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Uniform Commercial Code Survey, Sales

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Sales

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This survey discusses some important and interesting cases decided by the courts under Article 2 of the Uniform Commercial Code (U.C.C.) in 2003. For a discussion of the status of the revision to Article 2, see the Introduction to this Survey.[1]

SCOPE

Courts dealt with the question of whether the U.C.C. applies to a wide variety of transactions. Two cases involved hybrid transactions that were both a sale of goods and the provision of services. In *Brandt v. Boston Scientific Corp.*,[2] a patient sued a hospital for breach of the U.C.C.'s implied warranty of merchantability.[3] The hospital had surgically implanted a defective device into the patient shortly before the manufacturer recalled the device, and the patient developed severe post-surgical complications and ultimately needed to have the device removed.

Noting that the transaction involved both the sale of a "good" and the provision of medical services, the Supreme Court of Illinois applied the predominant purpose test[4] and held that the transaction was primarily for services.[5] Accordingly, the court affirmed the grant of a motion to dismiss the breach of warranty claim against the hospital.[6] The court based its decision on the fact that the purchase price of the device was less than fifteen percent of the hospital bill and on the fact that the patient came to the hospital seeking medical services rather than the acquisition of a good. The court noted that other jurisdictions are divided on this

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1. *See* Robyn L. Meadows, Russell Hakes, and Stephen L. Sepinuck, *The Uniform Commercial Code Survey: Introduction*, 59 BUS. LAW. 1553 (2004).

2. 792 N.E.2d 296, 50 U.C.C. Rep. Serv. 2d (West) 701 (Ill. 2003).

3. *Id.* at 297, 50 U.C.C. Rep. Serv. 2d (West) at 701–02 (citing 810 ILL. COMP. STAT. 5/2-314 (2000)).

4. *Id.*, 50 U.C.C. Rep. Serv. 2d (West) at 704 (citing Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 770 N.E.2d 177, 194–95, 47 U.C.C. Rep. Serv. 2d (West) 1044, 1050–51 (Ill. 2002)).

5. *Id.* at 304, 50 U.C.C. Rep. Serv. 2d (West) at 711.

6. *Id.*

issue,[7] but that the majority of jurisdictions treat this type of transaction primarily as the provision of services.[8]

The U.S. District Court for the District of South Carolina addressed a similar hybrid issue in *Trident Construction Co. v. Austin Co.*[9] The case involved the construction of an airplane hangar. Noting that the contract was a lump-sum contract for the design, manufacture and erection of the hangar, the court found that the predominant purpose of the contract was the sale of the steel and cladding and thus a sale of goods.[10]

Courts decided two cases involving the sale of software. Collectively, these cases continued the trend of treating the sale of prepackaged software predominantly as a sale of goods and the sale of custom created software predominantly as a sale of services. In *Smart Online, Inc. v. Opensite Technologies, Inc.*,[11] a Superior Court in North Carolina held that the U.C.C. applied to a sale of prepackaged software.[12] The court so ruled even though the software was somewhat customized for the purchaser. The court reasoned that software sales occur on a continuum of transactions: from the consumer purchasing a prepackaged piece of software, which the court regarded as clearly a sale of a good, to a purchaser ordering the design of new software, which the court regarded as a sale of services.[13] The court then concluded that the case under consideration was predominantly a sale of goods with some incidental rendering of services.[14]

In contrast, in *Pearl Investments, LLC v. Standard I/O, Inc.*,[15] the U.S. District Court for the District of Maine held that the U.C.C. did not apply to a sale of software.[16] The court reasoned that because the transaction at issue involved creation of software from scratch, with payment on a time and materials basis, it was

7. *Id.* at 301, 50 U.C.C. Rep. Serv. 2d (West) at 707 (citing 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9-2, at 436 (3d ed. 1988); Linda A. Sharp, Annotation, *Liability of Hospital or Medical Practitioner Under Doctrine of Strict Liability in Tort, or Breach of Warranty, for Harm Caused by Drug, Medical Instrument, or Similar Device Used in Treating Patient*, 65 A.L.R.5th 357 (1999)).

8. *Brandt*, 792 N.E.2d at 304, 50 U.C.C. Rep. Serv. 2d (West) at 710 (citing McCombs v. S. Reg'l Med. Ctr., Inc., 504 S.E.2d 747, 749, 37 U.C.C. Rep. Serv. 2d (West) 36, 37 (Ga. Ct. App. 1988); *In re* Breast Implant Prod. Liab. Litig., 503 S.E.2d 445, 452, 38 U.C.C. Rep. Serv. 2d (West) 49 (S.C. 1998); Easterly v. HSP of Tex., Inc., 772 S.W.2d 211, 214, 9 U.C.C. Rep. Serv. 2d (Callaghan) 530, 533 (Tex. Ct. App. 1989); Hector v. Cedars-Sinai Med. Ctr., 225 Cal. Rptr. 595, 602 n.3 (Cal. Ct. App. 1986); Redwine v. Baptist Gen. Convention of the State of Okla., 681 P.2d 1121, 1124, 34 U.C.C. Rep. Serv. (Callaghan) 883, 886 (Okla. Ct. App. 1982); Frostifresh Corp. v. Reynoso, 281 N.Y.S.2d 964, 4 U.C.C. Rep. Serv. (Callaghan) 300 (N.Y. Sup. Ct. 1967); *contra* Skelton v. Druid City Hosp. Bd., 459 So. 2d 818, 821–23, 39 U.C.C. Rep. Serv. (Callaghan) 369, 373–77 (Ala. 1984); Perfetti v. McGhan Med., 662 P.2d 646, 654, 35 U.C.C. Rep. Serv. (Callaghan) 1472, 1477–78 (N.M. Ct. App. 1983)).

9. 272 F. Supp. 2d 566, 51 U.C.C. Rep. Serv. 2d (West) 638 (D.S.C. 2003).

10. *Id.* at 572, 51 U.C.C. Rep. Serv. 2d (West) at 643.

11. 51 U.C.C. Rep. Serv. 2d (West) 47 (Super. Ct. N.C. Bus. Ct. 2003).

12. *Id.* at 54.

13. *Id.* at 52–53.

14. *Id.* (citing Wharton Mgmt. Group v. Sigma Consultants, Inc., 50 U.C.C. Rep. Serv. 2d (West) 678 (Del. Super. Ct. 1990)), *aff'd*, 582 A.2d 936, (Del. 1990); Pearl Invs., LLC v. Standard I/O, Inc., 257 F. Supp. 2d 326, 353, 50 U.C.C. Rep. Serv. 2d (West) 377, 397 (D. Me. 2003); Multi-Tech Sys., Inc. v. Floreat, Inc., 47 U.C.C. Rep. Serv. 2d (West) 924 (D. Minn. 2002)).

15. 257 F. Supp. 2d 326, 50 U.C.C. Rep. Serv. 2d (West) 377 (D. Me. 2003).

16. *Id.* at 353, 50 U.C.C. Rep. Serv. 2d (West) at 397.

primarily a services transaction.[17] Accordingly, the court distinguished cases involving the sale of pre-existing software—with or without modification—which treated such transactions as sales of goods.[18]

Finally, there were three other scope cases of note. In *Farm Bureau Mutual v. Combustion Research Corp.*,[19] the Court of Appeals of Michigan held that the U.C.C. did not apply to a case involving an improperly installed radiant heater that caused the destruction of a building by fire.[20] The claim was brought by an insurer against the manufacturer of the heater, who had initially sold the heater to an entity that later resold it to the insured and installed it. The claim was predicated not on any defect of the heater, but on the fact that the manufacturer had allegedly assisted in a service call and inspected and approved the installation.

The trial court ruled that the claim was subject to U.C.C.'s four-year statute of limitations and therefore time-barred.[21] The court of appeals reversed. It concluded that the predominant purpose of both underlying transactions—the initial sale and the subsequent resale and installation—was the sale of a good rather than the provision of services.[22] Nevertheless, noting that the alleged service call occurred nearly two years after the manufacturer's initial sale and without any contractual duty to install, inspect or service the heater, the court found that there was an issue of fact "regarding whether a duty to warn or disclose, based in tort law and apart from the sale of the heating unit and any related contractual obligations, arose out of [the service call]."[23] Thus, the court reversed the grant of summary judgment and held that the U.C.C. statute of limitations did not apply to the claim because it did not arise from the contract for the sale of the heater.[24]

In *M.S. Distributing Co. v. Web Records, Inc.*,[25] the U.S. District Court for the Northern District of Illinois decided that although a distributorship agreement was predominantly a sale of goods, a guaranty relating to damages payable for breach of the distributorship agreement was not.[26] Even though the guarantee agreement was in the same writing as the distributorship agreement, the court held that it was a "separate undertaking" not subject to the U.C.C.[27]

In *Madrid v. Bloomington Auto Co., Inc.*,[28] the Court of Appeals of Indiana had to determine whether the U.C.C. or the Indiana Certificate of Title Act governed

17. *Id.*
18. *Id.*, 50 U.C.C. Rep. Serv. 2d (West) at 396–97 (citing Micro Data Base Sys., Inc. v. Dharma Sys., Inc., 148 F.3d 649, 654–55, 35 U.C.C. Rep. Serv. 2d (West) 747, 752-54 (7th Cir. 1998); Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 675–76, 13 U.C.C. Rep. Serv. 2d (West) 669, 674–76 (3d Cir. 1991); RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 546–47, 41 U.C.C. Rep. Serv. (Callaghan) 1561, 1563–65 (9th Cir. 1985)).
19. 662 N.W.2d 439, 50 U.C.C. Rep. Serv. 2d (West) 67 (Mich. Ct. App. 2003).
20. *Id.* at 442, 50 U.C.C. Rep. Serv. 2d (West) at 70.
21. *Id.* at 441–42, 50 U.C.C. Rep. Serv. 2d (West) at 69.
22. *Id.* at 443, 50 U.C.C. Rep. Serv. 2d (West) at 71.
23. *Id.* at 445, 50 U.C.C. Rep. Serv. 2d (West) at 73–74.
24. *Id.*, 50 U.C.C. Rep. Serv. 2d (West) at 74.
25. 51 U.C.C. Rep. Serv. 2d (West) 716 (N.D. Ill. 2003).
26. *Id.* at 718.
27. *Id.* at 719 (citing Am. Trading Co., Inc. v. Fish, 364 N.E.2d 1309, 1311, 21 U.C.C. Rep. Serv. 1083, 1084–85 (N.Y. 1977)).
28. 782 N.E.2d 386, 49 U.C.C. Rep. Serv. 2d (West) 795 (Ind. Ct. App. 2003).

the sale of a car. The Madrids had attempted to purchase a new car from a used car dealer. The car was actually owned by a new car dealer, which brought the car to the used car dealer to show to the Madrids. The new car dealer insisted that any sales agreement be directly between it and the buyers, but the used car dealer nevertheless claimed to own the car, purported to sell it to the Madrids, and accepted the purchase price. The Madrids never received a certificate of title, the used car dealer's assets were seized, and a battle ensued between the Madrids and the new car dealer over rightful ownership of the car.

The court first concluded that the U.C.C. rather than the Indiana Certificate of Title Act controlled the issue.[29] It then held that the used car dealer was a "merchant who deals in goods of the same kind" for the purposes of the entrustment rule of U.C.C. section 2-403, even though the car was new, not used, and even though the used car dealer was not an authorized dealer of the car in question.[30]

STATUTE OF FRAUDS

Amid a mass of routine Statute of Frauds litigation,[31] two decisions stood out. In *Cloud Corp. v. Hasbro, Inc.*,[32] Hasbro purchased from Cloud packets of gel for its "Wonder World Aquarium."[33] Hasbro's initial arrangement with Cloud was informal, omitting price, quantity, delivery, and the like. Subsequently, the parties both signed a Hasbro letter containing the "terms and conditions" that Hasbro insisted its suppliers agree to. Periodically thereafter, Hasbro discussed its needs with Cloud, with regard to both quantity and the precise ingredients for each package, following up its conversations with purchase orders. Cloud would respond with a written acknowledgment. Neither party signed the other's form.

Hasbro sent its last purchase orders in February and April of 1996. In June, Hasbro instructed Cloud to use a new formula that would allow Cloud to manufacture more packets with the raw materials it had on hand. Cloud determined that with its stocks of raw material it could manufacture 4.5 million small packets and 5 million large packets beyond those called for under the February and April orders. Cloud then sent an acknowledgment to Hasbro for that number of small and large packets, quoting a lower price because of the new formula. Hasbro had

29. In so holding, the court reasoned that Indiana's Title Act creates a registration system rather than an ownership system. *Id.* at 395, 49 U.C.C. Rep. Serv. 2d (West) at 804–05.

30. *Id.* at 396, 49 U.C.C. Rep. Serv. 2d (West) at 806.

31. *See, e.g.*, Easy Way, Inc. v. Transp. Int'l Pool, Inc., 67 Fed. Appx. 863, 50 U.C.C. Rep. Serv. 2d (West) 731 (6th Cir. 2003) (writing ambiguous on whether contract for sale had been made and thus did not satisfy the Statute of Frauds); Phoenix Ancient Art, S.A. v. Kimbell Art Found., 52 U.C.C. Rep. Serv. 2d (West) 81 (S.D.N.Y. 2003) (writings showed nothing more than negotiations and thus did not satisfy the Statute of Frauds); Kuwaiti Danish Computer Co. v. Digital Equip. Corp., 781 N.E.2d 787, 49 U.C.C. Rep. Serv. 2d (West) 729 (Mass. 2003) (writings did not provide evidence of a contract for sale and therefore did not satisfy the Statute of Frauds); Quality Pork Int'l v. Rupari Food Servs., Inc., 50 U.C.C. Rep. Serv. 2d (West) 724 (Neb. Ct. App. 2003) (purchase order unsigned by buyer insufficient to satisfy the Statute of Frauds).

32. 314 F.3d 289, 49 U.C.C. Rep. Serv. 2d (West) 413 (7th Cir. 2002).

33. The packets contained a substance that, when mixed with water, formed a transparent gel in which the toy-owner would suspend plastic fish, thus creating "the illusion of a real fish tank with living, though curiously inert, fish." *Id.* at 291, 49 U.C.C. Rep. Serv. 2d (West) at 413.

not sent Cloud a purchase order for these. Hasbro did not respond directly to the acknowledgment, but continued exchanging e-mails with Cloud about delivery dates. These e-mails used quantities exceeding those in the February and April purchase orders. Ultimately Hasbro refused to accept delivery of these extra packets. Cloud therefore sued for breach. At trial the district judge ruled for Hasbro.

The appellate court reversed, in large part on Statute of Frauds grounds.[34] Initially it concluded that Hasbro's no-oral-modifications clause in the "terms and conditions" was enforceable.[35] This left two issues: whether the subsequent writings regarding Cloud's attempted shipment satisfied the Statute of Frauds and the contractual prohibition on oral modifications, and whether Hasbro had waived its contractual rights to insist upon a signed writing.

First, the Statute of Frauds required that any modification to the contract be in writing, as the initial contract fell within the Statute of Frauds.[36] In reversing the trial court, Judge Posner held that the e-mails sent by Hasbro satisfied the Statute of Frauds, pointing out that the U.C.C. requires not that the contract itself be in writing, but merely that there be "adequate documentary evidence of its existence and essential terms."[37] Nor was the absence of a signature worrisome, for the Code does not require a handwritten signature, and the e-mails were identified as the sender's and supported by other information, including Cloud's own performance. Additionally, Cloud's acknowledgment fell within the merchant's exception to the Statute of Frauds.[38] Hasbro did not object within ten days, so it lost its Statute of Frauds defense.

The contractual bar to unsigned modifications also did not trouble the appellate court. First, there *were* writings sufficient to satisfy these clauses, for the reasons stated above.[39] Second, Cloud's reliance on the exchanges of e-mails was reasonable, for Hasbro, knowing that Cloud had continued making gel packets, should have told Cloud that it did not need any more packets before the packets were completed and tendered. Accordingly, Hasbro waived its right to insist upon a written modification.[40]

This decision seems quite sound. Possibly it is most important for its discussion of e-mail as a means of satisfying the Statute of Frauds. As the court pointed out, this issue is resolved by E-SIGN for contracts entered into after its effective date

34. *Id.* at 295, 49 U.C.C. Rep. Serv. 2d (West) at 418.

35. The court also concluded that similar clauses in Hasbro purchase orders would also be part of the contract, as they appeared in the first of two forms evidencing the contract and the second form contained no contradiction. *Id.* at 295, 49 U.C.C. Rep. Serv. 2d (West) at 417–18; *see also, e.g.*, Idaho Power Corp. v. Westinghouse Elec. Corp., 596 F.2d 924, 927, 26 U.C.C. Rep. Serv. (Callaghan) 638, 642–43 (9th Cir. 1979); Polyclad Laminates, Inc. v. VITS Maschinenbau GmbH, 749 F. Supp. 342, 345, 13 U.C.C. Rep. Serv. 2d (Callaghan) 721, 725 (D. N.H. 1990).

36. U.C.C. §§ 2-201(1), 2-209(3) (2001).

37. *Cloud Corp.*, 314 F.3d at 295, 49 U.C.C. Rep. Serv. 2d (West) at 418–19.

38. U.C.C. § 2-201(2) (2001).

39. The court noted that a contractual prohibition on oral modification *might* require more written evidence than section 2-201 does and need not be subject to the section 2-201(2) exception, but Hasbro had not advanced either of these arguments or otherwise claimed that the contractual statute of frauds was different in scope from section 2-201. *Cloud Corp.*, 314 F.3d at 297, 49 U.C.C. Rep. Serv. 2d (West) at 421.

40. *Id.* at 297–98, 49 U.C.C. Rep. Serv. 2d (West) at 421–22; *see also* U.C.C. § 2-209(4) (2001).

of October 1, 2000.[41] The court could have added that the issue is also resolved in states that have enacted the Uniform Electronic Transactions Act.[42] Furthermore, this will not be an issue under revised Article 2, with its emphasis on authentication rather than signature and record rather than writing.[43] In the meantime, though, courts generally have either ruled or assumed that e-mail can satisfy the Article 2 Statute of Frauds.[44]

The judicial admissions exception[45] arose during another interesting case. In *Wehry v. Daniels*,[46] Wehry, a Formula One aficionado, asked Daniels, the owner of a shop specializing in racing memorabilia, whether he could purchase a reproduction of a 1985 Ayrton Senna helmet without purchasing the rest of its set. The set cost $9,000. Wehry said that he was willing to pay up to $3,000 for this helmet. After some inquiries, Daniels said that Wehry could purchase the Senna helmet apart from the set. Wehry then told Daniels to order the helmet. Daniels did, but Wehry never picked it up. Daniels eventually sued Wehry. At trial, when asked if he told Daniels to order the helmet, Wehry testified "At Seventeen ($1,700.00) Eighteen Hundred Dollars ($1,800.00) yes."[47] Wehry added that Daniels had not revealed the price of $2,750 until the helmet had arrived. Daniels prevailed at trial; Wehry appealed, asserting the Statute of Frauds as a defense.

The court began its analysis by pointing out that the admissions exception would be satisfied if Wehry admitted facts that would establish the existence of a contract, even if he simultaneously denied that he had entered into a contract.[48] Nor would Wehry have to admit to every term of the contract, as long as he admitted to facts sufficient to show that a contract existed. Here, the court found that Wehry admitted that he had asked Daniels to order the helmet for him, an admission sufficient to satisfy the Statute of Frauds.[49]

What, then, about the price disparity? The court held that this was a question of fact.[50] Daniels testified that Wehry had agreed to purchase the helmet for $2,750; Wehry testified that he had agreed to pay $1,700–$1,800 for the helmet. There was thus a basis for the finder of fact to conclude that the parties had agreed to a price of $2,750.[51]

41. 15 U.S.C. § 7001(a) (2000).

42. Uniform Electronic Transactions Act § 7 (1999) ("UETA"). The court's omission of UETA is a little odd, as E-SIGN permits reverse preemption by UETA. 15 U.S.C. § 7002(a)(1) (2000). UETA is in force in 43 states, the District of Columbia, and the Virgin Islands.

43. *See, e.g.*, U.C.C. §§ 2-103(1)(q), 2-201(1) (2001).

44. *See also, e.g.*, Gen. Trading Int'l, Inc. v. Wal-Mart Stores, Inc., 320 F.3d 831, 836–37, 49 U.C.C. Rep. Serv. 2d (West) 1076, 1081–83 (8th Cir. 2003); Roger Edwards, LLC v. Fiddes & Son, Ltd., 245 F. Supp. 2d 251, 261 (D. Me. 2003); Cent. Ill. Light Co. v. Consolidation Coal Co., 235 F. Supp. 2d 916, 919, 49 U.C.C. Rep. Serv. 2d (West) 399, 402 (C.D. Ill. 2002), *aff'd*, 349 F.3d 488, 52 U.C.C. Rep. Serv. 2d (West) 75 (7th Cir. 2003). *But see* G.R. Toghiyany v. AmeriGas Propane, Inc., 309 F.3d 1088, 1091 (8th Cir. 2002) (e-mails unsigned).

45. U.C.C. § 2-201(3)(b) (2001).

46. 784 N.E.2d 532, 49 U.C.C. Rep. Serv. 2d (West) 1070 (Ind. Ct. App. 2003).

47. *Id.* at 534, 49 U.C.C. Rep. Serv. 2d (West) at 1072.

48. *Id.* at 535–36, 49 U.C.C. Rep. Serv. 2d (West) at 1073–74.

49. *Id.* at 536, 49 U.C.C. Rep. Serv. 2d (West) at 1074.

50. *Id.*

51. *Id.*

The court's analysis is unexceptional, though the final step is a little controversial. Certainly courts and commentators agree that it is not necessary that the party asserting the Statute of Frauds admit to the existence of a contract; admitting to facts that as a matter of law would constitute a contract is quite enough.[52] One can even go a step further and find the exception satisfied if the defendant admits facts that give rise to a jury question whether a contract exists.[53] Though Wehry admitted to an offer, not to an acceptance, his admission was sufficient to establish a contract when combined with Daniels' performance. But what of the difference between Wehry's price and Daniels' price? It is entirely possible, after all, that Wehry was not interested in the helmet save at his price. On this point courts scatter. Some state that once the defendant admits facts sufficient to establish the existence of a contract, any dispute over terms is left to the finder of fact.[54] In contrast, other courts have held that the admission renders the contract enforceable only to the extent of the admission—usually an admission of quantity, but sometimes an admission to price.[55] Restricting the scope of the admission to the quantity admitted is consistent with the Statute of Frauds generally.[56] The logic of this restriction may not extend to price, though. To reach the Statute of Frauds defense the plaintiff must already have proved that there is a contract. If so, then there is a means of supplying a missing price.[57] Furthermore, a writing that satisfies the Statute of Frauds need not also establish all the terms of the contract.[58] Consistency may suggest the same result for the judicial admissions exception.[59]

52. *See, e.g.*, Lewis v. Hughes, 346 A.2d 231, 236–37, 18 U.C.C. Rep. Serv. (Callaghan) 52, 60-61 (Md. 1975); GREGORY M. TRAVALIO ET AL., NORDSTROM ON SALES & LEASES OF GOODS § 3.01[C][3], at 89, 3.01, at 98–99 (2d ed. 2000) [hereinafter TRAVALIO].

53. *See, e.g.*, Dangerfield v. Markel, 222 N.W.2d 373, 378, 15 U.C.C. Rep. Serv. (Callaghan) 765, 768 (N.D. 1974).

54. *See, e.g.*, Oskey Gasoline & Oil Co. v. Cont'l Oil Co., 534 F.2d 1281, 1284–85, 19 U.C.C. Rep. Serv. (Callaghan) 61, 65 (8th Cir. 1976); Jackson v. Meadows, 264 S.E.2d 503, 505, 28 U.C.C. Rep. Serv. (Callaghan) 990, 991–92 (Ga. Ct. App. 1980); *Dangerfield*, 222 N.W.2d at 378, 21 U.C.C. Rep. Serv. (Callaghan) at 768.

55. *See, e.g.*, Songbird Jet Ltd., Inc. v. Amax Inc., 581 F. Supp. 912, 922, 38 U.C.C. Rep. Serv. (Callaghan) 431, 440 (S.D.N.Y. 1984) (quantity); Allen v. Harris Truck & Trailer Sales, Inc., 490 F. Supp. 488, 489–90, 29 U.C.C. Rep. Serv. (Callaghan) 397, 398–99 (E.D. Mo. 1980) (price); Barton v. Tra-Mo, Inc., 699 P.2d 1182, 1185, 41 U.C.C. Rep. Serv. (Callaghan) 373, 376–77 (Or. Ct. App. 1985) (quantity).

56. U.C.C. § 2-201(1) (2001).

57. *Id.* § 2-305(1) (2001).

58. *See, e.g.*, Gen. Matters, Inc. v. Penny Prods., Inc., 651 F.2d 1017, 1020, 31 U.C.C. Rep. Serv. (Callaghan) 1556, 1559 (5th Cir. 1981); Perdue Farms, Inc. v. Motts, Inc. of Miss., 459 F. Supp. 7, 18, 25 U.C.C. Rep. Serv. (Callaghan) 9, 18 (N.D. Miss. 1978); Hinson-Barr, Inc. v. Pinckard, 356 S.E.2d 115, 116, 4 U.C.C. Rep. Serv. 2d (Callaghan) 36, 37 (S.C. 1987).

59. *See, e.g.*, Marion W. Benfield, *General Provisions, Sales, Bulk Sales*, 36 BUS. LAW. 1267, 1270 (1981).

One last Statute of Frauds case merits brief mention. In *Casazza v. Kiser*, 313 F.3d 414, 49 U.C.C. Rep. Serv. 2d (West) 342 (8th Cir. 2002), the court dealt with a panoply of arguments that one or another exception to the Statute of Frauds should be applied. It rejected them all. *Id.* at 421–23, 49 U.C.C. Rep. Serv. 2d (West) at 348–51. The most interesting of them was the promissory estoppel exception. The court, citing to a state supreme court opinion, listed three approaches to this: (i) that promissory estoppel would defeat the Statute of Frauds only when the promise relied upon was a promise to reduce the contract to writing; (ii) that the exception was unavailable under Article 2; and (iii) that the exception exists, but only when the reliance is so great that failing to enforce would allow

FORMATION

One formation opinion bears mention, if only because of its factual peculiarity. In *Office Pavilion South Florida, Inc. v. ASAL Products, Inc.*,[60] ASAL, an office supply wholesaler, contracted with Office Pavilion, a subsidiary of an office furniture manufacturer, to supply ASAL with keyboard trays. ASAL agreed to order a minimum of one thousand units per year for two years, and Office Pavilion agreed to supply up to two thousand units per month. About a month later, ASAL wanted to expand this contract to include the Aeron office chair, for which Office Pavilion was the exclusive distributor in that region. After two months or so of negotiations, Office Pavilion sent ASAL a letter containing amendments to the keyboard tray contract. These amendments provided that the terms and conditions of the original contract would apply to the purchase and sale of chairs, except that the amendments contained no mention of quantity. After this letter, ASAL purchased six chairs from Office Pavilion to display at a trade show. The show was so successful that ASAL wanted to order 2,480 chairs. Office Pavilion declined, however, to accept the order because ASAL wanted to sell chairs outside the geographic range that Office Pavilion had anticipated during their negotiations, and Office Pavilion had no authority to sell to ASAL for resale outside that range. Office Pavilion suggested that ASAL submit a smaller order and ASAL submitted one for 1,000 chairs, but the accompanying deposit check bounced and Office Pavilion rejected it.

As a result, ASAL sued Office Pavilion for breach of contract, seeking lost profits for two years of anticipated sales. Office Pavilion defended by asserting that the chair contract lacked consideration. At trial, Office Pavilion's sales manager testified that the modification lacked a quantity term because there was no guarantee that ASAL would buy any chairs, and it was understood in the industry that these sorts of agreements were essentially a "hunting license."[61] The sales manager, however, added that Office Pavilion would honor ASAL's orders 'within whatever terms.'[62] The jury awarded ASAL $4 million in damages for lost profits and Office Pavilion appealed.

the promisor to perpetrate a fraud. Like the state court, it took no position among these in this diversity case, finding that the exception would not apply whatever approach one used. *Id.* at 421-23, 49 U.C.C. Rep. Serv. 2d (West) at 348-51.

Surely, however, there is a fourth approach that now predominates—the one laid out in RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981), which essentially carries the standard elements of promissory estoppel into the Statute of Frauds. *See, e.g.*, TRAVALIO, *supra* note 52, § 3.01[D], at 98–99. Though the Court of Appeals in *Casazza* relied on a state court opinion, that opinion antedated the RESTATEMENT (SECOND) OF CONTRACTS and a great deal of case law. On the facts, the plaintiff here had at least a plausible claim for this exception as generally applied. Even if this diversity court did not think it appropriate to extend state law in light of an opinion of the highest court of the state, it might reasonably have pointed out that the opinion no longer reflects current thinking as a way to bring the matter to the state court's attention. It might also have certified the issue to the state supreme court so that the most suitable court could resolve this matter.

60. 849 So. 2d 367, 51 U.C.C. Rep. Serv. 2d (West) 648 (Fla. Dist. Ct. App. 2003).

61. *Id.* at 369, 51 U.C.C. Rep. Serv. 2d (West) at 651.

62. *Id.*

The appellate court reversed, holding that there was no consideration for the chair contract and thus it was unenforceable. Citing to Florida case law, it stated that modifications must be supported with consideration.[63] Although there would be consideration for any chair actually purchased, it pointed out that ASAL was not obliged to purchase any chairs from Office Pavilion, which rendered the contract illusory and thus wanting in consideration. In addition, the court held that the contract was unenforceable because it lacked a quantity term, which is essential under the Article 2 Statute of Frauds.[64]

Possibly the court reached the correct conclusion, but surely for the wrong reason. Under Article 2, modifications need no consideration to be enforceable.[65] The court might well be correct on a subsidiary ground—namely, that the agreement was too indefinite to be enforceable. One may ask, though, whether the modification was a requirements contract. To be sure, the contract did not expressly oblige ASAL to buy Aeron chairs exclusively from Office Pavilion. Exclusivity is the hallmark of a requirements contract.[66] But Office Pavilion was the sole distributor for Aeron chairs in Office Pavilion's area. In other words, any Aeron chairs that ASAL wanted would have to come from Office Pavilion. This exclusivity might plausibly make the modification into a requirements contract.[67] As such, the contract would be sufficiently definite.[68] Furthermore, requirements contracts do not run afoul of the Statute of Frauds.[69] In any case, the court did not address the requirements issue. Possibly the parties did not raise it.

Terms of the Contract

The disputed term in *Hessler v. Crystal Lake Chrysler-Plymouth, Inc.*[70] was "ASAP," handwritten into an automobile sales contract. Hessler contacted the defendant dealership about the purchase of a new promotional vehicle, the Plymouth

63. *Id.* at 370, 51 U.C.C. Rep. Serv. 2d (West) at 648 (citing Wilson v. Odom, 215 So. 2d 37, 39 (Fla. Dist. Ct. App. 1968)). The court did not cite to U.C.C. section 2-209, which provides that no consideration is necessary to modify a contract governed by Article 2. U.C.C. § 2-209(1) (2001).

64. *Office Pavilion S. Fla., Inc.*, 849 So. 2d at 371, 51 U.C.C. Rep. Serv. 2d (West) at 651.

65. U.C.C. § 2-209(1) (2001).

66. Thus, for example, the decisions holding that non-exclusive purchase agreements are not requirements contracts. *See, e.g.*, Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1120, 41 U.C.C. Rep. Serv. (Callaghan) 38, 41 (5th Cir. 1985); Rangen, Inc. v. Valley Trout Farms, Inc., 658 P.2d 955, 961, 35 U.C.C. Rep. Serv. (Callaghan) 52, 56 (Idaho 1983); Canteen Corp. v. Former Foods, Inc., 606 N.E.2d 174, 183, 20 U.C.C. Rep. Serv. 2d (CBC) 64, 72 (Ill. App. Ct. 1992).

67. A contract may implicitly be a requirements contract, should the circumstances of its formation suggest as much. *See, e.g.*, Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Prods., Inc., 212 F.3d 373, 377–78, 41 U.C.C. Rep. Serv. 2d (West) 445, 449–50 (7th Cir. 2000); R.A. Weaver & Assocs., Inc. v. Asphalt Constr., Inc., 587 F.2d 1315, 1319–21, 25 U.C.C. Rep. Serv. (Callaghan) 388, 395-98 (D.C. Cir. 1978); Am. Original Corp. v. Legend, Inc., 652 F. Supp. 962, 966–67, 3 U.C.C. Rep. Serv. 2d (Callaghan) 65, 71–73 (D. Del. 1986).

68. U.C.C. § 2-306 cmt. 2 (2001).

69. *See, e.g.*, Zayre Corp. v. S.M. & R. Co., Inc., 882 F.2d 1145, 1154, 9 U.C.C. Rep. Serv. 2d (Callaghan) 465, 470 (7th Cir. 1989); Gestetner Corp. v. Case Equip. Co., 815 F.2d 806, 811, 3 U.C.C. Rep. Serv. 2d (Callaghan) 1328, 1336 (1st Cir. 1987); Syrovy v. Alpine Res., Inc., 841 P.2d 1279, 1282, 19 U.C.C. Rep. Serv. 2d (CBC) 995, 999 (Wash. Ct. App. 1992).

70. 788 N.E.2d 405, 50 U.C.C. Rep. Serv. 2d (West) 330 (Ill. App. Ct. 2003).

Prowler. At that point, no Prowlers had been delivered to dealerships. The agreement, signed by the parties, provided the buyer would pay $5,000 over the manufacturer's list price. In the box labeled "To Be Delivered On or About," "ASAP" was handwritten. The contract also provided that if a Prowler could not be delivered by December 31 of that year, the dealership would return the buyer's deposit. The owner, who had arranged the deal with the buyer, testified "ASAP" was written in by a salesperson after the sale was negotiated and the agreement signed by the buyer while the salesperson was "finishing up" the transaction. Several months after entering into the written agreement with Hessler, the dealership signed a contract to sell a Prowler to another buyer. At that point, there was still no commitment by Plymouth that any Prowlers would be delivered to the defendant. Once it became clear that the dealership would receive one Prowler, it refused to sell it to Hessler, selling it instead to the later buyer. Hessler purchased another Prowler for $77,706, $29,853 more than the contract with Crystal Lake Chrysler-Plymouth, then sued Crystal Lake Chrysler-Plymouth for cover damages. The defendant argued that it was not obligated to deliver the first Prowler it received to the plaintiff buyer and that because it received only one Prowler before December 31, it was obligated merely to return the buyer's deposit, which it had done. The buyer argued that the term ASAP required the dealer to deliver the first Prowler it received to him and therefore, the dealership's refusal to sell him the Prowler constituted a breach of contract.

The first issue the court considered was the inclusion of the handwritten "ASAP" as a term of the contract. Interestingly, the court first cited U.C.C. section 2-207 and the accompanying comments as support for the proposition that failure of the parties to object to an added term supports the assumption that the additional term had been assented to.[71] This section applies, however, not to the terms in a negotiated, integrated signed contract as in this case, but to a term in a form propounded by one party.[72] The court did ultimately decide, appropriately, that the term was included because it was inserted by an authorized representative of the defendant seller as the transaction was being completed and neither the buyer nor the seller objected to its inclusion. Finally, the terms of the contract itself provided that the contract was not binding until the defendant or its authorized representative accepted it. By this point, the term had been inserted in the writing.

Having decided that the term "ASAP" was part of the contract, the court next turned to the meaning of the term. The dealership argued that the term "ASAP" was meaningless in the contract. The dealership further objected to the introduction of extrinsic evidence regarding the meaning of the term. The dealership argued first that the contract was unambiguous and thus any parol evidence regarding the meaning of the term was inadmissible. Secondly, the dealership argued that the evidence was inadmissible because the document, by its own terms, was

71. *Id.* at 411, 50 U.C.C. Rep. Serv. 2d (West) at 337.

72. *See* U.C.C. § 2-207 cmt. 1 (2001) (providing that section 2-207 is intended to deal with two situations in which contracts are created, one in which there is a written memorandum confirming a prior deal created orally or through informal correspondence and the other in which there is an offer followed by a written acceptance).

a completely integrated document and therefore, even consistent evidence was inadmissible.

The court properly noted that U.C.C. section 2-202 changed the common law requirement of a finding of ambiguity as a prerequisite for the admission of parol evidence.[73] Rather, the rule excludes evidence that contradicts integrated writings. The court properly noted that the initial inquiry under section 2-202 is whether the writing is integrated. A writing must at least be intended by the parties as a final expression of the terms of the writing before the parol evidence rule is implicated.[74] Furthermore, a completely integrated contract is a final and complete statement of the terms of the parties' agreement. The court agreed with the defendant, based on the relevant considerations including the presence of a merger clause in the contract,[75] that the contract was a completely integrated document. The court disagreed, however, over the admissibility of the proffered evidence. The court noted that even with a completely integrated writing, not all parol evidence is excluded. Although a completely integrated contract cannot be supplemented with extrinsic evidence of additional terms, such evidence is admissible to determine the meaning of the terms of the writing itself.[76] The evidence offered by the buyer on the meaning of the term "ASAP," the testimony of the defendant's employee that it means the car will be delivered as soon as the dealership can get it, was admissible to determine the meaning of "ASAP." Accordingly, the Court of Appeals upheld the judgment of the trial court in favor of the plaintiff buyer.[77]

Pennsylvania lined up with the majority of courts when the Pennsylvania Superior Court decided that the "knockout rule" was the proper approach to the issue of conflicting terms in forms under U.C.C. section 2-207. In *Flender Corp. v. Tippins International, Inc.*,[78] Tippins, a Pennsylvania company, purchased gear drive assemblies for use in a rolling steel mill it was constructing in the Czech Republic from Flender. Tippins placed the order using a purchase order that provided that the offer was limited to acceptance of the form's terms and included an arbitration clause requiring all disputes to be submitted to the International Chamber of Commerce in Vienna, Austria.[79] The seller, without expressly agreeing

73. *Hessler*, 788 N.E.2d at 412, 50 U.C.C. Rep. Serv. 2d (West) at 339 (citing the Official Comments to U.C.C. section 2-202). *See also* U.C.C. § 2-202 cmt. 1 (2001) (stating that the parol evidence rule in Article 2 definitely rejects the requirement of a finding that the contract is ambiguous before parol evidence may be admitted).

74. *Hessler*, 788 N.E.2d at 412–13, 50 U.C.C. Rep. Serv. 2d (West) at 339.

75. Because a completely integrated contract is one intended by the parties to be final and exclusive, the court noted that integration was a question of the parties' intent and should be evaluated based on a number of considerations, including the presence of a merger clause and disclaimer clauses, prior negotiations, the proffered parol evidence, and the sophistication of the parties. *Id.* at 413, 50 U.C.C. Rep. Serv. 2d (West) at 340.

76. *Id.*

77. *Id.* at 414, 50 U.C.C. Rep. Serv. 2d (West) at 341.

78. 830 A.2d 1279, 51 U.C.C. Rep. Serv. 2d (West) 68 (Pa. Super. Ct. 2003).

79. The form stated that the purchase order "is expressly limited to acceptance of Standard General Conditions Nova Hut Purchase Order and special conditions of purchase, which take precedence over any terms and conditions written on the back of the purchase order." *Id.* at 1281, 51 U.C.C. Rep. Serv. 2d (West) at 70. It also provided that the only method of acceptance was by the seller signing and returning the purchase order, which, of course, was not done.

to the terms in the purchase order, manufactured and shipped the drive assemblies. The seller's invoice accompanied the shipment and provided that its terms and conditions were the sole terms and conditions on which the order was accepted and that the seller's acceptance of the buyer's order would not act as an acceptance of provisions in the buyer's purchase order that were inconsistent with the invoice. The invoice also provided that the federal and state courts in Chicago, Illinois would have exclusive jurisdiction over any disputes arising from the sale.

When the buyer accepted the goods but did not pay the balance due on the goods, the seller instituted an action in Pennsylvania state court. The buyer filed preliminary objections to the complaint asserting that the dispute had to be submitted to arbitration as provided in the buyer's purchase order. The trial court denied the objection, holding that because the parties had preceded with the transaction, although they had not accepted the other's terms, the parties had created a contract through conduct under U.C.C. section 2-207(3) and therefore, neither dispute resolution term became part of the contract.[80] On appeal, the Pennsylvania Superior Court affirmed the decision of the trial court, but under the correct analysis, first using section 2-207(1) to determine if a contract had been created on the writings and then determining which approach to the issue of different terms should be adopted.[81]

The Superior Court concluded that the forms of the parties created a contract under section 2-207(1).[82] This subsection provides that a definite and seasonable expression of acceptance constitutes an acceptance of the offer, even if it contains additional or different terms, unless the acceptance is expressly made conditional on assent to the terms of the acceptance.[83] The court, agreeing with an earlier federal case interpreting Pennsylvania law,[84] held that a contract will be created by an acceptance unless the form explicitly indicates the party's unwillingness to proceed with the deal unless the other party accepts the terms.[85] Finding the seller's invoice did not meet this standard, the Superior Court found that a contract had been created on the forms.

The court then turned to the issue of the dispute resolution term. The buyer argued that its term requiring arbitration, contained in the offer, should control. The court noted that some courts and commentators have adopted this approach, treating different terms under section 2-207(2) although its express language applies only to additional terms.[86] One justification for this approach noted by the

80. *Id.* at 1282, 51 U.C.C. Rep. Serv. 2d (West) at 71. References in this survey are based on the uniform version of section 2-207.

81. *Id.* at 1283–84, 51 U.C.C. Rep. Serv. 2d (West) at 73–75.

82. *Id.* at 1284, 51 U.C.C. Rep. Serv. 2d (West) at 74–75.

83. U.C.C. § 2-207(1) (2003).

84. Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 39 U.C.C. Rep. Serv. (Callaghan) 1203 (10th Cir. 1984).

85. *Flender Corp.*, 830 A.2d at 1284, 51 U.C.C. Rep. Serv. 2d (West) at 74 (citing *Daitom, Inc.*, 741 F.2d at 1578, 39 U.C.C. Rep. Serv. (Callaghan) at 1216 and Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 10 U.C.C. Rep. Serv. (Callaghan) 585 (6th Cir. 1972)).

86. *Id.*, 51 U.C.C. Rep. Serv. 2d (West) at 74. *See also* U.C.C. § 2-207 cmt. 3 (2001) (stating "[w]hether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2)"); Reilly Foam Corp. v. Rubbermaid Corp., 206 F. Supp. 2d 643, 653, 48

court is that the offeree at least had the opportunity to review the terms of the offer prior to acceptance and could object or refuse to accept if a term is not acceptable.[87]

The alternative rule, which has been adopted by a majority of courts that have addressed the issue, is known as the "knockout rule."[88] Under this approach, the conflicting terms in the offer and acceptance both drop out of the contract. The acceptance is treated as only accepting those terms in the offer that do not conflict with any term in the acceptance.[89] Under this approach, the buyer's term requiring arbitration of disputes and the seller's term vesting sole jurisdiction over disputes in the courts located in Chicago, Illinois would both drop out of the contract. The court noted that this rule rests on a pragmatic approach to the battle of the forms, that is, a party should not be given an advantage solely based on the timing of its form.[90] Just as the last form should not be given preference as it did at common law, the first form should not prevail solely because it is the first form sent.[91] This approach puts the parties on equal footing, a more fair approach given that, in these situations, the parties typically proceed with the transaction even though all terms have not been assented to.[92] Additionally, the court noted that although subsection (1) of section 2-207 expressly refers to additional or different terms, subsection (2) refers only to additional terms.[93] The court noted that it is equally relevant in statutory interpretation to pay attention to not only what a statute says but also what it does not say.[94] Because the language of subsection (2) does not reference different terms, the court held that it did not apply to different terms.[95] Persuaded by the strong support for the "knockout rule" by courts across the country, including two federal courts predicting its use under Pennsylvania law,[96] and finding that such an approach is the most consistent with the language of U.C.C. section 2-207, the court adopted the "knockout rule" and held that the contract did not include the buyer's arbitration clause.[97]

U.C.C. Rep. Serv. 2d (West) 81, 93 (E.D. Pa. 2002) (discussing the minority view that the terms of the offer control when the acceptance contains different terms); 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §§ 1-3, at 35 (5th ed. 2000).

87. *Flender Corp.*, 830 A.2d at 1285, 51 U.C.C. Rep. Serv. 2d (West) at 76.

88. *Id.* For an extensive list of cases adopting the knockout rule, see *id.* at 1286, 51 U.C.C. Rep. Serv. 2d (West) at 77.

89. *Id.* at 1285–86, 51 U.C.C. Rep. Serv. 2d (West) at 76.

90. *Id.* at 1286, 51 U.C.C. Rep. Serv. 2d (West) at 76.

91. *Id.*, 51 U.C.C. Rep. Serv. 2d (West) at 76–77.

92. *Id.*, 51 U.C.C. Rep. Serv. 2d (West) at 76.

93. *Compare* U.C.C. § 2-207(1) (2001) (providing that an acceptance operates as an acceptance "even though it states terms additional to or different from those offered or agreed upon") *with* U.C.C. § 2-207(2) (2001) (providing that "additional terms" are proposals for addition to the contract, unless both parties are merchants, in which situation they become part of the contract unless one of three requirements is met).

94. *Flender Corp.*, 830 A.2d at 1287, 51 U.C.C. Rep. Serv. 2d (West) at 78.

95. *Id.*

96. *See* Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 39 U.C.C. Rep. Serv. (Callaghan) 1203 (10th Cir. 1984); Reilly Foam Corp. v. Rubbermaid Corp., 206 F. Supp. 2d 643, 48 U.C.C. Rep. Serv. 2d (West) 81 (E.D. Pa. 2002).

97. *Flender Corp.*, 830 A. 2d at 1287, 51 U.C.C. Rep. Serv. 2d (West) at 78.

WARRANTIES

BASIS OF THE BARGAIN

Disputing the precise meaning of "the basis of the bargain" in suits for breach of express warranty proved to be a hardy perennial in Article 2 litigation this year, as in years past. This year's crop shows the usual mix. A federal district court in *Williams v. Dow Chemical Co.*,[98] dealt with a putative class action against Dow and others by users of Dursban, a pesticide Dow withdrew from the market after significant adverse health reports had come to light. The plaintiffs alleged in part that Dow used false advertising to misrepresent to the public the potential health risks of Dursban, and that consumers, justifiably relying on these false advertisements, allowed Dursban to be used in their homes or allowed themselves or their family members to be exposed to Dursban. Among the causes of action was breach of express warranty. The court granted Dow's motion for judgment on the pleadings for this count, holding that the plaintiffs nowhere alleged "that any of the Plaintiffs heard, saw or relied upon any representation by Defendants before allowing Dursban to be used in their home."[99]

Somewhat along the same lines was *Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.*[100] Holland supplied colors to Nebraska Plastics, which had hitherto confined itself to the manufacture of white plastic fencing. Holland supplied a great deal of technical expertise as Nebraska Plastics developed this product line. Unfortunately, the fencing faded far too quickly. After years of questions, Nebraska Plastics learned from other sources that an additive manufactured by OMYA, another of its suppliers, caused the colors to fade. Holland Colors had reached this conclusion some years before, but had not told Nebraska Plastics. Neither did OMYA. Nebraska Plastics sued both firms for breach of express warranty, among other things. Both defendants moved for summary judgment. In denying OMYA's motion as to the express warranty count, the court held that it was essential that the plaintiff prove reliance on the warranty to establish that the warranty became part of the basis of the bargain.[101] As OMYA's statements that its additives did not cause the problem were made about four years after the start of manufacture and three after the start of complaints, the warranty action could survive only from the date of those statements; however, Nebraska Plastics' proof of those statements sufficed to defeat summary judgment.

98. 255 F. Supp. 2d 219, 50 U.C.C. Rep. Serv. 2d (West) 403 (S.D.N.Y. 2003).

99. *Id.* at 230, 50 U.C.C. Rep. Serv. 2d (West) at 408. Some named plaintiffs alleged that they had spoken with representatives of the defendants, but not until after Dursban had been used in their homes. *Id.; see also, e.g.*, Murrin v. Ford Motor Co., 756 N.Y.S.2d 596, 597, 50 U.C.C. Rep. Serv. 2d (West) 745, 747 (N.Y. App. Div. 2003) (per curiam).

100. 51 U.C.C. Rep. Serv. 2d (West) 1100 (D. Neb. 2003).

101. *Id.* at 1127. In another recent diversity case, the U.S. Court of Appeals for the Fifth Circuit, applying Texas law, ruled that some degree of reliance was necessary to establish that an affirmation of fact was part of the basis of the bargain and consequently denied class certification to a group of motor home purchasers in their suit against the manufacturer for misrepresenting the vehicle's towing capacity. McManus v. Fleetwood Enters., Inc., 320 F.3d 545, 550, 49 U.C.C. Rep. Serv. 2d (West) 1124, 1130–31 (5th Cir. 2003).

In contrast, the Ohio Court of Appeals found no reliance required in *Norcold, Inc. v. Gateway Supply Co.*[102] There the plaintiff, a manufacturer of refrigerators, bought tap tees, used to carry inflammable gas, from the defendant. Despite testing, Norcold found the tap tees prone to stress corrosion cracking and thus potentially hazardous, requiring a costly recall of its refrigerators. Norcold sued Gateway for breach of warranty. The trial court granted Gateway's motion for summary judgment on the express warranty count because Norcold did not actually rely upon Gateway's representations.[103] The appellate court reversed. It pointed to comment 3 to section 2-313, which suggests that reliance is not required for a statement to become part of the basis of the bargain.[104] At least for express written warranties, the court held that a warranty is a term like any other, requiring no more reliance than any other term to become part of the basis of the bargain.[105]

Though this year's cases fall heavily toward requiring reliance, the Ohio court has the better of the argument. This is not so clear descriptively. True, the comments to section 2-313 make no sense unless reliance is at a minimum not uniformly required.[106] But at least some courts invoke reliance as essential—according to one recent survey, quite a few.[107] That said, though, a great many courts, perhaps most, allow buyers to pursue warranty claims based on statements not made or not seen until after the sale.[108] And the arguments from principle favor substantial abandonment of a reliance requirement. Others have laid out the textual and historical basis for this statement.[109] Even warranties that arrive after the contract might become part of the bargain, a term distinct from contract and agreement. This is especially so where it is common to receive such warranties, as with warranties found in a package or glove compartment. The buyer might reasonably expect to receive a warranty of this sort, even if its exact nature is not

102. 798 N.E.2d 618, 51 U.C.C. Rep. Serv. 2d (West) 88 (Ohio Ct. App. 2003).

103. *Id.* at 624, 51 U.C.C. Rep. Serv. 2d (West) at 96.

104. *Id.* at 623–24, 51 U.C.C. Rep. Serv. 2d (West) at 95.

105. *Id.* at 624 & n.11, 51 U.C.C. Rep. Serv. 2d (West) at 95 & n.11 (collecting cases).

106. U.C.C. § 2-313 cmts. 3, 7 (2001).

107. James J. White, *Freeing the Tortious Soul of Express Warranty Law*, 72 TUL. L. REV. 2089, 2098–2106 (1998).

108. *See, e.g.*, Winston Indus., Inc. v. Stuyvesant Ins. Co., Inc., 317 So. 2d 493, 497, 17 U.C.C. Rep. Serv. (Callaghan) 924, 928–29 (Ala. Civ. App. 1975); New Nautical Coatings, Inc. v. Scoggin, 731 So. 2d 145, 147, 38 U.C.C. Rep. Serv. 2d (West) 381, 384 (Fla. Dist. Ct. App. 1999); Daughtrey v. Ashe, 413 S.E.2d 336, 338–39, 16 U.C.C. Rep. Serv. 2d (CBC) 294, 298–300 (Va. 1992). Late-arriving warranties might also become part of the contract, and hence the bargain, through modification. *See, e.g.*, Moldex, Inc. v. Ogden Eng'g Corp., 652 F. Supp. 584, 589–90, 3 U.C.C. Rep. Serv. 2d (Callaghan) 572, 580 (D. Conn. 1987); Pack & Process, Inc. v. Celotex Corp., 503 A.2d 646, 659, 42 U.C.C. Rep. Serv. (Callaghan) 462, 472 (Del. Super. Ct. 1985). When the claimed warranty arises from mass-market advertising not seen until after the contract, though, the courts have generally not found warranty without reliance. *See, e.g.*, Ciba-Geigy Corp. v. Alter, 834 S.W.2d 136, 147, 20 U.C.C. Rep. Serv. 2d (West) 448, 454 (Ark. 1992); Anderson v. Heron Eng'g Co., Inc., 604 P.2d 674, 676 (Colo. 1979); Adolphson v. Gardner-Denver Co., 553 N.E.2d 793, 798, 12 U.C.C. Rep. Serv. 2d (Callaghan) 651, 656–57 (Ill. App. Ct. 1990).

109. *See, e.g.*, Charles A. Heckman, *"Reliance" or "Common Honesty of Speech": The History and Interpretation of Section 2-313 of the Uniform Commercial Code*, 38 CASE W. RES. L. REV. 1, 7–16 (1987); Sidney Kwestel, *Freedom from Reliance: A Contract Approach to Express Warranty*, 26 SUFFOLK U. L. REV. 959, 992–1000 (1992).

known and its absence would not prove actionable. Indeed, one might even argue that warranties made in mass-market advertising should become part of the basis of the bargain as a matter of course. The seller presumably expects some buyers to take these warranties into account when deciding whether and what to purchase, and sets the price accordingly. If, therefore, a buyer pays a premium for this warranty, the buyer should get its benefit even if the warranty did not figure in the buyer's purchase decision.[110]

PRIVITY

Privity provoked a good deal of litigation, yielding many, often contradictory, opinions. For instance, in *Rampey v. Novartis Consumer Health, Inc.*,[111] the Alabama Supreme Court was faced with a suit against the manufacturer of Ex-Lax by a buyer claiming economic loss because Ex-Lax had contained phenolphthalein, a laxative that the Food and Drug Administration determined it could no longer regard as safe and effective because of its possible carcinogenicity. Novartis, the manufacturer, contended that because Rampey had not purchased his Ex-Lax directly from Novartis, he lacked privity and thus could not bring his suit for breach of the implied warranties of merchantability and of fitness. The court agreed, holding that implied warranty actions for economic loss may not be brought against a manufacturer not in privity with the plaintiff.[112] The court pointed out that the implied warranties of quality are created by sellers for the benefit of their buyers, not non-privity buyers.[113] It further pointed to a long line of its decisions to the effect that the statute did not expand the scope of vertical privity, so it did not feel obliged to do so.[114]

Somewhat more lenient was the Washington Supreme Court's decision in *Tex Enterprises, Inc. v. Brockway Standard, Inc.*[115] Tex, the seller of a deck sealant, pur-

110. Thomas J. Holdych & Bruce D. Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties—Getting What You Pay For and Paying For What You Get*, 45 DEPAUL L. REV. 781 (1996); *see also* Robert S. Adler, *The Last Best Argument for Eliminating Reliance from Express Warranties: "Real-World" Consumers Don't Read Warranties*, 45 S.C. L. REV. 429 (1994).

Revised Article 2 leaves in place the basis of the bargain requirement for routine express warranty, but deals separately with non-privity express warranties. The warranty in the box becomes part of the contract if it is in a record is furnished to the remote purchaser, unless a reasonable person in the position of the remote purchaser would not believe that it created an obligation. U.C.C. § 2-313A(2) (2003). In contrast, for an affirmation of fact created in advertising to create a warranty, the buyer must know it at the time of purchase and the buyer must expect the goods to conform to the affirmation, unless a reasonable person in the position of the buyer would not believe that it created an obligation. U.C.C. § 2-313B(2) (2003). These new provisions helpfully avoid the decisions that bar non-privity warranties, but in the case of advertising warranties may unhelpfully affirm or even strengthen the line of cases requiring reliance.

111. 867 So. 2d 1079, 51 U.C.C. Rep. Serv. 2d (West) 117 (Ala. 2003).

112. *Id.* at 1089, 51 U.C.C. Rep. Serv. 2d (West) at 129. Alabama has enacted Alternative A to U.C.C. section 2-318. ALA. CODE § 7-2-318 (2002).

113. *Rampey*, 867 So. 2d at 1091, 51 U.C.C. Rep. Serv. 2d (West) at 131.

114. For another recent case along these lines, see *CertainTeed Corp. v. Russell*, 51 U.C.C. Rep. Serv. 2d (West) 418 (Ala. Civ. App. 2003).

115. 66 P.3d 625, 50 U.C.C. Rep. Serv. 2d (West) 317 (Wash. 2003). Washington has adopted Alternative A to U.C.C. section 2-318. WASH. REV. CODE ANN. § 62A.2-318 (West 2003).

chased containers manufactured by Brockway to store its sealant. It did so after meeting with representatives of both Brockway and Shelton, Brockway's distributor. Tex purchased the containers from Shelton. Not long after Tex began using the containers, it received complaints that the sealant solidified in the cans. Tex determined that a rust inhibitor used in the cans caused this problem, and sued both Brockway and Shelton. Brockway sought dismissal, among other reasons, because of a lack of privity.[116] The trial court dismissed Brockway. The appellate court reversed, holding that direct representations to the purchaser could create express and implied warranties between manufacturer and purchaser despite a lack of privity.[117] The Washington Supreme Court reversed again, holding that ordinarily breach of implied warranty requires privity in economic loss cases.[118] It recognized an exception where the non-privity plaintiff was the intended third-party beneficiary of the implied warranty given by the manufacturer to its immediate buyer.[119] Given the procedural posture, it reversed and remanded for further proceedings, both on the intended beneficiary issue and on the possibility that Brockway made representations directly to Tex, thereby creating express warranties that would not require privity to be grounds for a cause of action.[120]

Contrasting further with these is *U.S. Tire-Tech, Inc. v. Boeran, B.V.*,[121] which recognized a non-privity economic loss claim for breach of implied warranty. The Texas Court of Civil Appeals, relying on a Texas Supreme Court decision[122] applying that state's non-uniform version of U.C.C. section 2-318,[123] held that privity was not required for a suit for economic loss resulting from breach of express

116. *Tex Enters., Inc.*, 66 P.3d at 627, 50 U.C.C. Rep. Serv. 2d (West) at 319.

117. *Id.* at 628, 50 U.C.C. Rep. Serv.2d (West) at 322.

118. *Id.* at 630, 50 U.C.C. Rep. Serv. 2d (West) at 324.

119. Other recent decisions using this third-party beneficiary analysis are *Bryant v. Hoffman-La Roche, Inc.*, 585 S.E. 2d 723, 51 U.C.C. Rep. Serv. 2d (West) 422 (Ga. Ct. App. 2003) and *Bobb Forest Prods., Inc. v. Morbark Indus., Inc.*, 783 N.E.2d 560, 576, 50 U.C.C. Rep. Serv. 2d (West) 106, 117 (Ohio Ct. App. 2002). This approach derives some statutory authority from the caption to section 2-318, which refers to third party beneficiaries. Captions are part of the U.C.C. § 1-107 (2003).

120. Another recent case found just such a third-party beneficiary relationship. In *Reed v. City of Chicago*, 263 F. Supp. 2d 1123, 50 U.C.C. Rep. Serv. 2d (West) 146 (N.D. Ill. 2003), the plaintiff was the administrator of her son's estate. He committed suicide by hanging himself with his paper isolation gown while in one of the city's detention cells. Police officers allegedly knew that he was mentally unstable, and indeed that he had attempted suicide in their presence. The plaintiff sued the city, various police officers, and, critically for our analysis, the manufacturers and designers of the isolation gown. One of the latter sought dismissal on privity grounds. The court held that Illinois courts would recognize an exception to strict horizontal privity here, where the gown was designed to prevent its use in suicide attempts. *Id.* at 1126, 50 U.C.C. Rep. Serv. 2d (West) at 149–50. Necessarily the beneficiary of this design would be the person who issued the gown, not the city. Moreover, the safety of detainees was part of the bargain between the city and its seller. The court therefore concluded that the plaintiff's decedent was an intended beneficiary of the contract between the city and the manufacturer and denied the motion to dismiss.

121. 110 S.W.3d 194,. 50 U.C.C. Rep. Serv. 2d (West) 780 (Tex. App. 2003).

122. Nobility Homes of Tex., Inc. v. Shivers, 557 S.W.2d 77, 81, 22 U.C.C. Rep. Serv. (Callaghan) 621, 627–28 (Tex. 1977).

123. TEX. BUS. & COM. CODE ANN. § 2.318 (Vernon 1994) (taking no position whatever on almost every form of privity, leaving the matter entirely up to the courts).

warranty.[124] Otherwise, as the court observed, manufacturers could avoid the consequences of their public statements about their goods.[125]

One can reconcile these cases; those allowing the privity defense focused on implied warranties, and those disallowing the defense did so for express warranties. But is this apparent harmony sound? The distinction is not without broader support in the case law. Courts almost always allow non-privity suits for economic loss resulting from breaches of express warranty.[126] In contrast, courts are split on whether vertical privity is required for implied warranty suits seeking damages for economic loss.[127] The statute does not require this result; indeed, none of the alternatives in section 2-318 deal with economic loss, and the comment expressly leaves the area to development elsewhere.[128] On balance, abolishing the privity defense for all vertical claims seems the better course of action. As Professor Speidel has observed, the privity defense stands in the way of efficient loss internalization and interferes with relational norms.[129] Nor should we worry particularly about excessive liability by remote sellers for unknowable consequential loss, as some have suggested.[130] First, ordinary consequential damages analysis should prevent the recovery of disproportionate or extreme sums.[131] Second, if the remote seller is liable for breach of warranty, it may also claim the protections available to sellers by the Code. Thus, the remote seller should be able to disclaim implied

124. *U.S. Tire-Tech, Inc.*, 110 S.W. 3d at 198, 50 U.C.C. Rep. Serv. 2d (West) at 784. *Nobility Homes* had already abolished the privity requirement for economic loss resulting from breach of the implied warranties of quality.

125. *Id.*, 50 U.C.C. Rep. Serv. 2d (West) at 784.

126. *See, e.g.*, Milbank Mut. Ins. Co. v. Proksch, 244 N.W.2d 105, 107–10, 19 U.C.C. Rep. Serv. (Callaghan) 774, 777–81 (Minn. 1976); Crews v. W.A. Brown & Son, Inc., 416 S.E.2d 924, 929–30, 18 U.C.C. Rep. Serv. 2d (CBC) 112, 117 (N.C. Ct. App. 1992); Dravo Equip. Co. v. German, 698 P.2d 63, 65, 40 U.C.C. Rep. Serv. (Callaghan) 1240, 1243 (Or. Ct. App. 1985); TRAVALIO, *supra* note 52, § 4.09[E]; 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-7 (5th ed. 2000).

127. *Compare, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279, 289–92, 19 U.C.C. Rep. Serv. (Callaghan) 1, 18–20 (Alaska 1976) (no defense) *and* Spring Motors Distrib., Inc. v. Ford Motor Co., 489 A.2d 660, 674–77, 40 U.C.C. Rep. Serv. (Callaghan) 1184, 1204–08 (N.J. 1985) (same) *with* Vt. Plastics, Inc. v. Brine, Inc., 824 F. Supp. 444, 452–54, 22 U.C.C. Rep. Serv. 2d (CBC) 700, 710–13 (D. Vt. 1993) (allowing defense) *and* Szajna v. Gen. Motors Corp., 503 N.E.2d 760, 762–67, 2 U.C.C. Rep. Serv. 2d (Callaghan) 1268, 1275–79 (Ill. 1986) (same). On the split, see generally TRAVALIO, *supra* note 52, § 4.09[D]; WHITE & SUMMERS, *supra* note 126, § 11-5.

128. U.C.C. § 2-318 cmt. 3 (2001).

129. Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More Into the Void*, 67 B.U. L. REV. 9, 37–48 (1987).

130. *See, e.g.*, WHITE & SUMMERS, *supra* note 126, § 11-6.

131. First, simple *Hadley* analysis should bar the recovery of damages that do not flow naturally from the breach, for it is hard to imagine that the remote seller will have actual knowledge of the special circumstances of the buyer. Second, modern doctrine limits recovery further by lowering or eliminating consequential damages when they would be disproportionate. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1979); Larry T. Garvin, *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality*, 59 OHIO ST. L.J. 339 (1998). For representative cases looking at potentially disproportionate consequential damages resulting from the sale of goods, see, e.g., Gen. Motors Corp. v. Martine, 567 A.2d 808, 811 (Conn. 1989); Manouchehri, M.D. v. Heim, 941 P.2d 978, 984, 33 U.C.C. Rep. Serv. 2d (West) 81, 89 (N.M. Ct. App. 1997); Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 465 N.Y.S.2d 606, 613–14, 37 U.C.C. Rep. Serv. (West) 1147, 1154–56 (N.Y. App. Div. 1983).

warranties or consequential damages.[132] It should also be able to require notice from the buyer as a precondition of recovery.[133] These protections should reduce the moral hazard—the plaintiff's failure to discover a nonconformity or to take action to minimize loss after the nonconformity is discovered—problems that otherwise might arise.[134]

REMEDIES

Several cases discussed the requirement in U.C.C. section 2-607 that, once the goods have been accepted, the buyer must give the seller notice of the breach as a condition to maintaining an action for breach of contract.[135] In *Adams v. Wacaster Oil Co., Inc.*,[136] the court held that notice of breach under section 2-607 is a condition precedent to an action for breach and when the buyer does not allege in the complaint, in the response to the seller's motion for summary judgment, or even on appeal that notice had been given, summary judgment for the seller on the breach of warranty claim would be affirmed.[137] The buyers, who contended their crop duster crashed because the fuel they bought from the defendant was defective, argued that notice was not necessary because the plane and fuel had been destroyed prior to the buyer being aware of the breach of warranty claim, and therefore notice to the seller would be useless. The court relied on an earlier case in noting that two purposes are served by the notice requirement: to give the seller the opportunity to minimize damages, perhaps by correcting the defect; and to protect the seller against stale claims.[138] Although the first purpose could not have been served by notice in this case, the latter purpose could have been and, therefore, the buyers' failure to give the seller notice prior to filing a complaint barred the buyer from recovery.

In *Quality Business Forms of Minneapolis, Inc. v. Secured Choice, Inc.*,[139] the Minnesota Court of Appeals addressed the issue of what constitutes sufficient notice of breach under this section. Secured Choice contracted with American Express to produce financial statements for American Express customers. Secured Choice sub-contracted with Quality Business Forms (QBF) for the design, printing and

132. U.C.C. §§ 2-316, 2-719 (2001); *see also, e.g., Morrow*, 548 P.2d at 292, 19 U.C.C. Rep. Serv. (Callaghan) at 19. The comment to section 2-318 recognizes this potential limit. U.C.C. § 2-318 cmt. 1 (2001).

133. U.C.C. § 2-607(3)(a) (2003).

134. *See* Speidel, *supra* note 129, at 50–51. The scope of the warranty may also be limited. The fitness warranty arises only where the seller has reason to know the specific needs of the buyer, a situation unlikely to arise outside of privity. Even the merchantability warranty is limited to ordinary, and thus predictable use, so the remote seller should be able to anticipate the scope of its warranty exposure. *See, e.g.*, TRAVALIO, *supra* note 52, § 4.09[D]; Speidel, *supra* note 129, at 49–50.

135. U.C.C. § 2-607(3)(a) (2001) (barring the buyer from any remedy for breach by the seller unless the buyer gives notice within a reasonable time after the buyer discovers or should have discovered the breach).

136. 98 S.W.3d 832, 50 U.C.C. Rep. Serv. 2d (West) 774 (Ark. Ct. App. 2003).

137. *Id.* at 836, 50 U.C.C. Rep. Serv. 2d (West) at 778–79.

138. *Id.* at 835–36, 50 U.C.C. Rep. Serv. 2d (West) at 778 (citing Williams v. Mozark Fire Extinguisher Co., 888 S.W.2d 303, 26 U.C.C. Rep. Serv. 2d (CBC) 1116 (Ark. 1994)).

139. 51 U.C.C. Rep. Serv. 2d 447 (Minn. Ct. App. 2003).

production of the statements. During the course of the contract, recipients of the statements reported delays in receiving the statements as well as problems with the quality of the statements received. After the problems with the statements from QBF, American Express initially reduced its order from Secured Choice, and then terminated their agreement. After Secured Choice failed to fully pay QBF sums due under the contract, QBF sued. Secured Choice counterclaimed, alleging breach of contract, breach of the implied warranties, negligence, and misrepresentation. The case was submitted to the jury on the contract claims and the jury found that QBF had breached the contract and awarded Secured Choice over $200,000 in damages. QBF appealed on a number of issues, including the sufficiency of Secured Choice's notice of breach.[140]

QBF argued that Secured Choice failed to give the requisite notice because Secured Choice failed to inform QBF that the production errors constituted a breach of the contract for which Secured Choice would seek damages. Additionally, Secured Choice continued doing business with QBF even after it complained of the production problems. The court, relying on the Official Comments to the section, held that U.C.C. section 2-607 is not a rigid rule, requiring notice in a specific form, but merely that the buyer inform the seller "that the transaction is still troublesome and must be watched."[141] Noting that the comments indicate one purpose of notice is to begin the process of settlement through negotiation, the court found the buyer's actions in trying to resolve the problem through negotiation instead of litigation sufficient under section 2-607.[142] The court was equally unpersuaded that Secured Choice's continuation of the business relationship with QBF should vitiate the notice. The court noted that at no time did Secured Choice indicate it was satisfied with the disputed goods and the additional projects QBF undertook were pursuant to the existing agreement, not newly agreed-upon responsibilities.[143]

Old Kent Bank v. Kal Kustom, Inc.,[144] addressed whether a buyer's failure to give its seller notice of a lawsuit filed by its remote buyer under the vouching-in procedure in section 2-607(5)(a) barred the buyer from pursuing a breach of warranty claim against its seller.[145] The trial court, finding that the seller did not receive proper notice of the prior litigation, granted its motion for summary judgment.[146] The Michigan Court of Appeals reversed. It noted that the trial court, by

140. QBF challenged the sufficiency of the jury finding of Secured Choice's damages based on lost profits from the American Express contract, alleging that a number of facts contributed to the cancellation of the American Express-Secured Choice contract. The court found that Secured Choice had met its burden on the issue of causation through the circumstantial evidence it adduced at trial regarding the problems with the statements and the resulting cancellation of the contract. *Id.* at 453.

141. *Id.* at 450-51 (quoting U.C.C. § 2-607 cmt. 4 (2003)).

142. *Id.* at 451.

143. *Id.*

144. 660 N.W.2d 384, 49 U.C.C. Rep. Serv. 2d (West) 1167 (Mich. Ct. App. 2003).

145. U.C.C. section 2-607(5)(a) provides a procedure, called vouching-in, whereby a buyer may notify its seller in writing if the buyer is sued by its own buyer for breach of warranty. If the buyer offers to permit the seller to come in and defend the action and the seller dues not do so, the seller is bound by the determination of any common factual issues. U.C.C. § 2-607(5)(a) (2001).

146. *Old Kent Bank*, 660 N.W.2d at 387, 49 U.C.C. Rep. Serv. 2d (West) at 1170.

granting the summary disposition, implicitly determined that the procedure in section 2-607(5)(a) was mandatory.[147] The clear language of the statute is permissive, however.[148] Additionally, the court compared the language of section 2-607(5)(a), providing the buyer may notify the seller of the litigation, with the notice requirement of section 2-607(3)(a), which provides that the buyer *must* give notice of breach or be barred from a remedy.[149] The court properly noted that if the procedure in subsection (5)(a) was intended to be mandatory along the lines of the requirement in subsection (3)(a), the legislature would have used mandatory language as it did in the latter section.[150] The court therefore concluded that the only result of a failure of a buyer to give its seller notice under section 2-607(5)(a) is that the seller is not bound by any determination made in the initial litigation.[151]

Two cases dealt with U.C.C. section 2-719, which permits parties to establish exclusive remedies in their agreement, but also provides that where such an exclusive remedy fails of its essential purpose, the aggrieved party may resort to the remedies generally available in Article 2.[152] In *BOC Group, Inc. v. Chevron Chemical Co., LLC*,[153] the buyer terminated its requirements contract with the seller when the seller failed to timely deliver sufficient quantities of liquid nitrogen, which was required for the safe operation of the buyer's oil refinery production facility. The seller sued for breach of contract, alleging that, under the contract, if the seller failed to deliver, the buyer's only remedy was to buy liquid nitrogen from other sources and then charge the seller for the price difference. The buyer countered that the exclusive remedy had failed of its essential purpose because the seller's failure to deliver on time put the buyer's facility and employees in danger because buyer was unable to purchase the liquid nitrogen from other sources.

In evaluating the buyer's argument, the court noted that an exclusive remedy fails of its essential purpose when novel circumstances, not contemplated by the parties, arise.[154] It then found not credible the buyer's evidence that it was unable to acquire the liquid nitrogen from other sources. In fact, the buyer did purchase substitute goods at least once. Further, the court rejected the buyer's assertion that other suppliers would be reluctant to disturb the contract between these parties because the buyer could not point to any supplier who ever turned down

147. *Id.*

148. *See* U.C.C. § 2-607(5)(a) (2001) (stating, in relevant part, "Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over (a) he *may* give his seller written notice of the litigation") (emphasis added).

149. *Old Kent Bank*, 660 N.W.2d at 388–89, 49 U.C.C. Rep. Serv. 2d (West) at 1171–72.

150. *Id.* at 389, 49 U.C.C. Rep. Serv. 2d (West) at 1172.

151. *Id.*, 49 U.C.C. Rep. Serv. 2d (West) at 1172–73.

152. *See* U.C.C. § 2-719 (2001) (providing in subsection (1) that the parties may establish exclusive remedies for breach in the contract, but further stating in subsection (2), "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.").

153. 819 A.2d 431, 50 U.C.C. Rep. Serv. 2d (West) 489 (N.J. Super. Ct. App. Div. 2003).

154. *Id.* at 438, 50 U.C.C. Rep. Serv. 2d (West) at 494 (citing 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 12-10, at 660 (4th ed. 1995)).

a request for liquid nitrogen from the buyer.[155] The court noted that the parties were both sophisticated business entities that should be held to their bargain.[156] Because the buyer did not attempt to resort to the limited remedy provided for in the contract, the court found that no rational trier of fact could find for the buyer and therefore, the trial court's entry of summary judgment was proper.[157]

In *Patapsco Designs, Inc. v. Dominion Wireless, Inc.*,[158] the U.S. District Court for the District of Maryland held that even if an exclusive remedy of repair or replace failed of its essential purpose, the contract's limitation of the seller's liability for consequential damages was still enforceable.[159] The court noted that the question involved interpreting the potentially conflicting provisions of U.C.C. section 2-719(2) and (3).[160] The court initially noted that although many courts have discussed this conflict, the Maryland Court of Appeals had not addressed the issue.[161] The court then concluded that Maryland would likely treat U.C.C. section 2-719(3) as the controlling provision and, therefore, limitations on consequential damages will fail only if unconscionable.[162] The court found support for this position in the Official Comments to section 2-719, which recognize the validity of clauses limiting or excluding consequential damages as long as they do "not operate in an unconscionable manner."[163] The comments note that such clauses are merely an allocation between the parties of the risk of these unknown damages.[164] Based on the comment, the court recognized the sophisticated business entities should be free to assign these risks to either party as long as it is not unconscionable.[165] Commercial buyers frequently assume the risk of consequential damages, the court noted, to avoid paying a higher price and sellers seek to avoid the uncertainty of these damages that they are not in a position to evaluate.[166] In the court's view, setting aside this provision would undermine the allocation of these uncertain risks determined by the parties in their freely negotiated contract.[167] The court also noted that this approach was consistent with a Fourth Circuit case which had suggested that a limitation of consequential damages provision would survive in a commercial contract even if a limited remedy

155. *Id.* at 439, 50 U.C.C. Rep. Serv. 2d (West) at 496.
156. *Id.* at 440, 50 U.C.C. Rep. Serv. 2d (West) at 497.
157. *Id.* at 439–40, 50 U.C.C. Rep. Serv. 2d (West) at 496–97.
158. 276 F. Supp. 2d 472, 51 U.C.C. Rep. Serv. 2d (West) 159 (D. Md. 2003).
159. *Id.* at 476–77, 51 U.C.C. Rep. Serv. 2d (West) at 164.
160. *Id.* at 476, 51 U.C.C. Rep. Serv. 2d (West) at 163. *Compare* U.C.C. § 2-719(2) (2001) (providing that when an exclusive remedy fails of its essential purpose, the Article 2 remedies may be used) and U.C.C. §§ 2-711 to 715 (2001) (providing that, under Article 2, the buyer may recover consequential damages) *with* U.C.C. § 2-719(3) (2002) (providing consequential damages may be excluded in a contract so long as the exclusion is not unconscionable and further providing such an exclusion for commercial damages is not prima facie unconscionable).
161. *Patapsco Designs*, 276 F. Supp. 2d at 476–77, 51 U.C.C. Rep. Serv. 2d (West) at 164.
162. *Id.* at 477, 51 U.C.C. Rep. Serv. 2d (West) at 164.
163. *Id.* (citing U.C.C. § 2-719 cmt. 3 (2002)).
164. U.C.C. § 2-719 cmt. 3 (2001).
165. *Patapsco Designs*, 276 F. Supp. 2d at 477, 51 U.C.C. Rep. Serv. 2d (West) at 164.
166. *Id.*
167. *Id.*

failed of its essential purpose.[168] Finally, the court observed that this approach was consistent with the modern trend, noting that a majority of courts have determined that limitations on consequential damages are enforceable even if the accompanying limited remedy fails.[169] Therefore, the court dismissed the defendant buyer's counterclaim.[170]

Two cases decided in 2003 limited a remote buyer's remedies against one other than the immediate seller under the U.C.C. In *Neal v. SMC Corp.*,[171] the court held that buyers of motor homes could not revoke acceptance of the goods against the manufacturer when the manufacturer was not the immediate seller.[172] Reasoning that revocation of acceptance returns the parties to the position held before the sale, the court held that the manufacturer, not being a party to the sale, could not return the buyers to the position held before the sale, and thus was not a proper party against whom revocation could be sought.[173] In *Pulte Home Corp. v. Parex, Inc.*,[174] the Virginia Supreme Court held that a contractor who was sued by its customers for defective stucco could not cross-claim and recover consequential damages from the manufacturer with whom it was not in privity of contract.[175]

168. *Id.*, 51 U.C.C. Rep. Serv. 2d (West) at 165 (citing Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102, 30 U.C.C. Rep. Serv. (Callaghan) 103 (4th Cir. 1980)).
169. *Id.* at 478, 51 U.C.C. Rep. Serv. 2d (West) at 166.
170. *Id.* at 479, 51 U.C.C. Rep. Serv. 2d (West) at 167.
171. 99 S.W.3d 813, 49 U.C.C. Rep. Serv. 2d 1179 (Tex. Ct. App. 2003).
172. *Id.* at 817–18, 49 U.C.C. Rep. Serv. 2d (West) at 1184.
173. *Id.* at 818, 49 U.C.C. Rep. Serv. 2d (West) at 1184.
174. 579 S.E.2d 188, 50 U.C.C. Rep. Serv. 2d 766 (Va. 2003).
175. *Id.* at 193, 50 U.C.C. Rep. Serv. 2d (West) at 773.