supreme Court of Connecticut decided an interesting case involving the unauthorized sale of an Andy Warhol painting (Red Elvis) by an art dealer to an experienced and knowledgeable art collector.<sup>95</sup> The plaintiff, Kerstin Lindholm, and her husband had an extensive and lengthy business relationship with Anders Malmberg, a reputable art dealer. In 1987, Lindholm purchased the Red Elvis from Malmberg. Over the next decade, through Malmberg, Lindholm lent the painting to several museums to be displayed. When the painting was on display, it was to be designated as owned by a private collector "courtesy Anders Malmberg," although the loan documents indicated that Lindholm owned the work.<sup>96</sup>

Peter Brant, the buyer and defendant in the action, was an art collector and a member of the Guggenheim Museum Board of Trustees. Lindholm loaned the Red Elvis to the Guggenheim in 1996, so Brant was aware that she owned the painting at that time. In 1998, Lindholm, due to a pending divorce, requested that Malmberg assist her in selling some of her works of art, but not the Red Elvis. Nevertheless, Malmberg represented to Brant that he owned the Red Elvis and subsequently agreed to sell it to Brant for \$2.9 million.<sup>97</sup>

Brant hired an attorney to ensure that he would receive title to the painting and particularly to determine if Lindholm's husband was asserting any claim or lien on the painting. The attorney conducted a lien search and a search of an international database of stolen and missing works of art, which revealed no outstanding claims, although the attorney advised Brant that this provided only "minimal assurances" of good title. The attorney requested a copy of the invoice through which Malmberg purchased the painting, but Malmberg refused, maintaining such invoices are not customarily disclosed in art sales. Another dealer who was acting as an intermediary between Malmberg and Brant's counsel prepared a letter to be signed by Lindholm stating she had good title to the painting when she sold it to Malmberg. Although the other dealer showed the unsigned letter to Brant's counsel, he did not provide a signed copy of the letter.<sup>98</sup>

Despite Malmberg's refusal to provide the requested documentation, Brant proceeded with the purchase. Malmberg arranged to deliver the painting to a Danish bonded warehouse and Brant agreed to pay once the painting was delivered. To acquire the painting, Malmberg convinced Lindholm to display the painting at an exhibit in Copenhagen. Lindholm authorized the release of the Red Elvis by the

94. *Id.* at 1099–1100.

95. *Lindholm v. Brant*, 925 A.2d 1048 (Conn. 2007).

96. *Id.* at 1050–51.

97. *Id.* at 1051–52.

98. *Id.* at 1052.

Guggenheim to Malmberg's custody for delivery to the Danish museum. Malmberg instead had it delivered to the warehouse and completed the sale to Brant.<sup>99</sup>

When Lindholm later learned of the sale, she sued Brant alleging the sale was unauthorized and thus Brant did not have title. Brant asserted he was a buyer in the ordinary course of business who bought the painting from a merchant to whom it had been entrusted under U.C.C. section 2-403(2).<sup>100</sup> The parties conceded that Malmberg was a merchant with respect to works of art and that Lindholm entrusted the painting to him when she authorized the release of the painting to him.<sup>101</sup> However, Lindholm argued that Brant could not be a buyer in the ordinary course of business<sup>102</sup> because he did not act in good faith, which required that he, as a merchant, act honestly and observe reasonable commercial standards of fair dealing in buying the painting.<sup>103</sup>

Brant introduced expert testimony that art transactions are frequently "completed on a handshake and an exchange of an invoice," that it was not customary for a buyer to obtain corroborating evidence of the dealer's authority to sell, and that it was customary for buyers to rely on the representations of art dealers.<sup>104</sup> Despite the expert testimony, the court found that this was no ordinary sale, and the buyer, Brant, had good reasons to question Malmberg's title.<sup>105</sup> The court determined that a "merchant buyer has a heightened duty of inquiry when a reasonable merchant would have doubts or questions regarding the seller's authority to sell."<sup>106</sup>

The appellate court ruled, however, that the trial court could have reasonably found that Brant had met this higher duty of inquiry by hiring a lawyer to do a search, inquiring as to the painting's ownership, and receiving assurances from Malmberg that he had bought the painting from Lindholm because she needed money for her divorce.<sup>107</sup> Additionally, Brant's concerns about Malmberg's ownership were allayed when Malmberg had the painting delivered to the bonded warehouse because Brant knew the Guggenheim's policy was to release loaned works of art only to the true owner or one authorized by the true owner.<sup>108</sup> The court noted that it was bound by Article 2 to consider the customary practices of the art industry, which do not require documentary proof of ownership, even if the

99. *Id.* at 1052–53.

100. *Id.* at 1054. Entrusting possession of goods to a merchant who regularly deals in that kind of good gives the merchant the power to transfer the owner's rights to a buyer in the ordinary course of business. U.C.C. § 2-403(2) (2002).

101. *Lindholm*, 925 A.2d at 1056.

102. A buyer in the ordinary course of business is defined as one who "buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind." U.C.C. § 1-201(9) (2003).

103. See *Lindholm*, 925 A.2d at 1056; see also U.C.C. § 2-103(1)(b) (2002).

104. *Lindholm*, 925 A.2d at 1056–57.

105. *Id.* at 1057–58.

106. *Id.* at 1058.

107. *Id.* at 1059.

108. *Id.*

court might consider the wiser practice to be otherwise.<sup>109</sup> Deferring to the unique custom and practices in the art world, the court found Brant qualified as a buyer in the ordinary course of business who had acquired good title.<sup>110</sup>

### BREACH

The case of *Upton v. Ginn*<sup>111</sup> raised the question of what constitutes anticipatory repudiation. The buyer of tobacco at an auction requested an adjustment of the contract price because he believed 10,000–12,000 pounds of high quality tobacco had been removed from the warehouse and replaced with poor quality “junk” tobacco after the auction. Despite this, the buyer began removing tobacco, having already paid one half the price upon learning he was the winning bidder of the auction. The buyer had to stop removing tobacco for several days because of an earlier commitment to a trade show. At that point, approximately 90,000 pounds of tobacco remained in the warehouse. When the buyer’s agent returned to the warehouse after the show, the warehouse door was chained and locked. The buyer then learned that the seller had sold the remaining tobacco to a third party. The seller sued the buyer seeking the difference between the contract price and the resale price, alleging the buyer had repudiated the contract. The trial court rejected the seller’s arguments and awarded the buyer the amount of the purchase price paid to the seller that represented the price of the undelivered tobacco.<sup>112</sup>

The appellate court affirmed.<sup>113</sup> It began its analysis by noting that whether a party has repudiated a contract is a question of fact, which would not be disturbed unless it was clearly erroneous.<sup>114</sup> It then looked to the Official Comment to section 2-610, which states that an anticipatory repudiation is an “overt communication of intention or an action which renders performance impossible or demonstrates clear determination not to continue with performance.”<sup>115</sup> From this, the court concluded that to constitute a repudiation, the words or conduct alleged must be “unequivocal.”<sup>116</sup> The court looked to the buyer’s testimony, which besides the admission that he was demanding a price adjustment, also indicated he never intended to repudiate the deal or abandon the remaining tobacco.<sup>117</sup> The buyer testified that there were forty to fifty pallets loaded and awaiting transport and numerous empty pallets to be used to load additional tobacco left at the warehouse when his employees had to stop removing tobacco because of the trade show.<sup>118</sup> The court also noted that the dispute was over less than 2 percent

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109. *Id.*

110. *Id.* at 1060.

111. 231 S.W.3d 788 (Ky. Ct. App. 2007).

112. *Id.* at 790. The court also ruled that even if the buyer had repudiated, the seller was precluded from recovering because it had failed to give the buyer notice of the resale. *Id.*

113. *Id.* at 789.

114. *Id.* at 790–91.

115. *Id.* at 791 (quoting U.C.C. § 2-610 cmt. 1 (2002)).

116. *Id.*

117. *Id.*

118. *Id.* at 790.

of the total tobacco sold and that “junk” tobacco was not sold to the second buyer either.<sup>119</sup>

The seller then argued that buyer’s conduct in demanding a price adjustment was a repudiation of the contract and that his refusal to remove the tobacco was a breach of the entire contract.<sup>120</sup> The court rejected this argument, reasoning that section 2-610 requires that any repudiation must substantially impair the value of the contract to the non-breaching party in order to justify the non-breaching party treating the contract as having been breached.<sup>121</sup> The seller provided no evidence that the refusal to take a small quantity of tobacco substantially impaired the value of the contract to it.<sup>122</sup> Finding no error, the court affirmed the trial court’s judgment.<sup>123</sup>

## REMEDIES

Revocation of acceptance was the issue in several cases this past year. In *Lile v. Kiesel*,<sup>124</sup> the Indiana Court of Appeals upheld a trial court ruling that the buyers of a camping trailer, which had significant leaking that led to rust damage, were entitled to revoke their acceptance and recover the purchase price.<sup>125</sup> The court found that the leaks and rust substantially impaired the value of the trailer to the buyers and would have been difficult to discover before acceptance because the leaks became apparent only after it rained.<sup>126</sup> The buyers also properly notified the seller of the problems within one week, which was “undoubtedly” within a reasonable time.<sup>127</sup> The court further rejected the seller’s argument that the buyer failed to act in good faith by refusing to permit cure of the defects under U.C.C. section 2-508.<sup>128</sup> The court first noted that section 2-508 specifically applies to the right to cure after rejection, while this dispute involved revocation of acceptance.<sup>129</sup> The court then found that the buyers had acted in good faith because they provided the seller an opportunity to correct the problem even though they were not required to do so, but the seller did not cure the defects.<sup>130</sup>

In *Asia Pulp & Paper Trading (USA), Inc. v. Innovative Converting, Inc.*,<sup>131</sup> the court addressed when a buyer is required to return goods to a seller after revocation of

119. *Id.* at 792.

120. *Id.*

121. *See id.*; *see also* U.C.C. § 2-610(b) (2002) (providing when a repudiation substantially impairs the value of the contract to a party, that party may resort to any remedy for breach).

122. *Upton*, 231 S.W.3d at 792.

123. *Id.* at 793.

124. 871 N.E.2d 995, 997–98 (Ind. Ct. App. 2007).

125. *See* U.C.C. § 2-608 (2002) (stating buyer may revoke if defects substantially impair value of good to buyer and good was accepted without knowledge of defect because of difficulty of discovery).

126. *Lile*, 871 N.E.2d at 998.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. 62 U.C.C. Rep. Serv. 2d (West) 297 (D.N.J. 2007).

acceptance. Section 2-608 denies the buyer a right to revoke acceptance of goods if there has been a substantial change in the condition of the goods not caused by their own defect.<sup>132</sup> In discussing this rule, Official Comment 6 notes that worthless goods need not be offered back to the seller and minor defects in reoffered goods should be disregarded.<sup>133</sup> Based on this comment, the seller argued that the buyer's revocation was invalid because the buyer did not return the defective goods (paper) to the seller. The buyer countered that the only value of the goods was salvage value, and thus the goods should be regarded as worthless within the meaning of the comment.<sup>134</sup> The court indicated the parties missed the point: a revoking buyer has the same rights and duties with respect to the goods as a rejecting buyer,<sup>135</sup> and thus if the seller gives no instructions on return of the goods, the buyer is entitled to resell the goods for the seller's account.<sup>136</sup> The court then denied summary judgment and left for resolution at trial whether the seller had sought to recover the goods and whether the goods had been processed before they were sold for salvage.<sup>137</sup>

Parties are generally free to limit their remedies, but if a limited remedy fails of its essential purpose, Article 2's normal remedies kick in.<sup>138</sup> In several cases, courts faced the issue of whether a limited remedy failed of its essential purpose. In *Enron Wind Energy Systems, LLC v. Marathon Electric Manufacturing Corp.*,<sup>139</sup> the sales contract contained a term providing that a limited remedy could not fail of its essential purpose as long as the seller retained the right to provide the buyer with a cash refund.<sup>140</sup> The court denied, however, the seller's motion to dismiss the buyer's claim that the remedy had failed because an issue remained as to whether the seller's refusal to provide a refund or repair the goods over more than three years terminated the seller's right to provide a cash refund.<sup>141</sup>

Another court determined that if a "repair or replace" remedy failed of its essential purpose, a buyer may be entitled to recover incidental and consequential damages even though a separate provision in the contract disclaimed those damages.<sup>142</sup> The buyer, a limited liability company created to own a pleasure yacht, alleged the yacht it purchased from the defendant was so defectively designed and built that it was irreparable.<sup>143</sup> After six months of the seller's failed attempts to make repairs the buyer returned the yacht and sued seeking not only a return of the purchase price but incidental and consequential damages, including crew salaries, travel

132. U.C.C. § 2-608 cmt. 6 (2002).

133. *Id.*

134. *Asia Pulp*, 62 U.C.C. Rep. Serv. 2d (West) at 299.

135. *Id.* (citing U.C.C. § 2-608(3) (2002)).

136. *Id.*

137. *Id.* at 300.

138. *See* U.C.C. § 2-719(2) (2002).

139. *In re Enron Corp.*, 367 B.R. 384 (Bankr. S.D.N.Y. 2007).

140. *Id.* at 395.

141. *Id.* at 395-96.

142. *Lady Di Fishing Team, LLC v. Brunswick Corp.*, No. 3:07-cv-402-J-33TEM, 2007 WL 320271 at \*7-8 (M.D. Fla. Oct. 29, 2007).

143. *Id.* at \*2

expenses, loss of use, and dockage fees.<sup>144</sup> Denying the seller's motion to dismiss, the court accepted the argument that an exclusion of incidental and consequential damages may be disregarded if the exclusive remedy provided in the contract failed of its essential purpose.<sup>145</sup>

A different court reached the opposite result in *Polymer Dynamics, Inc. v. Bayer Corp.*<sup>146</sup> The court held that a limitation on remedy and an exclusion of consequential damages were independent contract provisions.<sup>147</sup> To determine enforceability of a limited remedy, the court evaluates whether it fails of its essential purpose.<sup>148</sup> To decide enforceability of the consequential damages limitation, the court uses an unconscionability test.<sup>149</sup> Even if the limited remedy failed, the consequential damages limitation would be enforceable if not unconscionable.<sup>150</sup>

### STATUTE OF LIMITATIONS

Plaintiffs who delay filing a lawsuit only to come up against the statute of limitations often make creative arguments to avoid the dismissal of their suits as time barred. In *Lands v. Lull International, Inc.*,<sup>151</sup> the Alabama Supreme Court rejected the argument that a promise to repair a defect in a forklift, whether it was in or out of warranty, made in a service bulletin sent after delivery of the good constituted a warranty of future performance, thus delaying the commencement of the limitations period to discovery of the breach.<sup>152</sup> The court distinguished between warranties that explicitly guarantee the performance of the good in the future and a warranty to repair or replace, which merely recognizes that the good might not perform and offers to repair it if it fails.<sup>153</sup>

In *Wuhu Import & Export Corp. v. Capstone Capital, LLC*,<sup>154</sup> the court rejected the characterization of a "settlement agreement," which adjusted the price of non-conforming goods delivered under the original sales contract, as a separate contract subject to the state's general six-year statute of limitations.<sup>155</sup> It concluded instead

144. *Id.* at \*7.

145. *Id.* at \*8–9.

146. 63 U.C.C. Rep. Serv. 2d (West) 641 (E.D. Pa. 2007).

147. *See id.* at 649–50.

148. *See id.* at 651.

149. *Id.* at 650. Compare U.C.C. § 2-719(2) (2002) (stating when exclusive or limited remedy fails of its essential purpose, U.C.C. remedies may be sought), with *id.* § 2-719(3) (stating consequential damages exclusion or limitation permissible as long as not unconscionable).

150. *Polymer Dynamics*, 63 U.C.C. Rep. Serv. 2d (West) at 651.

151. 963 So. 2d 626, 628, 630 (Ala. 2007).

152. The four-year statute of limitations generally commences when the breach occurs, which for a warranty is usually on tender of delivery of the goods. *See* U.C.C. § 2-725 (2002). The statute of limitations does not begin to run on tender of delivery if "a warranty explicitly extends to future performance of goods and discovery must await the time of such performance," in which case the period begins to run when the breach is or should have been discovered. *Id.* § 2-725(2).

153. *Lands*, 963 So. 2d at 630.

154. 834 N.Y.S.2d 129 (App. Div. 2007).

155. *Id.* at 130.

that the "settlement agreement" was instead merely a modification of the sales contract and thus subject to the four-year statute of limitations in Article 2.<sup>156</sup>

The plaintiff in *Electric Insurance Co. v. Freudenberg-NOK, General Partnership*,<sup>157</sup> convinced the U.S. District Court for the Western District of Kentucky that a claim for indemnity based on the sale of a defective part was a common law claim subject to the general five-year statute of limitations.<sup>158</sup> The plaintiff EIC provided insurance to General Electric Company ("GE"), which had purchased pump seal assemblies for use in GE dishwashers from Freudenberg-NOK, General Partnership ("FNGP"). The goods had allegedly corroded, causing the dishwashers to leak. EIC paid homeowners who asserted property damage claims against GE and then brought a claim for indemnity against FNGP. The claim was based on Kentucky common law and on the contract between GE and FNGP, in which FNGP promised to hold GE harmless from failure of the assemblies.<sup>159</sup> Some of the claims were based on parts delivered more than four years before the action so FNGP argued that the Article 2 statute of limitations barred the action.<sup>160</sup>

The court first noted the split in authority over whether an indemnity claim that arises from a breach of a sales contract is subject to Article 2, with the majority of courts finding that section 2-725 does not apply because the claim is a separate equitable cause of action.<sup>161</sup> Those courts that apply the Article 2 statute of limitations rely on the U.C.C.'s policies of certainty and finality.<sup>162</sup> Because Kentucky courts had not decided the issue, the court considered a recent Kentucky Supreme Court decision in which the court refused to apply the one-year tort limitations period to an indemnity claim, suggesting that Kentucky would follow the majority rule.<sup>163</sup> The court noted Kentucky's recognition of the right of indemnity as an independent right based on restitution, not dependent on statute or contract.<sup>164</sup> The court reasoned that suits outside the four-year window would reward buyers who did not adequately inspect before reselling the goods.<sup>165</sup> Yet, the court found that a buyer's unreasonable failure to inspect would render the buyer equally at fault with the seller and prevent the buyer's recovery in a common law indemnity action because recovery is awarded only against the party who primarily causes the plaintiff's injuries.<sup>166</sup>

156. *Id.*

157. 487 F. Supp. 2d 894 (W.D. Ky. 2007).

158. *Id.* at 900-01.

159. *Id.* at 896.

160. *Id.* at 897.

161. *Id.* For cases following the majority rule, see *Central Washington Refrigeration, Inc. v. Barbee*, 946 P2d 760, 764-65 (Wash. 1997); *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W2d 872, 874-77 (Minn. 1994); *Carrier Corp. v. Detrex Corp.*, 6 Cal. Rptr. 2d 565, 569 (Cal. Ct. App. 1992); and *Barbara Oil Co. v. Kunsas Gas Supply Corp.*, 827 P2d 24, 36-37 (Kan. 1992). For cases applying the minority rule, see *Perry v. Pioneer Wholesale Supply Co.*, 681 P2d 214, 217-19 (Utah 1984), and *Farmers National Bank v. Wickham Pipeline Construction*, 759 P2d 71, 75-77 (Idaho 1988).

162. *Id.* at 898.

163. *Id.*

164. *Id.*

165. *Id.* at 899.

166. *Id.* at 899-900.