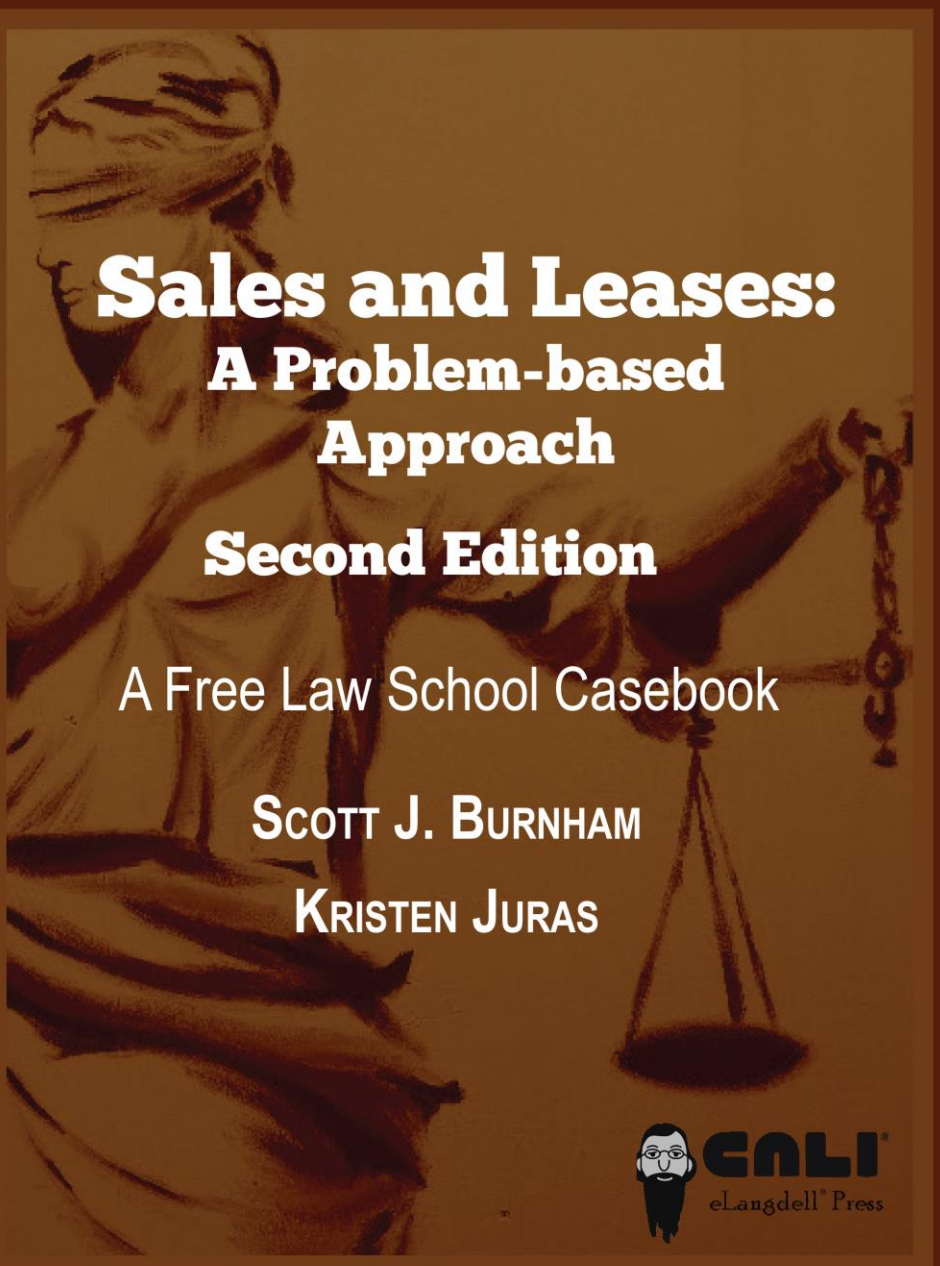
FLORIDA A&M UNIVERSITY COLLEGE OF LAW
SPRING 2024 - First Week Assignment

Subject	Sales
Professor	Ramkellawan, Cynthia
Learning Management System	TWEN
Text and Material Information	REQUIRED COURSE MATERIALS: (1) Access to UCC Articles 1, 2, & 2A. (2) Scott J. Burnham and Kristen Juras, "Sales and Leases: A Problem-based Approach" (Second Edition, 2023). (NOTE - the "Sales and Leases: A Problem-based Approach" assigned course material/textbook can be accessed online at no cost using the following link: https://www.cali.org/books/sales-and-leases-problem-based-approach#. You may choose to: (1) download the text as a PDF or MS Word document; (2) download a tablet-compatible, electronic version of the text; and/or (3) purchase a hardcopy of the text, available as described on the page linked above.)
Text and Material Information	RECOMMENDED TEXTS: Scott J. Burnham and Daniel Keating, "Glannon Guide to Sales: Learning Sales Through Multiple-Choice Questions and Analysis," (Fourth Edition, Wolters Kluwer Publishing, 2021 Copyright; ISBN: 9781543841183). All/any other applicable RISE resources & supplements provided by the College of Law.
Assignment Detail	See attached PDF for purposes of completing the below detailed reading assignment: Class 1 - cover pages; i-xiv; Ch. 1 (pages 1-14); Ch. 2 (pages 15-29); and Ch. 3 (pages 30-42).



Sales and Leases:
A Problem-based Approach

Second Edition

A Free Law School Casebook

SCOTT J. BURNHAM

KRISTEN JURAS

CALI
eLangdell Press

SALES AND LEASES: A Problem-based Approach Second Edition

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Professor Kristen Juras taught contracts, UCC Article 2, property, business, international law and other classes at The University of Montana School of Law from 2000 until 2020. She is the coauthor of the Law of the Sea in a Nutshell (West 2009) and Cases and Materials on the Law of the Sea (Brill 2015). Prior to teaching, Professor Juras practiced transactional and commercial law for more than twenty years, including serving as general counsel for a publicly traded corporation. In 2020, she was elected Lieutenant Governor of Montana.

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Changes in the Second Edition

This new Second Edition incorporates the 2022 Amendments to the Uniform Commercial Code, expands on the discussion for added clarification, and uses gender-neutral language (with the exception of statutory language).

Table of Contents

Chapter 1. Introduction to the Uniform Commercial Code and Article 1

1.1. History of the UCC. As interstate commerce grew, so did the need for national uniformity in laws applicable to commercial transactions. Although the federal government has the power to regulate interstate commerce, commercial law has been left to the states, so in theory there are 51 different bodies of commercial law. Under the leadership of Professor Karl Llewellyn, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) (which is now known as the Uniform Law Commission or ULC) promulgated the Uniform Commercial Code (UCC or Code), which was first enacted by a state in 1953. Today, all states have enacted most parts of the UCC, although there are some variations. Louisiana is the only state that has not enacted Article 2.

1.1.1. Article 1 of the UCC contains general provisions that, according to Revised § 1-102, apply when a transaction is governed by another article of the UCC. For example, statements of purpose, rules of construction, and general definitions are contained in Article 1. In 2001, the ULC promulgated changes to Article 1; these changes are known as Revised Article 1. Every state has adopted Revised Article 1, although none has enacted it in its uniform version.

Note the three significant changes that Revised Article 1 made to former Article 1. It (1) clarifies that Article 1 applies only to Code transactions, (2) clarifies that the concept of course of performance applies throughout the Code, and (3) redefines good faith. When a jurisdiction enacted Revised Article 1, it also made a few changes to Article 2 to coordinate with the changes in Article 1.

1.1.2. In 1999, the ALI voted to support a draft Revised Article 2, but the ULC did not support it, probably because of the perceived difficulty of enacting such a substantial revision in the states. In 2003, the ULC drafted a less radical version known as Amended Article 2. In May 2011, the ULC and the ALI agreed to withdraw Amended Article 2 from consideration by the states. No state has enacted either Revised Article 2 or Amended Article 2. Nevertheless, reference to the proposed revisions may be valuable for seeing the clarifications that were made to the existing text. In 2022, the ULC promulgated amendments to the UCC in order to address emerging technologies. These amendments, which we will call the 2022 Amendments, are discussed in this book, but it is important to check whether they have been enacted in the jurisdiction you are dealing with.

The bottom line is that a statute that is some 75 years old governs modern commercial transactions. As we will see, the Code has a great deal of flexibility in the joints to accommodate change, but there will be many strains put on it.

1.1.3. Unless otherwise indicated, when these materials cite sections from Article 1 and Article 2, this refers to the sections as found in Revised Article 1 and the pre-2003 version

of Article 2 as amended to reflect Revised Article 1 and the 2022 Amendments. When researching the law of a particular jurisdiction, you will have to (1) determine whether that jurisdiction has enacted the 2022 Amendments, and (2) note the nonuniform provisions that were enacted.

These materials sometimes include a **Research Assignment** that invites you to determine or apply the rule adopted in a particular jurisdiction. If you look up a code section in Uniform Laws Annotated, you will find listed each state's nonuniform enactments of the section. In Westlaw, go to ULA, choose the Article of the UCC, and then the section. In the menu bar, choose History and scroll down to Action in Adopting Jurisdictions. You will see a list of Variations from Official Text by state.

1.1.4. Most of the Code sections are followed by Official Comments (which we often simply refer to as "Comment" throughout these materials). Unlike the statute itself, these have not been enacted by the legislature. Therefore, they are only persuasive authority. However, because they are promulgated by the drafters of the statute, they are highly persuasive. The Official Comments can be useful for (1) putting the section in context, (2) elaborating on the principles involved in the section, and (3) guiding interpretation to preserve uniformity.

1.1.5. Remember that the Code is state law, enacted by each state legislature. Often in your research you will find that a federal court is asked to resolve a Code issue, usually because it has diversity jurisdiction. Because there is no federal law on point, the court must apply the law of a particular state, using choice of law analysis to determine which state's law applies. Always note which state's law is being applied. Keep in mind that when deciding a state law issue, the federal court is trying to determine how the highest court in that state would resolve the issue. But because it is a state law issue, the federal court's decision is not binding on the state court and, if faced with the same issue, the state is free to disregard the decision of the federal court.

1.2. Purposes of the UCC. The general *purposes* of the UCC are set forth at § 1-103:

(1) To *simplify, clarify, and modernize* the law governing commercial transactions;

(2) To permit the continued expansion of commercial practices through *custom, usage, and agreement* of the parties; and

(3) To *make uniform* the law among various jurisdictions.

Regarding this last purpose, consider this analysis by Judge Posner in *Northrop Corp. v. Litronic Industries*, 29 F.3d 1173, 1175, 1178 (7th Cir. 1994). This is a good example of a federal court putting aside its views of the merits, and instead determining what the highest court in the state would do:

> Unfortunately, the Illinois courts – whose understanding of Article 2 of the UCC is binding on us because this is a diversity suit governed, all agree, by Illinois law – have had no occasion to choose among the different positions on the consequences of an acceptance that contains "different" terms from the offer. We shall have to choose....
>
> The Uniform Commercial Code, as we have said, does not say what the terms of the contract are if the offer and acceptance contain different terms, as distinct from cases in which the acceptance merely contains additional terms to those in the offer. The majority view is that the discrepant terms fall out and are replaced by a suitable UCC gap-filler.… The leading minority view is that the discrepant terms *in the acceptance* are to be ignored.… Our own preferred view – the view that assimilates "different" to "additional," so that the terms in the offer prevail over the different terms in the acceptance only if the latter are materially different, has as yet been adopted by only one state, California….
>
> Because Illinois in other UCC cases has tended to adopt majority rules …, and because the interest in the uniform nationwide application of the Code – an interest asserted in the Code itself (see [§ 1-103(a)(3)]) – argues for nudging majority views, even if imperfect (but not downright bad), toward unanimity, we start with a presumption that Illinois, whose position we are trying to predict, would adopt the majority view.…

Problem 1-1. You are litigating a case in the state of Washington involving a particular section of UCC Article 2 which has not been addressed by the Washington Supreme Court, but has been addressed by courts in other jurisdictions. What weight should the Washington Supreme Court give to the decisions of other jurisdictions? Mandatory, persuasive, or something in-between? What weight should the Washington Supreme Court give to a decision of the 9th Circuit (of which Washington is a part) that applied California law? A decision of the 9th Circuit that applied Washington law?

1.3. Variation of UCC Provisions by Agreement. Although some provisions of the UCC are mandatory and cannot be varied (discussed below), most provisions are intended to be "default" provisions that govern in the absence of a differing agreement by the parties. See Scott J. Burnham, *Is UCC Article 2 Facilitatory or Regulatory?* 68 Ohio St. L. J. 57 (2007).

1.3.1. The principle of *freedom of contract* (which you should always be prepared to argue to a court) is alive and well under the UCC. Section 1-302(a) provides:

> Except as otherwise provided in subsection (b) or elsewhere in the UCC, the effect of provisions of the UCC *may be varied by agreement*. (emphasis added)

After they finished, the Code drafters realized that sometimes they stated that a provision governed "unless otherwise agreed" and sometimes they didn't. They then included § 1-302(c) to make clear that when they failed to say it, they did not mean that the parties cannot otherwise agree.

Query: Do parties have the freedom of contract to opt out of the UCC when it would otherwise apply? To opt into the UCC when it would not otherwise apply? See § 1-302, Official Comment 2.

Problem 1-2. Although the UCC allows a *buyer* to recover reasonably foreseeable consequential damages arising from a breach, the UCC does not provide for a *seller* to recover consequential damages. See §§ 2-708, 2-713. In a transaction involving goods, the parties agree to the following provision: "In the event of a breach, both Seller and Buyer may recover from the breaching party all damages arising from the breach, including reasonably foreseeable consequential damages." If all the elements of are established, will the seller be entitled to recover consequential damages? See also § 1-305.

What difference does it make that Amended Article 2 provides in § 2-708 that "the measure of [seller's] damages for nonacceptance by the buyer is the difference between the contract price and the market price at the time and place for tender together with any incidental or consequential damages provided in Section 2-710"?

1.3.2. Although § 1-302(a) provides the general rule that the parties may vary the UCC default rules by agreement, under § 1-302(b) the parties *may not* disclaim any of the following obligations prescribed by the UCC:

(1) *good faith* (see § 1-304);
(2) *diligence* (see, for example, the use of *"due diligence"* in the context of notice at § 1-202(f) and "*reasonable diligence*" in the context of notice of dishonor at § 3-504);
(3) *reasonableness* (see, for example, the requirement of reasonable notice of termination at § 2-309(3)); and
(4) *care* (see, for example, buyer's duty to hold rejected goods with reasonable care at § 2-602(b)).

Although these obligations cannot be disclaimed by agreement of the parties, standards of performance intended to satisfy these requirements may be specified, as long as such standards are not manifestly unreasonable. See Scott J. Burnham, *Setting Standards under Sections 1-302 and 9-603*, 1 The Transactional Lawyer 3 (Aug. 2011), available at http://www.law.gonzaga.edu/files/Transactional-Lawyer-Aug2011.pdf.

Problem 1-3. In defining when a buyer's acceptance of goods occurs, § 2-606 refers to a "reasonable opportunity to inspect." Your client has recently opened a retail computer store, and wants you to draft a standard purchase agreement governing the sale of personal computers to customers.

(1) Can the agreement provide that the buyer waives the reasonable opportunity to inspect?

(2) Can the agreement provide that the purchaser has a certain minimum time to inspect? What

factors would you consider in coming up with this time frame?

> 1.3.3. In addition to providing that the obligations of good faith, diligence, reasonableness and care prescribed by the UCC may not be disclaimed, § 1-302(a) contains a second limitation on the parties' freedom to contract: "except as otherwise provided ... *elsewhere* in the UCC." (emphasis added) In other words, throughout the UCC there are mandatory provisions which may not be modified by contract. Some provisions expressly state that they may not be varied by contract. However, others may not be so labeled.

Problem 1-4. Determine whether the following provisions of Article 2 may be varied by agreement of the parties:

(1) The statute of limitations in § 2-725(1).
(2) The statute of frauds in § 2-201(1).
(3) The requirement in § 2-309(3) that a terminating party provide notice of termination of a contract.
(4) The requirement in § 2-511 that tender of payment is a condition to seller's duty to deliver the goods.
(5) The requirement in § 2-602 that a buyer seasonably notify the seller of rejection.

1.4. Good Faith. Section 1-304 states that the obligation of good faith applies throughout the Code, and § 1-201(b)(20) defines it. Recall that § 1-302(b) states that this obligation cannot be disclaimed by the parties.

> 1.4.1. *Good faith* is defined at § 1-201(b)(20) as "honesty in fact and the observance of reasonable commercial standards of fair dealing." The pre-2001 version of Article 1 applied the subjective standard of "honesty in fact" to all parties. However, for purposes of Article 2, former § 2-103(1)(b) applied the additional objective requirement of "observance of reasonable commercial standards of fair dealing" to merchants (the definition of which is discussed in Chapter 2). Thus, it is very important in applying this concept to ascertain what version of Article 1 has been adopted in the jurisdiction involved. Before applying precedent, determine whether the case you are citing applies the old standard or the new standard. For non-merchants, if there was not good faith under the old standard, then there would not be good faith under the new standard; but if there was good faith under the old standard, then there is not necessarily good faith under the new standard.

Research Assignment 1-1. Which version of the definition of "good faith" applies in your chosen jurisdiction?

Problem 1-5. Aunt Martha is not a merchant. She recently sold her car to her nephew, a law student. The written purchase agreement provides that the purchase price of $10,000 shall be paid in 36 monthly installments. However, there is a provision that gives Aunt Martha the option to accelerate the payment date and declare the entire amount due "at will." See § 1-309. When Aunt Martha learned that her nephew failed his Sales and Leases Class in his second year of law school,

Aunt Martha declared the entire unpaid balance of the purchase price due. The nephew had insufficient funds to pay her back in full. The nephew sued Aunt Martha for breach of the duty of good faith.

(1) Under the old definition of good faith, what would the nephew have to prove? How could he prove it?

(2) Under the new definition of good faith, what would the nephew have to prove? How could he prove it?

1.5. Unconscionability. Section 2-302 addresses *unconscionability* in contracts for the sale of goods. Although unconscionability is expressly found in the Code only in Article 2 and in Article 2A (Leases) at § 2A-108, as explained in the *Williams* case discussed below, it is a common law concept and probably supplements all Code transactions under § 1-103(b). Curiously, California did not enact § 2-302. This seems shocking until your realize that the provision was codified with the general Contracts statutes at Civil Code § 1670.5 to make clear that it applies to *all* contracts and not just to those involving transactions in goods.

1.5.1. The statute does not define "unconscionability," probably because defining it might limit it and the concept is intended to be applied in many different circumstances. However, Official Comment 1 states:

> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.

It is not exactly helpful to say that a term is unconscionable if it is unconscionable.

The case of *Williams v. Walker-Thomas Furniture Co*., 350 F.2d 445, 449 (D.C. Cir. 1965) laid out the two elements courts usually look for when confronted with an issue of unconscionability:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.

The element of "absence of meaningful choice" is sometimes referred to as ***procedural unconscionability***. The inquiry is into how the parties came to enter into the transaction. The element of "unreasonably favorable terms" is sometimes referred to as ***substantive unconscionability***. As the *Williams* court went on to say, the inquiry is "whether the terms of the contract are so unfair that enforcement should be withheld." *Id*. at 450. Many, but not all, courts require both elements to be present to support a finding of unconscionability. See, e.g., *Arrowhead School Dist. No. 75, Park Co., Montana v. Klyap*, 79 P.3d 250, ¶ 48

(Mont. 2003).

> 1.5.1.1. *Procedural unconscionability*: Generally, courts find unconscionability only when there is a "contract of adhesion," a contract that is prepared in advance of the transaction by a stronger party who offers it to a weaker party who has no alternative but to agree to the terms. Of course, one alternative is to walk away, so some courts are less willing to find unconscionability when the market offers a choice.
>
> 1.5.1.2. *Substantive unconscionability*: A claim of unconscionability usually arises when the party with all the bargaining power uses that power to include unfair terms in a contract with which the other party must agree. What makes a term so unfair that a court refuses enforcement? Obviously, the standard is subjective and flexible. However, § 2-302(2) provides some guidance:
>
> > When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

1.5.2. Most cases of unconscionability involve a consumer who agreed to a contract of adhesion. This makes sense, for if a party were able to negotiate the terms of a contract, it should not later be heard to complain that it agreed to unfair terms. Although business owners may have a more difficult time establishing procedural unconscionability because they are often viewed by courts as possessing "a greater degree of commercial understanding and substantially more economic muscle than the ordinary consumer …, generalizations are always subject to exceptions and categorization is rarely an adequate substitute for analysis." Several courts have recognized that "experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms." *A & M Produce Co. v. FMC Corp*., 135 Cal. App. 3d 473, 489 (1982). See also *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004 (9th Cir. 2010), in which the court found certain terms in a franchise agreement between two businesses to be unconscionable, noting that "California courts have long recognized that franchise agreements have some characteristics of contracts of adhesion because of the 'vastly superior bargaining strength' of the franchisor."

1.5.3. Several courts employ a sliding scale between the two elements of unconscionability. If there is a great deal of procedural unconscionability, then less substantive unconscionability is needed to support the finding of unconscionability. On the other hand, if there is little procedural unconscionability, then a great deal of substantive unconscionability is needed to support the finding. See, for example, *Donovan v. RRL Corporation*, 27 P.3d 702, 723 (Cal. 2001), in which the court refused to enforce a contract for the sale of a car advertised at a mistaken purchase price because of substantive unconscionability , even though there was little evidence of procedural unconscionability.

1.5.4. Note that the determination of whether a contract or a term is unconscionable is to be made as of "the time [the contract] was made." § 2-302(1). If the effect of a term turns out to be unfair later, it is probably not unconscionable. For example, in *J.L. McEntire & Sons, Inc. v. Hart Cotton Co., Inc.*, 511 S.W.2d 179 (Ark. 1974), cotton growers agreed to sell their crop at a certain price when the crop was delivered at harvest time. When that time came, the market price had doubled. The sellers claimed that the contract was unconscionable, but the court held that it was fair at the time, and "prices could have fallen as easily as they could have risen." *Id.* at 183.

1.5.5. What can a court do if it determines that a clause is unconscionable? The alternatives set forth in § 2-302(1) are:

(1) refuse to enforce the contract in its entirety;
(2) enforce the contract without the unconscionable clause; or
(3) limit the application of an unconscionable clause (*i.e.*, partial enforcement in a way which is not unconscionable).

1.5.6. Unconscionability is one of the provisions in the Code that the parties are not free to disclaim.

Practice Tip: If a drafter is concerned that a term may appear to be unfair, the drafter may wish to include some recitals that explain why it is reasonable in light of commercial practices or the circumstances of the parties.

Problem 1-6. Educational Materials Company sells a package of educational materials entitled "Junior Institute," which is advertised to prepare toddlers for elementary school. Company employees solicit sales door-to-door in areas that the company has identified as having high numbers of residents with limited education and economic means. The purchase price of $600 is three to four times higher than comparable educational products. Ninety-nine percent of purchasers elect to pay the purchase price in 36 monthly installments (rather than cash); interest is charged at the highest rate allowed by law. The salesman allows the consumer to examine the materials at the time of solicitation, and immediately delivers a complete set of materials to the purchaser if a sale is concluded. At the time of sale, the consumer is presented with a contract containing three pages of fine print. Salesmen are not authorized to make any changes to the contract. In compliance with federal consumer protection laws, the contract allows the consumer to cancel the contract within three business days after the purchase for a full return of the purchase price. The contract provides that the contract may not be terminated after this three-day cancellation period for any reason, and disclaims in bold print in the middle of the contract any express or implied warranties.

After making three of her monthly installment payments, a 22-year old purchaser terminated the contract, after reading a review rating the Junior Institute program at 1.5 on a scale of 1 (poor) to 10 (superior). She also discovered, while reading the review, that several similar but more highly rated toddler packages could be purchased for prices ranging between $150 and $200. Educational

Materials Company filed a judicial proceeding to collect the balance owing on the contract, plus all of its attorney's fees and expenses, pursuant to a clause requiring the consumer to pay any attorney's fees and expenses incurred by the company in any legal proceeding arising under the contract (and which does not contain a reciprocal attorney's fee clause in favor of the consumer). The mother raised the argument that the contract should not be enforced against her because it is unconscionable.

(1) What factors should the consumer's attorney rely upon to support an argument that the contract is procedurally unconscionable?

(2) What factors should the consumer's attorney rely upon to support an argument that the contract is substantively unconscionable?

(3) If you determine that the contract or portions thereof are unconscionable, what would be the appropriate remedy?

1.6. Hierarchy of Construction. The UCC provides rules of construction in interpreting the terms of the parties' contract.

1.6.1. First, you need to understand the definition of both *contract* and *agreement* under the UCC. Let's start with the term *agreement*, which is defined at § 1-201(b)(3) as comprising the following elements:

> (1) the bargain of the parties in fact as determined from their language and the circumstances;
> (2) course of performance;
> (3) course of dealing; and
> (4) usage of trade.

1.6.2. Under § 1-201(b)(12), a *contract*, as distinguished from an *agreement*, means the total legal obligation that results from the agreement as determined by the UCC (such as gap-fillers) and supplemental laws. For example, if I say that I will sell you ten grams of cocaine for $1,000 and you agree, we have made an *agreement* on those terms and you have probably impliedly agreed to pay cash on delivery because of usage of trade (we know this from watching movies). But we have not made a *contract* because our illegal agreement does not create any legal obligations. Like most practitioners, we will probably not use this distinction as carefully as we should in this book.

1.6.3. Note that the definitions in § 1-201 apply throughout the UCC, including, for example, Article 2A (Leases), Article 3 (Commercial Paper), and Article 9 (Secured Transactions). A separate list of definitions also appears within each Article. See, for example, §§ 2-103 through 2-106. If you run across an unfamiliar term, *always* check for a definition provided elsewhere in the UCC. You should even check for definitions of familiar terms. You might assume, for example, what constitutes a "writing" or what it

means to "sign" something. Now look at how those terms are defined at § 1-201. Note the distinction between a "writing" and a "record." Look also at the Official Comment for the term "sign" for further insight, especially regarding the effect of the 2022 Amendments. You might be surprised to learn that the definition of "purchase" includes acquiring a gift. Note, however, that § 1-201(a) provides that the definitions apply "unless the context requires otherwise."

1.6.4. Now, let's go back to the term "agreement." In addition to the "bargain of the parties," (*i.e.*, terms specifically agreed upon by language, conduct, or other circumstances), the UCC incorporates three important other sources of terms into the parties' agreement: *course of performance, course of dealing*, and *usage of trade.* These terms are defined at § 1-303:

1.6.4.1. *Course of performance* arises when there are repeated occasions for performance of *this particular contract* by the parties, and the repeated performance by one party is accepted by or acquiesced in by the other. For example, an installment contract would give rise to course of performance. See § 1-303(a).

1.6.4.2. *Course of dealing* is a sequence of conduct concerning *previous transactions* between the parties that is fairly to be regarded as establishing a common basis of understanding for interpreting a future agreement. See § 1-303(b).

1.6.4.3. *Usage of trade* is any practice or method of dealing having such regularity of observation in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. See § 1-303(c).

Query: Are you bound by a trade usage if you are not in the trade? See § 1-303, Official Comments 3 and 4.

Problem 1-7. Identify each of the following as course of performance, course of dealing, or usage of trade:

(1) On several previous occasions, a law firm has ordered stationery from a local paper company. The orders are less than $500 each, and the offer and acceptance are completed orally over the phone each time. On each prior sale, the law firm paid within 30 days of delivery. When the company delivered the next order, it insisted on payment upon delivery. When is payment due?

(2) An agreement provides for monthly delivery of books by Caselaw Publishing Group to Cheapbooks.com for resale. The agreement is silent as to the delivery date. The publisher delivered between the 5th and the 10th day of each month for the first three months of the agreement, and Cheapbooks.com accepted the deliveries without complaint. In the 4th month, Cheapbooks.com complained that a delivery made on the 10th is late. Is it?

(3) Poulsen's Hardware Store ordered 1,000 feet of 2"x4" lumber boards from Seeley Swan Mill.

A recognized industry publication allows a variance of up to 10% in the number of feet delivered. Seeley Swan Mill delivered 950 feet. Is the mill in breach?

> 1.6.5. Now read § 1-303(e). What happens if there is a conflict between the terms of the parties' agreement, and, for example, usage of trade? What if there is a conflict between, for example, the parties' course of performance and any mandatory provisions of the UCC?

Problem 1-8. Number from 1 through 6 the priority of the following sources of terms of the parties' contract:

___Course of dealing	___Course of performance	___Express terms
___Usage of trade	___Mandatory UCC provisions	___UCC default provisions

Problem 1-9. Apply the § 1-303 hierarchy to the following situations:

(1) You sell me a machine. The contract provides you will service it "every week." You find out that in the trade, these machines are serviced monthly, so you want to switch to monthly service. Can you?

(2) You sell me a machine. The contract provides you will service it "regularly." For a year, you service it every week. You find out that in the trade, these machines are serviced monthly, so you want to switch to monthly service. Can you?

(3) You sell me a machine every year for three years. Each contract provides you will service it "regularly." During each of these three years, you have serviced the machine every week. In the fourth year, you sell me another machine. The contract provides you will service it "regularly." When you don't show up the first week, I call and ask you to come service the machine. You say you only have to service it monthly, because that is the trade practice. Are you right?

(4) In the fifth year, you sell me a machine. The contract provides you will service it "regularly." You service it monthly for the first six months, and I don't object until the seventh month, when I claim you are in breach because you serviced the previous machines every week. Are you in breach?

> 1.6.6. In the hierarchy, the express terms of the parties' agreement trumps course of performance. However, under § 1-303(f), if the parties' course of performing a particular agreement varies from the express terms of the agreement, the conduct may constitute a waiver or modification of the term. We discuss waiver and modification in Chapter 9.

Problem 1-10. An agreement provides for monthly delivery of books by Caselaw Publishing Group to Cheapbooks.com for resale. The agreement provides for delivery on the 1st day of each month. The publisher delivered between the 5th and the 10th day of each month for the first three months of the agreement, and Cheapbooks.com accepted the deliveries without complaint. In the

4th month, Cheapbooks.com complained that a delivery made on the 10th is late. Is it? Does Cheapbooks.com have any recourse?

1.7. Supplementation by Other Law. Section 1-103(b) provides that *unless displaced* by a particular provision of the UCC, the principles of law and equity supplement the provisions of the UCC. Specific examples given of such supplementing laws and equitable principles include the following, but the list is non-exclusive (see Official Comment 3):

(1) the law merchant (what the heck is that?);
(2) capacity to contract, duress, coercion, mistake (issues going to the validity of a contract);
(3) estoppel;
(4) fraud and misrepresentation;
(5) bankruptcy;
(6) principal and agency relationships; and
(7) "other validating or invalidating cause" (huh?).

Article 2 does not mention most of the defenses to contract formation, but they nevertheless apply to a contract for the sale of goods. For example, if a 17-year old buys an automobile, that is an Article 2 transaction, but the rules applicable to a purchase by a minor are found in other law.

1.8. Choice of Law. Prior to its revision in 2001, former § 1-105 allowed the parties to designate a jurisdiction whose law governs the contract if the transaction bears a "reasonable relation" to that jurisdiction. As noted in Official Comment 1, any jurisdiction in which "a significant enough portion of the making or performance of the contract is to occur" is appropriate. For example, if a seller of goods enters into a contract at its headquarters in Delaware, has a California warehouse from which goods are to be shipped under the contract, the goods are manufactured in South Dakota, the buyer is located in Montana, and the goods are to be shipped to Texas, any one of those jurisdictions would have a "reasonable relation" to the contract, and the parties could choose to apply the law of any of those jurisdictions.

Revised Article 1 proposed a regime in which parties to a transaction that did not involve a consumer were free to choose the applicable law without limitation. After this proposal was rejected by every jurisdiction that enacted Revised Article 1, the Uniform Law Commission gave in and revised § 1-301 to restore the original regime.

1.8.1. Section 1-301(c) sets forth a narrow list of limitations on the parties' right to designate their choice of governing law. For example, under § 2A-106(1), a consumer lease may only designate the law of the jurisdiction where the consumer resides or in which the goods are to be used.

1.8.2. In the absence of an effective choice of law, § 1-301(b) directs the courts to apply the UCC to transactions having an "appropriate relationship" to that jurisdiction. *Restatement (Second) of Conflict of Laws* § xx suggests that the most significant

relationship in a sales transaction may be the place of delivery. As we will see in Chapter 10, the meaning of "place of delivery" may surprise you.

Official Comment 1 notes that it would not be appropriate to apply the UCC if, for example, the parties have "clearly contracted on the basis of some other law." Due to the uniformity and widespread adoption of the UCC, its application by the forum state should not present difficulties, unless the forum state has adopted a non-uniform version of the applicable UCC provisions that may affect the outcome of the case.

1.8.3. Note that choice of law differs from choice of forum. *Choice of forum* resolves the issue of where the case will be heard. Once that is determined, either by the parties or by the rules of civil procedure, then *choice of law* determines the law that the court will apply to the transaction. If the parties have not exercised their freedom of contract to determine the applicable law, then the courts will use principles of conflict of laws to make the determination.

1.8.4. Recall that § 1-103(b) provides that principles of law and equity supplement the UCC, unless displaced. *Restatement (Second) of Conflict of Laws* § 187(2) sets forth a widely accepted principle:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied …, unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which … would be the state of the applicable law in the absence of an effective choice of law by the parties.

Problem 1-11. The parties have chosen the law of a jurisdiction that has a reasonable relation to the transaction. The forum state (which is a different state than the jurisdiction whose law governs) also has a reasonable relation to the transaction. The forum court has determined that the law of the chosen jurisdiction applicable to certain non-UCC elements of the claim is contrary to an important public policy of the forum state. Under § 1-301, must the court honor the choice of law clause? Applying §187 of the Restatement, under what circumstances would the court be allowed to disregard the parties' choice of law provision and apply the law of the forum state?

Chapter 1 Additional Sources.

Scott J. Burnham and Daniel Keating, *Glannon Guide to Sales: Learning Sales Through Multiple-*

Choice Questions and Analysis (Wolters Kluwer), Chapter 2

James J. White and Robert S. Summers, *Uniform Commercial Code* (West 6th ed., 2010), Introduction

Chapter 2. Introduction to UCC Article 2

2.1. Scope of Article 2: Transactions in Goods. Article 2 of the Uniform Commercial Code applies to *transactions in goods*. § 2-102.

2.1.1. One of the purposes of this class is to teach you how to read and use statutes. In some areas of law, such as torts, you rely more heavily on case law than on statutes in giving advice and coming to conclusions. "Sales of goods" is an area of law where you must learn to *begin with the statute* and the *Official Comments*. Note that while the Official Comments are extremely valuable for purposes of interpretation, they have not been enacted by the legislature and are only persuasive authority. Cases become important when a particular UCC provision is subject to more than one interpretation.

2.1.2. You can seldom rely on a single statute when applying the UCC. In applying a particular provision of Article 2, you often have to refer to other provisions of Article 2, or to the general provisions of Article 1. Always look at any applicable *definitions*, which may be in Article 1 or Article 2, and at the *cross-references* to other UCC sections that are contained in or immediately follow the provision you are reading.

2.1.3. Article 2 applies to "transactions in goods." § 2-102. Article 2 does not apply to transactions involving real property or services. Our first step is to determine what constitutes a "good" under Article 2. For a comprehensive compilation of federal and state cases, see Sonja A. Soehnel, Annotation, W*hat Constitutes "goods" Within the Scope of UCC Article 2*, 4 A.L.R.4th 912 (1981).

Problem 2-1. Where are "goods" defined for purposes of Article 2? Identify the statutory requirements that must be met before an item can fall within the definition of "goods."

Problem 2-2. Seller is in the business of creating neon signs. Buyer offers seller $1,000 to create a neon sign that says "Stockman's Bar" and seller promises to create the sign within 30 days. Is this a contract for the sale of goods?

Problem 2-3. What three items are specifically *excluded* from the definition of goods?

Problem 2-4. In general, are things firmly affixed to the land at the time of the contract for sale subject to Article 2? Under § 2-107, what categories of things attached to realty fall within the definition of "goods"?

Problem 2-5. Now that you've mastered the definition of "goods," let's apply it. Do the following items fall within the definition of "goods" for purposes of Article 2:

(1) the sale of cookies by a girl scout?
(2) the sale of television programming?
(3) the sale of a yellow page ad?

(4) the sale of electricity by a utility company?
(5) the sale of a debt owed to you?
(6) the sale of a mobile home located on blocks on a dealer's lot?
(7) the sale of a mobile home embedded in a cement foundation on land, which the buyer subsequently intends to move?
(8) the sale by a farmer in December of wheat which he will plant next May?
(9) the sale of Confederate money?
(10) the sale of tickets to the Final Four basketball play-offs?
(11) the sale of the answer sheet to the Sales and Leases final exam?
(12) the sale of water by an owner of land on which an artesian well is located to a bottler who will pump 100,000 gallons per month from the spring?

Research Assignment 2-1. Does the sale of blood by a law student to a blood bank fall within the definition of "goods" for purposes of Article 2? Many jurisdictions have a statute on point that you may wish to research. See, e.g., California Health and Safety Code § 1606, which provides:

> **Blood, etc.; processing, distribution; service, not sale**
>
> The procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same, or any of them, into the human body shall be construed to be, and is declared to be, for all purposes whatsoever, the rendition of a service by each and every person, firm, or corporation participating therein, and shall not be construed to be, and is declared not to be, a sale of such whole blood, plasma, blood products, or blood derivatives, for any purpose or purposes whatsoever.

What reasons do you believe the California legislature considered in enacting this "blood shield" statute?

> 2.1.4. Section 2-102 specifies that Article 2 applies to "transactions in goods." *Transaction* is not defined, but is undoubtedly a broader concept than a "sale." Clearly, sales of goods are governed by Article 2, but what about gifts of goods? Leases of goods? Barter transactions? See § 2-304.
>
> > 2.1.4.1. Most operative provisions of Article 2 apply only to *sales* of goods. For example, the definition of "contract" and "agreement" under § 2-106 are limited to those relating to the *present* or *future sale* of goods. Thus, wherever the term "contract" or "agreement" is used in Article 2, leases of goods are by definition excluded. Similarly, most Article 2 provisions specifically refer to a contract for the sale of goods, such as the statute of frauds found at § 2-201 which states "a contract *for the sale of goods* ... is not enforceable ... unless there is a record."
> >
> > 2.1.4.2. A few sections, such as § 2-403 regarding title, apply not only to sales of goods, but to gifts of goods (see § 1-201(b)(29) that defines a "purchase" to include

gifts and the corresponding definition of "purchaser" at § 1-201(b)(30)), and to "entrusting" of goods.

2.1.4.3. Transactions intended to operate as a security transaction are specifically excluded from the scope of Article 2. § 2-102.

2.1.4.4. **Warning**: Some "leases" are actually sales in substance, especially those that give ownership to the lessee at the end of the term of the lease for little or no additional consideration. Sometimes what the parties call a "lease" is actually a sale, where the seller retains a security interest in the goods. See § 1-203. We will go into more depth on this issue in Chapter 20.

2.1.4.5. For a compilation of relevant cases, see Sonja A. Soehnel, Annotation, *What Constitutes a Transaction, a Contract for Sale, or a Sale Within the Scope of UCC Article 2*, 4 A.L.R.4th 85 (1981).

2.2. Hybrid Transactions. Article 2 does not apply to contracts for services or contracts for land, intangibles, or other items that are not "goods." Sometimes a transaction involves both goods and services (such as the sale and installation of carpet), both goods and real property (cattle and ranch land), or both goods and software (a computer loaded with programs). The 2022 Amendments added a new definition of "hybrid transaction" in § 2-106(5). Section 2-102(2) then provides:

(2) In a hybrid transaction:

(a) If the sale-of-goods aspects do not predominate, only the provisions of this Article which relate primarily to the sale-of-goods aspects of the transaction apply, and the provisions that relate primarily to the transaction as a whole do not apply.

(b) If the sale-of-goods aspects predominate, this Article applies to the transaction, but this does not preclude the application in appropriate circumstances of other law to the aspects of the transaction which do not relate to the sale of goods.

2.2.1. To apply this rule, first determine which aspect of the transaction predominates. The majority of jurisdictions have applied a ***predominant factor*** test to resolve this issue. A well-known case, *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974) enunciated this test as follows:

The test for inclusion or exclusion is ... whether their predominant factor, their thrust, their purposes reasonably stated, is the rendition of service with goods incidentally involved (e.g., contract with artist for painting) or is it a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

The revised Official Comment 3 to § 2-102 may be helpful:

> 3. It is important to note that, in contrast to the frequent reference (under prior case law in many states) to the predominant *purpose* of a hybrid transaction, subsection (2) focuses on which aspect of the transaction predominates without requiring a finding of the "purpose" of either or both parties (although that purpose, when evident, may be a relevant factor in deciding which aspect predominates). The determination of which aspect of a hybrid transaction predominates is left to the court, which should evaluate each transaction on a case-by-case basis without the necessity of applying any particular formula. Factors that may be relevant to that determination include, but are not limited to, the language of the agreement, the portion of the total price that is attributable to the sale of goods (as to which an agreed-upon allocation will ordinarily be binding on the parties), the purposes of the parties in entering into the transaction (when that is ascertainable), and the nature of the businesses of the parties (such as whether the seller is in the business of selling goods of that kind). Because the definition of "goods" expressly includes "specially manufactured goods," services involved in manufacturing goods are normally attributable to the sale-of-goods aspects of the transaction. Services in designing specially manufactured goods, however, would not normally be attributable to the sale-of-goods aspects of the transaction.

As an example of analysis of this issue by the courts, in *Pass v. Shelby Aviation, Inc*., 2000 Tenn. App. LEXIS 247, an airplane was brought in for a required inspection. The mechanics failed to install some bolts, resulting in an accident. Having missed the statute of limitations for negligence, which is 3 years, the plaintiffs sought to bring a claim for breach of express and implied warranties under the UCC, which has 4 year statute of limitations. The court enunciated four factors to look at in determining whether the contract was predominantly for goods, or predominantly for services:

- the language of the parties' contract (*i.e.*, whether it focused on goods versus services);
- the nature of the business of the supplier (is this a person who regularly sells goods, or rather provides services);
- the reason the parties entered into the contract (what was bargained for B goods or services); and
- the respective amounts charged under the contract for goods and for services.

No one factor alone is conclusive. For example, even where the cost of goods exceeds the cost of services, the predominant purpose may still be deemed the provision of services where the other factors support such a finding. Applying these factors, the appellate court determined that the predominant purpose of this particular contract was the provision of

services rather than the sale of goods, and thus plaintiff could not assert breach of warranty claims under Article 2.

Not all courts apply the same factors. See, for example, *Colorado Carpet Installation, Inc. v. Palermo*, 668 P.2d 1384, 1388-89 (Colo. 1983), which defined the factors as: (1) the contractual language used by the parties; (2) whether the agreement involves one overall price that includes both goods and labor or, instead, calls for separate and discrete billings for goods on the one hand and labor on the other; (3) the ratio that the cost of goods bears to the overall contract price; and (4) the nature and reasonableness of the purchaser's contractual expectations of acquiring a property interest in goods.

2.2.2. Some of the factors of the "predominant factor" test don't easily apply, leaving the cost of the items involved as the most influential factor. Compare *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 13-14 (1st Cir. 1987), which held that Article 2 governed the sale of a construction company's equipment, inventory, and uncompleted construction contracts where "most of the significant terms" and 98% of the purchase price related to the sale of goods; and *Fink v. DeClassis*, 745 F. Supp. 509, 515-16 (N.D. Ill. 1990), finding that Article 2 did not govern the sale of a company's beauty care product lines where the goods (machinery, equipment, and inventory) constituted only 17% of the purchase price, which also included such intangible assets as "tradenames, trademarks, logos, advertising, artwork, customer lists, sales records, unfulfilled sales orders, goodwill, and licensing agreements."

2.2.3. If you have determined that the sales aspect of the transaction does not predominate, then under § 2-102(2)(a), apply Article 2 to the sales aspect and other law to the other aspect.

If you have determined that the sales aspect of the transaction does predominate, then under § 2-102(2)(b), generally apply Article 2 to the entire transaction, though there may be instances when you would apply other law to the other aspect. For example, the Article 2 rules on perfect tender and the definition of "merchantability" might not apply well to the software part of a transaction.

2.2.4. **Practice Tip.** Under the principle of freedom of contract, and subject to the choice of law provisions of § 1-301, the parties can agree to choose the law applicable to the contract. For example, if you draft a "hybrid transaction" contract, you can avoid the "predominant factor" test by specifying that UCC law applies to all claims relating to the goods, and non-UCC law to all other claims. Query: can you choose the UCC to govern all claims arising under the "hybrid transaction" contract, including, for example, claims relating to services or to intellectual property? What danger might there be in attempting to apply the UCC to all potential claims arising under a contract?

Problem 2-6. Belva needed dentures. When she visited her dentist, he measured her mouth and ordered the dentures. The invoice stated that the dentist's services were valued at $2,000 and the

dentures at $1,000. The dentures were defective and she developed severe mouth sores. Applying the predominant factor test, does she have a claim against the dentist for breach of warranty under Article 2? What factors would you consider? Would the result be different if the dentist's services were valued at $1,000 and the dentures at $2,000?

Problem 2-7. A farmer contracts with an aerial spraying service to have crops sprayed for weeds with a herbicide. The cost of the herbicide is separately stated in the contract, and represents 90% of the total invoice. The herbicide fails to control the weeds, and the farmer brings a claim for breach of warranty under Article 2. Will the farmer be able to do so under the predominant factor test? What factors should you consider? See *Moeller v. Huntting Elevator Co.*, 38 U.C.C. Rep. Serv. 2d (Callaghan) 1122 (Minn. App. 1999).

2.3. Application of Article 2 to Sales of Computer Software. Does the term "goods" include computer software? As noted by the American Law Institute in its *Introduction to the Principles of the Law of Software Contracts*, "perhaps no other commercial subject matter is in need of greater harmonization or clarification."

Advent Systems Ltd. v. Unisys Corp.
925 F.2d 670 (3d Cir. 1991)

WEIS, Circuit Judge

In this diversity case we conclude that computer software is a good within the Uniform Commercial Code.…

Plaintiff, Advent Systems Limited, is engaged primarily in the production of software for computers. As a result of its research and development efforts, by 1986 the company had developed an electronic document management system (EDMS), a process for transforming engineering drawings and similar documents into a computer data base.

Unisys Corporation manufactures a variety of computers.... In June 1987 Advent and Unisys signed two documents.…

In these documents, Advent agreed to provide the software and hardware making up the document systems to be sold by Unisys in the United States. Advent was obligated to provide sales and marketing material and manpower as well as technical personnel to work with Unisys employees in building and installing the document systems. The agreement was to continue for two years, subject to automatic renewal or termination on notice.…

The relationship, however, soon came to an end. Unisys, in the throes of restructuring, decided it would be better served by developing its own document system and in December 1987 told Advent their arrangement had ended....

Advent filed a complaint in the district court alleging, *inter alia*, breach of contract, fraud, and tortious interference with contractual relations. The district court ruled at pretrial that the Uniform Commercial Code did not apply because although goods were to be sold, the services aspect of the contract predominated.

On appeal ... Unisys contends that the relationship between it and Advent was one for the sale of goods and hence subject to the terms of statute of frauds in the Uniform Commercial Code. Because the agreements lacked an express provision on quantity, Unisys insists that the statute of frauds bans enforcement....

The district court ruled that as a matter of law the arrangement between the two parties was not within the Uniform Commercial Code and, consequently, the [UCC] statute of frauds was not applicable. As the district court appraised the transaction, provisions for services outweighed those for products and, consequently, the arrangement was not predominantly one for the sale of goods....

The Distribution Agreement begins with the statement, "Unisys desires to purchase, and Advent desires to sell, on a non-exclusive basis, certain of Advent hardware products and software licenses for resale worldwide."… Schedule A lists twenty products, such as computer cards, plotters, imagers, scanners and designer systems.…

In support of the district court's ruling that the U.C.C. did not apply, Advent contends that the agreement's requirement of furnishing services did not come within the Code. Moreover, the argument continues, the "software" referred to in the agreement as a "product" was not a "good" but intellectual property outside the ambit of the Uniform Commercial Code.

Because software was a major portion of the "products" described in the agreement, this matter requires some discussion. Computer systems consist of "hardware" and "software." Hardware is the computer machinery, its electronic circuitry and peripheral items such as keyboards, readers, scanners and printers. Software is a more elusive concept. Generally speaking, "software" refers to the medium that stores input and output data as well as computer programs. The medium includes hard disks, floppy disks, and magnetic tapes.

In simplistic terms, programs are codes prepared by a programmer that instruct the computer to perform certain functions. When the program is transposed onto a medium compatible with the computer's needs, it becomes software. The process of preparing a program is discussed in some detail in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222, 1229 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031, 107 S. Ct. 877, 93 L. Ed. 2d 831 (1987) and *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033, 104 S. Ct. 690, 79 L. Ed. 2d 158 (1984). *See also* Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply*?, 35 Emory L.J. 853, 864-74 (1986).

The increasing frequency of computer products as subjects of commercial litigation has led to controversy over whether software is a "good" or intellectual property. The Code does not specifically mention software.

In the absence of express legislative guidance, courts interpret the Code in light of commercial and technological developments. The Code is designed "to simplify, clarify and modernize the law governing commercial transactions" and "to permit the continued expansion of commercial practices." 13 Pa. Cons. Stat. Ann. § 1102 (Purdon 1984). As the Official Commentary makes clear:

> "This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices."

Id. comment 1.

The Code "applies to transactions in goods." 13 Pa. Cons. Stat. Ann. § 2102 (Purdon 1984). Goods are defined as "all things (including specially manufactured goods) which are moveable at the time of the identification for sale." *Id.* at § 2105. The Pennsylvania courts have recognized that "'goods' has a very extensive meaning" under the U.C.C." [cites omitted]

Our Court has addressed computer package sales in other cases, but has not been required to consider whether the U.C.C. applied to software per se. *See Chatlos Systems, Inc. v. National Cash Register Corp.*, 635 F.2d 1081 (3d Cir. 1980) (parties conceded that furnishing the plaintiff with hardware, software and associated services was governed by the U.C.C.); *see also Carl Beasley Ford, Inc. v. Burroughs Corporation*, 361 F. Supp. 325 (E.D. Pa. 1973) (U.C.C. applied without discussion), *aff'd* 493 F.2d 1400 (3d Cir. 1974). Other Courts of Appeals have also discussed transactions of this nature. *RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985) (goods aspects of transaction predominated in a sale of a software system); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 742-43 (2d Cir. 1979) (in sale of computer hardware, software, and customized software goods aspects predominated; services were incidental).

Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.

That a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace. The fact that some programs may be tailored for specific purposes need not alter their status as "goods" because the Code definition includes "specially manufactured goods."

The topic has stimulated academic commentary with the majority espousing the view that software fits within the definition of a "good" in the U.C.C. Applying the U.C.C. to computer software transactions offers substantial benefits to litigants and the courts. The Code offers a uniform body of law on a wide range of questions likely to arise in computer software disputes: implied warranties, consequential damages, disclaimers of liability, the statute of limitations, to name a few.

The importance of software to the commercial world and the advantages to be gained by the uniformity inherent in the U.C.C. are strong policy arguments favoring inclusion. The contrary arguments are not persuasive, and we hold that software is a "good" within the definition in the Code.

The relationship at issue here is a typical mixed goods and services arrangement. The services are not substantially different from those generally accompanying package sales of computer systems consisting of hardware and software. *See Chatlos Systems, Inc. v. National Cash Register Corp.*, 479 F. Supp. 738, 741 (D.N.J. 1979); *Beasley Ford*, 361 F. Supp. at 328.

Although determining the applicability of the U.C.C. to a contract by examining the predominance of goods or services has been criticized, we see no reason to depart from that practice here. As we pointed out in *De Filippo v. Ford Motor Co.*, 516 F.2d 1313, 1323 (3d Cir.), *cert. denied*, 423 U.S. 912, 96 S. Ct. 216, 46 L. Ed. 2d 141 (1975), segregating goods from non-goods and insisting "that the Statute of Frauds apply only to a portion of the contract, would be to make the contract divisible and impossible of performance within the intention of the parties."

We consider the purpose or essence of the contract. Comparing the relative costs of the materials supplied with the costs of the labor may be helpful in this analysis, but not dispositive. *Compare RRX*, 772 F.2d at 546 ("essence" of the agreement) *with Triangle*, 604 F.2d at 743 ("compensation" structure of the contract).

In this case the contract's main objective was to transfer "products." The specific provisions for training of Unisys personnel by Advent were but a small part of the parties' contemplated relationship.

The compensation structure of the agreement also focuses on "goods." The projected sales figures introduced during the trial demonstrate that in the contemplation of the parties the sale of goods clearly predominated. The payment provision of $ 150,000 for developmental work which Advent had previously completed, was to be made through individual purchases of software and hardware rather than through the fees for services and is further evidence that the intellectual work was to be subsumed into tangible items for sale.

We are persuaded that the transaction at issue here was within the scope of the Uniform Commercial Code and, therefore, the judgment in favor of the plaintiff must be reversed.

Case Notes:

1. A subsidiary issue that the *Advent* court failed to discuss was whether the software, which it classified as a good, was sold to Unisys, and thus subject to Article 2, or licensed, and thus not within the scope of Article 2. Some courts have ruled that because a software user is not required to return the software to the vendor, it is a sale and not a license. *Softman Products Co. v. Adobe Systems, Inc*. 171 F. Supp. 2d 1075 (C.D. Cal. 2001). Other courts have held that the "sale" of software is a license, because the end-user does not obtain all rights to the program (such as the right to copy it), but only a limited right to use it. *Adobe Systems v. Stargate Software*, 216 F. Supp. 2d 1051 (N.D. Cal. 2002).

2. Not all courts have followed the *Advent* decision. See *Triple Point Technology, Inc. v. D.N.L. Risk Management, Inc*., 2000 U.S. Dist. LEXIS 22327 (noting that "merely because the program had to be contained on a floppy disk or CD-ROM for transfer does not bring this agreement under the purview of the U.C.C."). Several commentators have also criticized the decision, including the following comments of Lorin Brennan from *Why Article 2 Cannot Apply to Software Transactions*, 38 Duq. L. Rev. 459, 466-67 (2000):

> As the court in *Advent Systems v. Unisys Corp*. blithely put it:
>
> > That a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable, and available in the marketplace.
>
> In other words, a computer program may start off as intangible intellectual property, but once it is copied onto a floppy disc it merges into the disc and becomes a tangible, physical "good." Under this view all software transactions fit neatly into the, if you will, Ptolemic world view of Article 2, where everything circles around the fixed notion of a sale in goods.
>
> It is a tidy and comforting notion - and spectacularly wrong.…
>
> The mere fact that [a software retailer downloads and redistributes a copy of a Linux program] does not make Linux the computer program "tangible, moveable and available in the marketplace." Linux, the computer program, still remains an intangible, copyrighted work. Linux, the computer program, has not moved from the Linux Web page even though it was copied. If the copy made by [the user] does not conform to the requirements of the GNU Public License, then that copy is unauthorized, its distribution infringing, and the copy is definitely not available in the marketplace.
>
> This difference is profound. The goods-centric image sees a software transaction as a delivery of a particular CD. It makes the medium the message; the container the content; the CD the computer program. The information-centric view sees just the

> opposite. The essence of the transaction is the legal authorization to use the program; the CD is just the means to enable that use. One needs a jar to carry caviar, but that does not make the jar the essence of the meal.…

For additional articles discussing whether software should constitute a "good," see Jean Braucher, *Contracting out of Article 2 Using a "License" Label: A Strategy That Should Not Work for Software Products*, 40 Loy. L.A. L. Rev. 261 (2006) (advocating that Article 2 should apply to the sale or license of software) and Holly K. Towle, *Enough Already: It Is Time to Acknowledge That UCC Article 2 Does Not Apply to Software and Other Information*, 52 S. Tex. L. Rev. 531 (2011) (advocating that Article 2 should not apply to the sale or license of software).

3. Applying the reasoning of the *Advent* court, would you characterize as an Article 2 "good" software that is not sold on a diskette, but which is obtained via the internet through a download from a software vendor's website? In *Specht v. Netscape Communications Corp.*, 306 F.3d 17, n.13 (2nd Cir. 2002), the court stated that downloadable software "is scarcely a 'tangible' good," but did not decide whether the UCC should apply to the downloaded program in question, because the application of the UCC (versus common law) would not affect the outcome with regard to the issues raised in the case (including the issue of whether an arbitration clause was enforceable).

4. What law should apply when customized (rather than "shrink-wrapped") software is involved?

5. In 1999, the Uniform Law Commission promulgated the Uniform Computer Information Transactions Act (UCITA) to apply to "computer information transactions" such as the purchase or license of shrink-wrapped software. It has been adopted in only two states (Maryland and Virginia), and in those states it is clear that UCITA governs sales or licenses of software rather than Article 2. The American Bar Association and several other groups have come out against UCITA, virtually stopping its enactment. Several states have adopted anti-UCITA laws, in an attempt to prevent choice of law clauses from making UCITA applicable to their residents. For more information on UCITA, see Carlyle C. Ring, Jr., *Uniform Rules for Internet Information Transactions: An Overview of Proposed UCITA*, 38 Duq. L. Rev. 319 (2000); Henry Deeb Gabriel, *The 2003 Amendments of Article Two of the Uniform Commercial Code: Eight Years or a Lifetime After Completion*, 52 S. Tex. L. Rev. 487 (2011).

6. In May 2009, the American Law Institute approved its *Principles on the Law of the Law of Software Contracts*. This publication contains valuable notes that summarize the case law applying UCC provisions to software. For a discussion of the Principles, see Maureen A. O'Rourke, *An Essay on the Challenges of Drafting a Uniform Law of Software Contracting*, 10 Lewis & Clark L. Rev. 925 (2006); Juliet M. Moringiello, *What's Software Got To Do with It? The ALI Principles of the Law of Software Contracts*, 84 Tul. L. Rev. 1541 (2010).

7. If you compare the terms, especially the warranty terms, of a contract for the sale or licensing of software and a contract for the sale of goods, you will find that there are substantial similarities. This similarity suggests that the expectation of the software companies is that Article 2 makes a good fit with the transaction.

2.4. The Article 2 "Merchant" Rules. As we have seen, Article 2 applies to transactions in goods. If a sale of goods is within Article 2, in general it doesn't matter whether the transaction is between sophisticated or unsophisticated parties. Article 2 covers Bic's sale of 2 million pens to Wal-Mart, Wal-Mart's sale of a package of six Bic pens to me, and my sale of one pen to you. See Scott J. Burnham, *Why Do Law Students Insist that Article 2 Applies Only to Merchants and What Can We Do About It?*, 63 Brook. L. Rev. 1271 (1997).

However, there are a few occasions (thirteen to be exact), where Article 2 contains a rule that applies only to merchants or only "between merchants." If the rule applies to a merchant, then only that party has to be a merchant, but if the rule applies "between merchants," then both parties have to be merchants for the rule to kick in. See § 2-104(3).

2.4.1. What does it mean to be a merchant? As you can imagine, when a rule applies to a merchant, it is generally because the merchant is more sophisticated in business matters and may be held to a higher standard of diligence. How does the merchant obtain that sophistication? Let's turn to the definition of merchant at § 2-104(1). The UCC distinguishes between *merchants as to goods* and *merchants as to practices*.

2.4.2. Under § 2-104(1), a merchant falls into the class of a merchant *as to goods* in one of three ways:

- A person who *deals in goods of the kind*;
- A person who, *by his occupation* (and not by hobby) holds himself out as having knowledge or skill peculiar to the practices or goods involved (for example, an automobile parts dealer, although he doesn't deal in cars, may nonetheless be a merchant as to cars because *by his occupation* he has special knowledge of car parts and car maintenance (see *Fay v. O'Connell,* 1990 Mass. App. Div. 141);
- A person who employs an agent who, *by the agent's occupation*, holds himself out as having knowledge or skill peculiar to the goods involved (see *Swift Freedom Aviation, LLC v. R.H. Aero*, 2005 U.S. Dist. LEXIS 37261 (E.D. Tenn. 2005)).

2.4.3. There are three important Article 2 sections which apply only to *merchants as to goods*:

2.4.3.1. The most important by far relates to the *implied warranty of merchantability* under § 2-314, which applies only to "merchants with respect to goods of that kind."

2.4.3.2. The power to transfer title in an *entrustment* situation applies only to a "merchant who deals in goods of that kind." § 2-403(2). For example, if you entrust your snowboard to a ski shop for waxing, and the shop (which sells skis) mistakenly sells the snowboard, a buyer in the ordinary course of business will obtain good title.

2.4.3.3. Under § 2-312(3), only a merchant dealing in goods of the kind gives a warranty that the goods are free of infringement claims.

Problem 2-8. To reduce its operating deficit, the nonprofit Nordic Sports Association sponsored a fund-raising luncheon, where it sold Swedish meatballs. A patron's tooth was cracked when the patron bit into a big chunk of bone contained in the meatball. Does the patron have a claim for breach of the implied warranty of merchantability against the Association?

Problem 2-9. Kathleen, a law professor, collects quilts as a hobby. In 2020 she began to sell some of her quilts on eBay; her transactions steadily increased to more than 100 transactions per year and more than $5,000 in annual sales. In 2024, eBay invited Kathleen to become a "Power Seller." Does the implied warranty of merchantability apply to Kathleen's sales of quilts on eBay?

Problem 2-10. Bob owns and operates a retail furniture store. As a hobby, he collects antique phonographs. If he sells one of the antique phonographs to a friend, does the warranty of merchantability apply? What if Bob consigns his collection of antique phonographs to an auction agency that specializes in the sale of antiques (including antique phonographs)?

2.4.4. Section 2.4.3 notes certain Article 2 "merchant" provisions that apply only to merchants in goods. Other merchant rules apply to both merchants in goods and merchants as to practices. It is much easier to fall into the class of *merchants as to practices*. This definition focuses on a person's familiarity with general business practices, and according to § 2-104, Comment 2, would include "*almost every person in business*." (emphasis added) A person falls into this class by one of two means:

2.4.4.1. A person who, *by his occupation* (and not by hobby) holds herself out as having knowledge or skill peculiar to the practices involved; or

2.4.4.2. A person who employs an agent who, *by the agent's occupation*, holds herself out as having knowledge or skill peculiar to the practices involved (such as a university that hires a purchasing agent familiar with general business practices to acquire equipment and supplies for the university).

2.4.4.3. ***Important exclusion***: Comment 2 states that the Article 2 sections

providing special rules for merchants as to practices *only applies* to a merchant in their mercantile capacity; the special rules *do not apply* when a merchant is buying goods for *personal use*.

Problem 2-11. Ann, a car dealer, purchases a copy machine for her office at the dealership. For purposes of determining whether the written confirmation rules of § 2-201(2) apply, is the car dealer a merchant?

Problem 2-12. Jack owns a pet shop. He orders a computer for his personal use from Dell by phone. Will Jack be considered a merchant in determining what rules to apply under § 2-207(2) regarding any additional terms proposed by Dell contained in the shipment?

2.4.5. You need to carefully read each Article 2 provision to determine to whom it applies. Although most Article 2 rules apply regardless of whether either party is a merchant, several Article 2 rules are limited in their application, depending upon one or both parties' status as a merchant as to goods or practices. In addition to the three rules that apply only if a party is a merchant as to goods as noted at Section 2.4.3, following are examples of rules whose application depends upon the merchant status of one or both parties.

2.4.5.1. The § 2-201(2) written confirmation exception to the statute of frauds applies when *both* parties are merchants, as indicated by the language "[b]etween merchants."

2.4.5.2. Section 2-207(2) regarding the "battle of the forms" allows additional terms to become a part of the contract when both parties are merchants, if certain requirements are met.

2.4.5.3. Section 2-209(2) requires a "no oral modification clause" on a form supplied by a merchant to be separately signed or initialed, *unless* both parties are merchants (in which case the "no oral modification clause" does not need to be separately signed or initialed).

2.4.5.4. Section 2-205 provides that an offer by a merchant to *buy or sell* goods may become irrevocable without consideration if certain requirements are met. Only the offeror needs to be a merchant.

2.4.5.5. As discussed in Chapter 1, Section 1.4, the obligation of "good faith" applies to merchants and nonmerchants alike, but the pre-2001 version of UCC Articles 1 and 2 (which still exists in several jurisdictions) applies a higher standard to merchants versus nonmerchants.

2.4.5.6. Under § 2-509, if the seller is a *merchant as to goods or practices*, the risk of loss passes to the buyer when the buyer receives the good. If the seller is a nonmerchant, the risk of loss passes to buyer on tender of delivery.

2.5. Special Cases Regarding "Merchant" Status.

2.5.1. Can a government be a merchant as to goods or practices? When presented with this question, the Montana Supreme Court in *Western Sign v. State*, 590 P.2d 141, 144 (Mont. 1979), conceded that "it may well be that a state may be a merchant in some circumstances," but ruled that the burden of proof to support such classification rests upon the opposing party.

If a government entity makes purchases through a purchasing division, and the purchasing division has knowledge regarding general purchasing practices, the government should be a merchant as to practices under the "agency" rules of § 2-104. See, for example, *County of Milwaukee v. Northrop Data Systems, Inc*., 602 F.2d 767 (7th Cir. 1979), in which the court ruled that a county that purchased a sophisticated computer system was a merchant, because the purchase was made through its purchasing division, which had extensive experience in business practices.

2.5.2. Is a farmer a merchant for purposes of § 2-201(2)? This issue has been frequently litigated. See David B. Harrison, Annotation, *Farmers as "merchants" Within Provisions of UCC Article 2, Dealing with Sales*, 95 A.L.R.3d 484 (1979).

Chapter 2 Additional Sources.

Scott J. Burnham and Daniel Keating, Glannon Guide to Sales: Learning Sales Through Multiple-Choice Questions and Analysis (Wolters Kluwer), Chapters 3, 4.A, 4.B

James J. White and Robert S. Summers, Uniform Commercial Code (West 6th ed., 2010), Chapter 1-1

Chapter 3. Formation of a Contract under the UCC

3.1. Common Law Principles of Contract Formation. Common law has developed principles governing formation of a contract, including the requirement of mutual assent between the parties manifested through an offer and acceptance. Early in its development, the common law was strict, making it difficult at times to form a contract.

3.1.1. Under the early *mirror image rule*, the terms of the acceptance had to exactly mirror the terms of the offer in order for a contract to be formed. Furthermore, the manner of acceptance (promise or performance) had to be the same, as did the medium of acceptance (letter, telegraph, etc.). For example, if an offer to sell a horse was delivered to a potential buyer in a telegram, the buyer could accept the offer only by telegram, and not by letter and not by performance. However, even before the UCC was adopted, these strict rules of contract formation were being relaxed by the courts and legislatures. See, for example, *Hammersberg v. Nelson*, 224 Wis. 403 (1937) (oral acceptance of a written offer was sufficient to form a contract). Reflecting current common law, the *Restatement (Second) of Contracts* § 30 (1981) provides: "Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances."

3.1.1.1. Even though common law has relaxed the rules of offer and acceptance, many courts require a "mirror image" acceptance of the terms proposed. In other words, a purported acceptance is not effective if it adds new or differing terms from those proposed; instead, it is a counter-offer. See *Restatement (Second) of Contracts* § 59 (1981): "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer." If a seller offers to sell a horse for $2,000, and the buyer replies, "It's a deal if you include the bridle," then there is no acceptance. The buyer's response is a counter-offer.

3.1.2. At common law, a contract cannot be formed if ***essential terms are missing***. In *Drug Fair Northwest v. Hooper Enterprises, Inc.*, 733 P.2d 1285 (Mont. 1987), the court determined that a letter regarding the lease of property did not form a contract. Although the letter referenced the lease of a specific property and the rental amount, it did not specify the commencement date of the lease or the responsibility of the parties for taxes, insurance, repairs, maintenance and utilities. In addition, the letter provided for renewal terms, but failed to specify the rental amount for the renewal periods.

3.2. Relaxed Formation Rules under the UCC. As noted by the Montana Supreme Court in *Conagra, Inc. v. Nierenberg*, 7 P.3d 369, ¶ 28 (Mont. 2000), "the UCC rules governing sales agreements are far more permissive in this respect than the general common law rules governing contract formation." The party trying to avoid a contract for the sale of grain argued that there was no mutual assent as to all material terms of the contract. The court cited § 2-204 to support its finding that a contract had been formed, emphasizing that:

3.2.1. Under § 2-204(1), a contract for the sale of goods may be made in *any manner sufficient to show agreement*, including conduct by both parties which recognizes the existence of a contract.

3.2.2. Under § 2-204(2), a contract may be found *even though the moment of its making is undetermined.*

3.2.3. Under § 2-204(3), even though *one or more terms are left open* a sales contract does not fail for indefiniteness if the parties have *intended* to make a contract and there is a reasonably certain basis for giving an appropriate remedy. The court also noted the gap-filler provisions upon which it could rely under Part 3 of Article 2. The gap fillers are summarized commencing at Section 3.2.4.1 below.

> 3.2.3.1. The court noted that the *only* term generally required is a *quantity term*, citing Comment 1 of § 2-201 (statute of frauds).
>
> 3.2.3.2. ***Warning:*** The Official Comment to § 2-204 states: "The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions." Although the UCC is more flexible, it still must be established that there was an intent to agree on the part of both parties.

3.2.4. If a seller agrees to sell a particular widget, and the buyer agrees to buy it, it looks like they made an agreement, but the terms are certainly indefinite. As discussed above, the Code wants to facilitate the making of the agreement, and if the parties intended an agreement, it will attempt to supply the missing terms. The Official Comment to § 2-204 states:

> Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of "indefiniteness" are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies, and the like.

Let's look at some of those "gap-fillers" or "default rules."

> 3.2.4.1. *Price*. In the absence of a stated price, the price is a reasonable price. The usual measure of a reasonable price is some objective source such as the seller's catalog or the market price. If the price is to be set by one of the parties, then that party is constrained by "good faith" as discussed in Chapter 1.
>
> 3.2.4.2. *Quantity*. Section § 2-204(3) states that a contract does not fail for indefiniteness if "there is a reasonably certain basis for giving an appropriate remedy." Failure to state a quantity can be fatal because without a quantity, it is

difficult to determine the remedy. For example, if I sue you for your failure to deliver "widgets," how many did you promise me? Failure to state a quantity is not fatal, however, if there is a reasonable basis for supplying the quantity term. It might be supplied by course of dealing. If each month a law firm has purchased 10 reams of paper from a seller and in April it orders "paper," the quantity can probably be supplied by the past measure. According to § 2-306, if the quantity is measured either by the output of the seller or the requirements of the buyer, that is sufficient to establish a quantity. The amount supplied or demanded is constrained by good faith and by prior output or requirements.

3.2.4.3. *Delivery*. Section 2-307 provides the default rule that all the goods ordered must be tendered in a single delivery. If the parties contract around that rule, they have created an "installment contract" under § 2-612. According to § 2-308, in the absence of a specified place for delivery, the place of delivery is at the seller's place of business or residence if the seller does not have a place of business. As we will see, this concept becomes important when we discuss delivery terms in Chapter 10. The starting point is that the seller has no obligation to deliver the goods to the buyer.

3.2.4.4. *Time*. It will not surprise you that § 2-309 provides that when the contract does not specify a time, the default rule is a reasonable time.

3.2.4.5. *Payment*. Sections 2-307 and 2-310 provide that payment is due on tender of delivery. According to § 2-511, payment must be made in the manner current in the ordinary course of business. So if it is customary to pay by check, the seller must accept a check. However, if the seller demands legal tender, the seller must give the buyer an extension of time to come up with the cash.

3.2.4.6. *Quality*. The quality of the goods promised by the seller is a matter of warranty law, which is discussed in Chapters 6-8.

Problem 3-1. A buyer agrees in a record to buy a widget from a seller for $1,000. The buyer then finds out that the market price of that widget at the time of sale was $800. Does the buyer have a claim against the seller that the price was not reasonable under § 2-305?

3.3. Offer and Acceptance. The UCC has not done away with the concepts of offer and acceptance. Although not expressly stated in such terms in § 2-204, both must still be present in order to form a contract under the UCC. We turn to the common law for basic principles of offer and acceptance, except to the extent they are revised by the UCC (which modifications we'll discuss in a moment). See § 1-103(b).

3.3.1. An "offer" is defined by *Restatement (Second) of Contracts* § 24 (1981) as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." A "bargain"

is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances. Id., § 3.

Problem 3-2. Are the following transactions offers? Why or why not?

(1) Professor Burnham asks Professor Juras if she is interested in buying his bicycle.

(2) You receive a catalog from Outdoor Adventureware offering certain goods at certain prices.

(3) A regional online auction site contains an item that states: "2008 Subaru Outback for sale; 115,000 miles; $5,500 firm. Call 253-0000."

3.3.2. At common law an offer can be revoked (that is, taken back) at any time prior to acceptance, unless consideration is paid to hold the offer open (referred to as an option contract). According to *Restatement (Second) of Contracts* § 36 (1981), in addition to revocation, the power of an offeree to accept is terminated by:

- Rejection or counter-offer by the offeree;
- Lapse of time; or
- Death or incapacity of the offeror or offeree.

3.3.3. Section 2-205 alters the common law rule on revocation of an offer. Under common law, an offeror can withdraw an offer at any time prior to acceptance, *unless* the offeror has specifically agreed to hold the offer open, which agreement must be supported by *additional consideration***,** resulting in an option contract. See *Restatement (Second) of Contracts* § 25 (1981). For example, if on March 1 Gabe offers to sell his house to Dell for $100,000, offer open until April 1, he can withdraw his offer at any time prior to acceptance *unless* Dell pays consideration to Gabe for the promise to hold the offer open until April 1.

3.3.3.1. Take a look at § 2-205, which provides that an offer will be irrevocable, or firm, *without payment of any additional consideration* (*i.e.*, a departure from common law). The provision probably reflects prevailing commercial practice, and is available only in the following circumstances:

- the offeror must be a *merchant*;
- there must be a *record signed* by the merchant offering to hold the offer open;
- the period of irrevocability must be for a *reasonable time*, which *cannot exceed three months* (and if longer than three months, will be enforced up to three months); and
- if the record containing the firm offer is provided by the offeree, the firm offer portion of the record must be separately signed by the offeror.

This fourth requirement is a good example of "reasonable expectations," a concept found frequently in the Code, though that name for it is never used. The concept recognizes the reality that the parties do not read their contracts carefully, and puts the burden on the party offering an unusual or unexpected term to reasonably call it to the attention of the other party. See Scott J. Burnham, *Incorporating the Doctrine of Reasonable Expectations in Article 2*, 11 Duq. Bus. L.J. 217 (2009).

Problem 3-3. A seller offers to sell a widget to a buyer for $1,000. The buyer sends the seller a draft agreement containing standard terms of sale. In addition, the buyer includes this term in the middle of the contract:

> 17. Seller hereby offers to sell Buyer 100 additional widgets for $1,000 each on the same terms. This offer will be held open until May 15.

On May 1, the seller signs the form on the signature line at the end and sends it to the buyer, who also signs it. A week later, the buyer informs the seller that he accepts the offer in paragraph 17. Is there a binding contract for the 100 additional widgets?

> 3.3.3.2. If consideration is paid by the offeree to the offeror to hold the offer open, the terms of § 2-205 do not apply. Read the last two sentences of Comment 3 to § 2-205.

Problem 3-4. A seller offers to sell a widget to a buyer for $1,000. The buyer wants more time to think about it, and asks the seller if he will accept $25 to keep the offer open for six months. The seller agrees and the buyer pays the $25. Four months later, the buyer accepts the offer. Is the offer still open at the time the buyer accepted it?

Problem 3-5. Raymond, who raises, trains, and sells quarter horses, sends the following letter to Ed, who has been looking for a roping horse to buy:

> January 13, 2024
> Dear Ed: I offer you the opportunity to buy an outstanding 8 year old roping horse, Pokey, for $20,000. This offer remains open until May 30, 2024.
> Sincerely yours, Raymond

Ed arrives on February 26, 2024 at Raymond's stables, $20,000 check in hand, to pick up Pokey. Raymond advises Ed that he sold Pokey for $25,000 to his neighbor yesterday. Ed comes to see you to ask if he has a claim for breach of contract against Raymond. What do you tell him?

> 3.3.4. Once an offer is made, a contract is formed when the offer is accepted. Acceptance is the manifestation by the offeree of assent to the terms of the offer. *Restatement (Second) of Contracts* § 50. In other words, if the offeree does not clearly express assent to the terms that have been offered, there is no acceptance.

3.3.4.1. Under the common law, if an expression of "acceptance" contains any differing terms or additional terms than those contained in the original offer, this is a "counter-offer," and not an acceptance. Example: Sue offers to sell John her car for $10,000. John replies that he'll accept her offer, provided that she throws in a new set of tires. At common law, this is not an acceptance, but a counter-offer.

3.3.5. The UCC has modified the common law rule regarding "mirror acceptance," most notably under § 2-207, commonly referred to as the "battle of the forms." But let's start with § 2-206. We will dedicate Chapter 4 to the intricacies of § 2-207.

3.3.5.1. As the common law developed, there was a departure from the mirror image rule regarding the *manner* of acceptance. Today, most jurisdictions allow acceptance in any reasonable manner and by any reasonable medium *unless* the offeror prescribes a specific manner or medium of acceptance. ***Note***: At common law, the offeror is still master of the offer, and can still insist on a specific manner or medium of acceptance.

3.3.5.2. Consistent with the development under common law, § 2-206(1)(a) allows an offeree to accept "in *any manner* and *by any medium reasonable* in the circumstances," *unless* otherwise unambiguously indicated by the language or circumstances. The "manner" means by promise or by performance. The "medium" means telephone, email, mail, etc.

Problem 3-6. Joe offers to sell his car to Bob for $1,000, but the offer specifically states that Bob can accept only by coming to Joe's house on February 15 between the hours of 5:00 p.m. and 8:00 p.m. to pick up the car, along with a certified check for $1,000. Can Bob accept by writing a letter to Joe accepting his offer? What if he shows up at the specified time and place, but brings a personal check instead of a certified check?

3.3.5.3. Section 2-206(1)(b) provides that if an offer to buy goods seeks "prompt or current shipment," the seller can accept by *either* a prompt promise to ship or by prompt performance. In other words, a reference to a prompt shipment is not to be construed as limiting the manner of acceptance to shipment, but also allows acceptance by promise.

3.3.5.4. Under § 2-206(1)(b), if there is an offer to buy goods for prompt or current shipment, and a seller responds by promptly sending a shipment, *but* the shipment is *non-conforming*, the shipment will nonetheless operate as an acceptance. Note that this differs from the common law "mirror-image rule," which provides that if the acceptance does not mirror the terms of the offer, it is a rejection. In other words, under the Code, the seller accepts and breaches at the same time. However, if the seller does not want to breach, it can notify the buyer that the shipment is only an accommodation, in which event it becomes a counter-offer that the buyer can accept

or reject.

Problem 3-7. Two Medicine Ranch sends the following email to several of its neighbors, who don't know that there are multiple offerees: "In urgent need of 30 head of registered Black Angus cows. Must be bred and between 3 and 4 year years of age; will pay $1500 per head. If you have this quantity to sell, ship immediately to Two Medicine Ranch." Two neighbors responded that day. First, Bob sent an email stating "I'll deliver 30 head of cattle as you described tomorrow." About one hour after that phone call, Alice drove up with 28 head of registered cows as described in the offer.

(1) Is a contract formed between Bob and Two Medicine Ranch, although the offer requested acceptance by shipment?

(2) Is a contract formed between Alice and Two Medicine Ranch when she delivered 28 head of cattle as described in the offer?

Problem 3-8. Office Supplies offers to sell a specific model of a copy machine to Mega Law Firm for $16,000. Mega Law firm responds: "We accept but will pay $15,000 for the copy machine." Has there been acceptance under § 2-206?

Problem 3-9. Toyland, a retail toy store, places a written order asking Dollmaker to ship 10,000 of its popular Cutie-Pie dolls at $1.00 per unit. Dollmaker responds by shipping 9000 Cutie-Pie dolls, with an invoice showing a price of $1.00 per unit. Has there been acceptance by Dollmaker under § 2-206?

3.3.6. Under § 2-206(2), if an offeree accepts by beginning performance, and performance is a reasonable mode of acceptance, the offeree must also provide notice within a reasonable time of beginning performance. Failure to do so will allow the offeror to treat the offer as having lapsed before acceptance. Read Comment 3. Note the Code rule differs from the common law rule. This is because common law offers that are accepted by performance, such as contests and rewards, often do not require notice, but the buyer of goods needs to know that they are going to receive the goods.

ProCD, Inc. v. Zeidenberg
86 F.3d 1447 (7th Cir. 1996)

EASTERBROOK, Circuit Judge

Must buyers of computer software obey the terms of shrinkwrap licenses? The district court held not, for two reasons: first, they are not contracts because the licenses are inside the box rather than printed on the outside; second, federal law forbids enforcement even if the licenses are contracts. 908 F. Supp. 640 (W.D. Wis. 1996). The parties and numerous amici curiae have briefed many other issues, but these are the only two that matter—and we disagree with the district judge's

conclusion on each. Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database....

The database in SelectPhone cost more than $ 10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and sic codes enables manufacturers to compile lists of potential customers.... Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone database. The corporation makes the database available on the Internet to anyone willing to pay its price—which, needless to say, is less than ProCD charges its commercial customers. Zeidenberg has purchased two additional SelectPhone packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that the second and third licenses stand no different from the first, even though they are identical, because they *might* have been different, and a purchaser does not agree to—and cannot be bound by—terms that were secret at the time of purchase. 908 F. Supp. at 654.

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between "contracts" and "licenses" (which may matter under the copyright doctrine of first sale) is a subject for another day.... Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an "offer," which the customer "accepts" by paying the asking price and leaving the store with the goods.... In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good—but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract—except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works),

or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See E. Allan Farnsworth, 1 *Farnsworth on Contracts* § 4.26 (1990); *Restatement (2d) of Contracts* § 211 comment a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions."). Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous.... Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One *could* arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information—but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer may place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box;

there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with Byte-Pusher 2.718"), and the terms of sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms—so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age....

What then does the current version of the UCC have to say? We think that the place to start is § 2-204(1): "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying "you owe us an extra $ 10,000" and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer's net gains....

REVERSED AND REMANDED.

Case Notes:

1. Although § 2-204(2) permits formation of a contract “even though the moment of its making is undetermined,” the timing of the formation of the contract in the *Pro CD* case was an important issue. The district court ruled that the placement of the software program on the store shelf was an offer, and the contract was formed when Mr. Zeidenberg accepted the offer by paying the purchase price to the sales clerk. 908 F. Supp. 640, 652 (W.D. Wis. 1996). At that point in time, the court reasoned, Mr. Zeidenberg had neither read nor considered the terms contained in the license enclosed in the box; he could not possibly have assented to them; and thus those terms were not a part of the contract. *Id.* at 654-55. Does the appellate court agree that Mr. Zeidenberg accepted the offer (and a contract was formed) when he paid the purchase price? What constituted acceptance, according to the appellate court?

2. The type of contract involved in this case has been referred to as a “terms later,” “rolling,” or “layered” contract. Can you recall a purchase that you have recently made in

which you became aware of additional terms after you ordered and paid for a good? When you ordered or paid for the good, were you aware that additional terms would be coming? Did you actually read the terms once they did arrive? Did you have the opportunity to return the good if the terms were, in fact, unacceptable to you? If there had not been notice on the outside of the box that additional terms were contained within the box, or if Mr. Zeidenberg had not been provided the option to return the software after reading those terms, would the court have reached a different result? What if there had been notice on the box and the option to return, but Mr. Zeidenberg had simply neglected to read the terms after he opened the box and for that reason was unaware of the limitations imposed? For further discussion of these types of contracts and the difficult issues they raise, see Eric A. Posner, *ProCD v Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. Chi. L. Rev. 1181 (2010); John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 Duq. L. Rev. 35 (2012).

3.4. Uniform Electronic Transactions Act. Most states have adopted the Uniform Electronic Transactions Act promulgated by the Uniform Law Commission in 1999. E-sign is the federal statute governing the enforceability of electronic contracts and signatures. Like UETA, it does not attempt to provide substantive law. E-sign does not preempt state law if a state uniformly enacts sections one to sixteen of UETA. 15 U.S.C. §§ 7001-7006.

As noted by the ULC, "the primary objective of this act is to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures, removing barriers to electronic commerce." UETA is not intended to be a source of substantive law regarding contracts; it relies upon other applicable laws for matters such as contract formation and enforceability. See § 7.

3.4.1. Section 5(b) of UETA specifically requires that a party assent to conduct a transaction electronically in order for UETA to apply. It does not force parties to use electronic records, electronic signatures, or other electronic processes.

Problem 3-10. Jane gives out a business card with an e-mail address on it. Has she consented to conduct transactions electronically with those customers who receive her card and place an order with her by e-mail?

3.4.2. Where it applies, UETA allows offers and acceptances to be communicated electronically. The formation of a contract may not be denied solely because there is not a pen and ink "writing" or "signature." UETA § 7. However, substantive law applies to the electronic communications. For example, if Susan sends an e-mail to Bill stating "I offer to sell you my collection of baseball cards for $1,000," and Bill replies by e-mail stating "I'll buy them for $900," the substantive laws of offer and acceptance apply and Bill's e-mail will be construed as a counter-offer rather than an acceptance.

Problem 3-11. Nancy, a law student, orders a computer from Superfast Computer Co. for $750 on its website, and provides an electronic signature. The signature and other details of the transaction,

including the quantity, purchase price, and delivery terms, are recorded and stored electronically at Superfast's website. A few hours later she finds a better deal on a better computer. Can Nancy successfully argue that her electronic signature is not valid, and thus she is not obligated to purchase the computer from Superfast? That the statute of frauds (§ 2-201) has not been satisfied? What if Nancy had engaged in the electronic deal by purchasing a used computer from another student on Craigslist? Does UETA apply to transactions where neither party is a merchant?

3.4.3. Section 14 of UETA allows contracts to be formed by machines functioning as electronic agents for parties to a transaction, *without action or review by a human being.* An electronic agent is defined at § 2(6) to include, for example, an automated computer program. This is referred to as an *automated transaction* (defined at §2(2)). See also § 2, Official Comment 2.

Problem 3-12. A pharmacy has a computerized inventory program which, without human review or input, automatically places an order by e-mail to a drug company when it determines that the supply of a particular drug is low. The drug company, through use of its own computer program that has access to the e-mail, accepts the offer. Has mutual assent to form a contract occurred, even though no human is aware of this particular transaction at the time it is made?

3.4.4. Under UETA § 14(2), special rules apply to the formation of a contract in an automated transaction occurring between an *electronic agent*, on one end, and an *individual*, on the other. Not all transactions between an individual and, for example, a website result in a contract. For example, an agreement is not necessarily formed when you get onto the ULC website to look at the text of UETA. However, what if you get onto a website and a little box pops up and provides you with the terms of usage, and states conspicuously **"If you proceed further you consent to the above terms"**? Or if the website does not allow you to proceed further unless you click "yes, I agree" (a clickwrap agreement). A contract may be formed if the individual performs actions that (i) the individual is free to refuse to perform and (ii) the individual knows or has reason to know will cause the electronic agent on the other end to complete the transaction or performance. Keep that in mind next time you click "yes" to access a company's website.

3.4.5. What happens, in an automated transaction, if an individual makes a mistake? For example, you are in the process of ordering a shirt from the Stuffed Shirts website, and you inadvertently type in "10" when requested to state the quantity of shirts, instead of "1"? Have you just formed a contract for ten shirts, when you really only wanted one? (By the way, is this a "unilateral" or a "mutual" mistake, and what would the result be at common law?)

Problem 3-13. Read UETA §§ 14(2) and 10 before responding to the following questions, which are based upon the above mistake while ordering from the Stuffed Shirts website.

(1) What if the Stuffed Shirts website provides you with an opportunity to correct the error? For example, at the end it provides a summary of your order, clearly showing the quantity

as “10” and asks you to confirm the order, and you zone out and hit “confirm”?

(2) What if the Stuffed Shirts website provides no opportunity to correct the error? What, if anything, can you do to “avoid” the effect of the error?

Chapter 3 Additional Sources.

Scott J. Burnham and Daniel Keating, Glannon Guide to Sales: Learning Sales Through Multiple-Choice Questions and Analysis (Wolters Kluwer), Chapter 5

James J. White and Robert S. Summers, Uniform Commercial Code (West 6th ed., 2010), Chapter 1-2, 1-4, 1-5