University of Nevada, Las Vegas -- William S. Boyd School of Law
Scholarly Commons @ UNLV Law

Scholarly Works | Faculty Scholarship

1-1-2007

Uniform Commercial Code Survey: Sales

Keith A. Rowley
University of Nevada, Las Vegas -- William S. Boyd School of Law

Carolyn L. Dessin

Larry T. Garvin

Robyn L. Meadows

Follow this and additional works at: http://scholars.law.unlv.edu/facpub

Part of the Contracts Commons, and the Other Law Commons

Recommended Citation
Rowley, Keith A.; Dessin, Carolyn L.; Garvin, Larry T.; and Meadows, Robyn L., "Uniform Commercial Code Survey: Sales" (2007). *Scholarly Works.* Paper 546.
http://scholars.law.unlv.edu/facpub/546

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ UNLV Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Scholarly Commons @ UNLV Law. For more information, please contact david.mcclure@unlv.edu.

Sales

*By Keith A. Rowley, Robyn L. Meadows, Larry T. Garvin, and Carolyn L. Dessin**

Scope of Article 2

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

In *Pennsy Supply, Inc. v. American Ash Recycling Corp.*,[4] the court had to determine whether a transfer of goods for which the transferee was not required to pay was a contract for the sale of goods.[5] A general contractor, Lobar, subcontracted with Pennsy to pave certain driveways and a parking lot. Lobar's specifications permitted Pennsy to use a form of treated ash aggregate known as "AggRite" in lieu of traditional paving materials and were accompanied by a letter from American Ash offering to supply AggRite at no cost on a first come, first served basis. American Ash provided Pennsy some 11,000 tons of free AggRite, which Pennsy used to perform the specified paving. Within two months, the pavement developed extensive cracking. Pennsy removed and disposed of the AggRite and repaved with other materials. In so doing, Pennsy incurred substantial expenses, in no small measure because the Pennsylvania Department of the Environment classified AggRite as hazardous

* Keith A. Rowley is a Professor of Law at the William S. Boyd School of Law, University of Nevada Las Vegas, the Charles E. Tweedy, Jr. Visiting Chairholder in Law for 2007–08 at the University of Alabama School of Law, and co-chair of the Sale of Goods Subcommittee. Robyn L. Meadows is a Professor of Law at Widener University School of Law in Harrisburg, Pennsylvania and an editor of the Annual U.C.C. Survey. Larry T. Garvin is a Professor of Law at the Moritz College of Law, The Ohio State University. Carolyn L. Dessin is an Associate Professor at the University of Akron School of Law.

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

2. *See* U.C.C. § 2-105(1) (2002).

3. While "transactions" appears to include more than just present and future sales, this approach is not without support in Article 2. Section 2-106 begins, "In this Article unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods." U.C.C. § 2-106(1) (2002). Because most of the substantive provisions in Article 2 apply to contracts or agreements, it is logical for courts to focus on contracts or agreements for the present or future sale of goods.

4. 895 A.2d 595 (Pa. Super. Ct.), *appeal denied*, 907 A.2d 1103 (Pa. 2006).

5. *See* U.C.C. § 2-106(1) (2002) ("A 'sale' consists in the passing of title from the seller to the buyer *for a price*." (emphasis added)).

HeinOnline -- 62 Bus. Law. 1559 2006-2007

waste material.[6] The trial court dismissed Pennsy's breach of warranty claims against American Ash because Pennsy did not pay American Ash for the AggRite. The superior court reversed, holding that the benefit to American Ash of Pennsy using AggRite on the project and Pennsy's assumption of liability for any disposal costs were consideration to support a contract between Pennsy and American Ash and, in turn, payment of a price by means other than money, goods, or realty.[7]

In *Russo v. NCS Pearson, Inc.*,[8] the plaintiffs were among nearly 500,000 high school students who took the October 2005 Scholastic Aptitude Test ("SAT"). After initially reporting the test scores, the College Entrance Examination Board ("CEEB") discovered that NCS Pearson ("NCSP"), the company CEEB engaged to score the tests, had misscored 4,724 tests: 4,111 examinees—including the plaintiffs—received scores that were lower than they should have received, and 613 other examinees received scores that were higher than they should have received. NCSP rescored the exams and CEEB reported the corrected higher scores to the schools the 4,111 underscored examinees had designated, but did not report the corrected lower scores to the schools the 613 overscored examinees had designated. The plaintiffs sued CEEB and NCSP for, *inter alia*, breach of Article 2 warranties, arguing that not correcting the overscored examinees' SAT scores hurt the plaintiffs' chances at gaining admission to and receiving financial aid from the schools to which they applied.[9] While the court could have found that the contract between CEEB and the plaintiffs was not a *sale* of goods because CEEB did not transfer title to the SAT exam book or the answer sheet to the plaintiffs,[10] instead the court "[a]ssumed without deciding" that it was a "mixed" contract for goods and services and found that CEEB's testing and score-reporting services were the predominant purpose of the contract; therefore, no Article 2 warranties arose from the contract.[11]

Another noteworthy "mixed" contract case is *Waterfront Properties, Inc. v. Xerox Connect, Inc.*[12] Waterfront agreed to purchase computer and network hardware and customized software from Xerox. The contract price allocated $30,575 for the hardware and $138,827 for the customized software. Waterfront timely paid in full. Both at the time Xerox initially installed the hardware and customized

6. *See Pennsy Supply*, 895 A.2d at 598–99.

7. *Id.* at 603–04; *see* U.C.C. § 2-304(1) (2002) ("The price can be made payable in money *or otherwise*." (emphasis added)).

8. 462 F. Supp. 2d 981 (D. Minn. 2006).

9. *See id.* at 988–90.

10. *See supra* note 5.

11. *See Russo*, 462 F. Supp. 2d at 997 ("In the same way that an artist cannot fill a canvas without paint, [CEEB] cannot administer, score, and report SAT results without the test booklet, answer sheet, and score report. Although the service provided by [CEEB] ultimately resulted in a score printed on a piece of paper, that piece of paper is not the predominant factor; it is the service provided by [CEEB] that predominates the transaction."); *compare* Wagner-Meinert, Inc. v. EDA Controls Corp., 444 F. Supp. 2d 800 (N.D. Ohio 2006) (applying Article 2 to a contract for the sale of a $13,000 ammonia detection system and $600 worth of on-site start-up service), *aff'd*, No. 06-3777, 62 U.C.C. Rep. Serv. 2d (West) 167 (6th Cir. Feb. 23, 2007).

12. No. Civ. 3:04CV322-H, 58 U.C.C. Rep. Serv. 2d (West) 809 (W.D.N.C. Jan. 31, 2006).

HeinOnline -- 62 Bus. Law. 1560 2006-2007

software and again several months after Waterfront made the final payment, Waterfront complained that the customized software was "cumbersome." However, at no time did Waterfront reject the software or request a price reduction or refund.[13] When Waterfront sued Xerox more than four years later, alleging that the customized software did not perform as warranted, Xerox moved for summary judgment due to Waterfront's failure to timely give notice under U.C.C. § 2-607. Waterfront did not contest that it failed to satisfy section 2-607; instead, it argued that the contract was not predominantly for the sale of goods, therefore section 2-607 did not apply. The court held that the customized software was a good and granted Xerox's motion for summary judgment.[14]

Article 2 does not govern all contracts that are exclusively or predominantly for the present or future sale of goods for a price. If the seller and buyer have their respective places of business in two different countries, each of which is a party to the U.N. Convention on Contracts for the International Sale of Goods ("CISG"), the CISG governs unless an exception applies.[15] CISG Article 6 empowers parties to agree contractually not to be bound by the CISG.[16] American courts have consistently held that merely choosing the law of a state of the United States or of another country that is a party to the CISG is insufficient to avoid the CISG because the CISG is part of the law of the chosen jurisdiction.[17] Instead, to avoid application of the CISG, the choice-of-law clause must expressly exclude the CISG.[18] *American Biophysics Corp. v. Dubois Marine Specialties*[19] bucked that trend, holding that a contractual term providing that the parties' agreement "shall be construed and enforced in accordance with the laws of the state of Rhode Island" was "sufficient to exclude application of the CISG."[20] As one of us has concluded elsewhere for reasons more fully explored therein, "*American Biophysics* is an outlier at best, and wrongly decided at worst."[21]

13. *See id.* at 810–11.

14. *See id.* at 814 (collecting cases); *see also In re* Mystic Tank Lines Corp., 354 B.R. 694, 700 (Bankr. D.N.J. 2006) (applying Article 2 to a contract for software). *But cf.* TK Power, Inc. v. Textron, Inc., 433 F. Supp. 2d 1058 (N.D. Cal. 2006) (bifurcating a contract for designing software and its subsequent sale, applying common law to the former and Article 2 to the latter).

15. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18 (1980) [hereinafter "CISG"]. *See generally* Keith A. Rowley, *The U.N. Convention on Contracts for the International Sale of Goods*, *in* HOWARD O. HUNTER, MODERN LAW OF CONTRACTS §§ 23:01–23:07 (rev. ed. 2007).

16. CISG art. 6 ("The parties may exclude the application of this Convention ....").

17. *See, e.g.*, BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337 (5th Cir. 2003); American Mint LLC v. GOSoftware, Inc., No. Civ. A. 1:05-CV-650, 2006 WL 42090, at *3 (M.D. Pa. Jan. 6, 2006); Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd., No. O1-C-5938, 2003 WL 223187, at *3 (N.D. Ill. Jan. 30, 2003); Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001). *See generally* Rowley, *supra* note 15, § 23:5.

18. *See, e.g.*, Modius, Inc. v. PsiNaptic, Inc., No. C 06-02074 SI, 2006 WL 1156390, at * 5 (N.D. Cal. May 2, 2006) ("The parties agree that the United Nations Convention on Contracts for the International Sale of Goods is specifically excluded from application to this Agreement."). *See generally* Rowley, *supra* note 15, § 23:5 n.5, at 23-21.

19. 411 F. Supp. 2d 61 (D.R.I. 2006).

20. *Id.* at 63.

21. Rowley, *supra* note 15, § 23:5 n.4, at 23-21.

HeinOnline -- 62 Bus. Law. 1561 2006-2007

CONTRACT FORMATION

Sections 2-204 through 2-207 govern contract formation under Article 2. While much attention centers on 2-207, *Kraft Foods North America, Inc. v. Banner Engineering Sales, Inc.*[22] turned on the application of section 2-206. Banner submitted a price quotation to Kraft for a pipe heating system to be installed in a Kraft plant to test certain baked goods. After several e-mail exchanges and some changes to the price quotation due to altered requirements, Kraft ordered the heating system using its purchase order, which imposed substantially greater liability on Banner in the event of a defect in the system than did the terms and conditions in Banner's price quotation. Problems with the system ultimately caused Kraft to destroy almost 35,000 cases of cookies and shut the test line down for four or five months.[23] Kraft sued to recover consequential damages attributable to, *inter alia*, Banner's breach of warranty. Banner argued that its price quotation, which disclaimed liability for consequential damages and limited all warranties to the extent of the manufacturer's express warranty, constituted the offer, which Kraft accepted by submitting its purchase order; therefore, Banner's terms and conditions governed the contract.[24] The court rejected this argument finding instead that Kraft's purchase order was the offer, which Banner accepted by shipping the goods.[25] The court noted that, while price quotations are generally invitations to offer because the recipient cannot simply accept the quote and create a binding contract, whether a particular price quote is an offer is governed by the intent of the party making it.[26] While Banner's price quotation included "Terms and Conditions" and indicated that Kraft could accept it within 30 days, it further provided that all orders were subject to approval by Banner's home office. Kraft could not accept the "offer" simply by submitting a purchase order; rather, the purchase order was Kraft's offer to buy goods for prompt or current shipment, which Banner accepted by shipping the goods; thus, the terms of Kraft's purchase order governed the contract.[27]

In *Robert Bosch Corp. v. ASC Inc.*[28]—a case hinging on section 2-207, rather than section 2-206—the court held that a seller's price quotation *was* an offer, which the buyer accepted by sending a purchase order for the quoted quantity and price. But what of the terms? Employing three arguments based on section 2-207, the buyer sought to avoid the application of an arbitration provision contained in the seller's terms and conditions. First, the buyer argued that its purchase order was the offer, which the seller accepted, and the seller's arbitration

22. 446 F. Supp. 2d 551 (E.D. Va. 2006).
23. *See id.* at 567–68.
24. *Id.* at 568.
25. *Id.* at 569.
26. *Id.* at 568–69.
27. *Id.* at 569–70; *see* U.C.C. § 2-206(1)(b) (2002). The court also noted that, even if the price quotation was an offer, Kraft's purchase order expressly conditioned its acceptance on assent to its terms under U.C.C. § 2-207, which would prevent the seller's terms from controlling the contract. *Kraft Foods*, 446 F. Supp. 2d at 569 n.15; *see* U.C.C. § 2-207 (2002) (discussed *infra* note 31).
28. 195 Fed. Appx. 503 (6th Cir. 2006).

HeinOnline -- 62 Bus. Law. 1562 2006-2007

provision was not part of the contract because it materially altered the contract.[29] The court held that the seller's quotation was the offer: not only did it contain the price, quantity, and other essential terms, the buyer's purchase order specifically referenced it.[30] Second, the buyer argued that, if the seller's quotation was an offer, the buyer's purchase order was expressly conditioned on the seller's assent to the buyer's terms and, therefore, was not an acceptance of the seller's offer.[31] The court held that a conditional acceptance must reveal that the offeree would not proceed unless the offeror assented to the additional or different terms in the conditional acceptance. Because there was no language in the buyer's purchase order that indicated it would not proceed without the seller's assent, the purchase order operated as an acceptance.[32] Finally, the buyer argued that even if its purchase order accepted the seller's offer, the reservation of rights in the purchase order conflicted with the seller's arbitration provision and therefore both terms were knocked out of the contract.[33] The court found that the objective plain meaning of the provision reserving all of the buyer's rights and remedies did not include the right to resolve disputes in a judicial forum; therefore, it did not conflict with the seller's arbitration term. Because the terms were not different, the knock out rule did not apply and the arbitration term was part of the parties' contract.[34]

In *General Steel Corp. v. Collins*,[35] the offeree triggered a battle of the forms by altering the written offer before signing and returning it to the offeror. The seller's written offer included an arbitration clause and language providing that any modification of or alteration to its terms would be void unless agreed to in a separate writing signed by both parties. The buyer's agent marked out the arbitration provision before signing and returning the seller's offer. After a dispute arose, the buyer sued to recover its deposit and the seller sought to compel arbitration. The seller argued that the buyer accepted the terms in the seller's offer even though the buyer's acceptance contained a different term and, therefore, the arbitration provision should be enforced.[36] The trial court denied the seller's motion to compel arbitration and the appellate court affirmed. While correctly noting that section 2-207 was intended to abrogate the common law mirror image rule and allow a contract to be formed even though the terms in the parties' documents differ, the

29. *See* U.C.C. § 2-207(2) (2002) (providing that, between merchants, an additional term in an acceptance becomes part of the contract unless the offeror limited acceptance to the terms of its offer, the additional term materially alters the contract, or the offeror notifies the offeree that the offeror objects to the additional term).

30. *See Robert Bosch*, 195 Fed. Appx. at 506.

31. *See* U.C.C. § 2-207(1) (2002). In that instance, the contract would be created by the parties' performance and terms of the contract would be only those contained in both parties' writings plus any terms implied by Article 2 needed to complete the contract. *See* U.C.C. § 2-207(3) (2002).

32. *See Robert Bosch*, 195 Fed. Appx. at 506.

33. The knock out rule provides that, when terms of an offer and acceptance conflict, the conflicting terms knock each other out and any resulting gaps are filled by the Code. *See, e.g.*, Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972); Flender Corp. v. Tippins Int'l, Inc., 830 A.2d 1279 (Pa. Super. Ct. 2003), *appeal denied*, 844 A.2d 553 (Pa. 2004).

34. *See Robert Bosch*, 195 Fed. Appx. at 507–08.

35. 196 S.W.3d 18 (Ky. Ct. App. 2006).

36. *See id.* at 19–20.

HeinOnline -- 62 Bus. Law. 1563 2006-2007

appellate court did not clearly state whether the buyer's acceptance constituted a definite and seasonable acceptance under section 2-207(1). The court did state, "[a]s long as the parties demonstrate their mutual assent to the essential terms of an agreement, a written contract is deemed to exist... [and] the contract is construed to consist of the *essential terms of the offer* to which the offeree's response has pledged its agreement."[37] While the court's statement that an acceptance operates on only the essential terms of the offer is too broad,[38] the court apparently viewed the buyer's act of signing the seller's form with the stricken arbitration clause as an acceptance containing a different term. The court then joined the majority of jurisdictions that apply the knock out rule to conflicting terms in the offer and acceptance.[39]

Contract Modification

Article 2 expressly recognizes both the enforceability of a contractual clause prohibiting subsequent oral modification[40] and the possibility that the parties may waive such a clause.[41] In *Royster-Clark, Inc. v. Olsen's Mill, Inc.*,[42] the court held that the parties to a fertilizer sales contract waived the no-oral-modification provision in their written agreement and orally modified their contract. After the market price of fertilizer fell dramatically, the buyer sought to buy out its obligation under the sales contract, as many of the seller's customers had done. The seller orally offered concessions on the price of the undelivered fertilizer if the buyer agreed to take all of the seller's remaining fertilizer. The buyer orally agreed and took all of the fertilizer called for under its original contract, plus an additional 36.4 tons, all of which the buyer sold at a loss. The seller, relying on the no-oral-modification provision, refused to give the buyer the promised concessions and sued the buyer for the full contract price. The buyer counterclaimed for a refund based on the seller's promised price reduction.[43] The court upheld as not clearly erroneous the trial court's factual finding that the parties had orally modified their original contract,[44] and then turned its attention to section 2-209. Section 2-209 requires that a modification

37. *Id.* at 21 (emphasis added). Nowhere does section 2-207 provide that a party accepts only the "essential terms" of an offer. The court may be basing this statement on the principles reflected in § 2-207(3) (discussed *supra* note 31), which recognizes a contract created by conduct when the parties do not agree to a contract through their writings; however, that section is inapplicable when the written acceptance is operative as an acceptance. *See* U.C.C. § 2-207(3) (2002).

38. A definite and seasonable acceptance that is not expressly conditioned on assent to its additional or different terms operates as an acceptance of the offer, not merely as an acceptance of the essential terms of the offer. *See* U.C.C. § 2-207(1) (2002). Based on this idea, a minority of courts has held, and some commentators agree, that the terms of the offer control over conflicting terms in the acceptance, because the offeree accepted the offer. *See Flender Corp.*, 830 A.2d at 1285–86 (discussing, but not adopting, this minority rule).

39. *General Steel*, 196 S.W.3d at 21; *see supra* note 33.

40. U.C.C. § 2-209(2) (2002).

41. U.C.C. § 2-209(4) (2002).

42. 714 N.W.2d 530 (Wis. 2006).

43. *See id.* at 532–33.

44. *Id.* at 534.

HeinOnline -- 62 Bus. Law. 1564 2006-2007

of a contract for the sale of goods be in writing if either the parties' contract so requires or the contract as modified is within the Article 2 statute of frauds.[45] The court held that the modified contract satisfied the Article 2 statute of frauds because the seller had delivered and the buyer accepted the additional fertilizer.[46] As for the contractual prohibition on oral modification, the court reasoned that there was sufficient evidence, based on the witnesses' testimony and parties' course of dealings over 40 years, to support the trial court's finding that the parties had waived the no-oral-modification provision.[47]

Open Price Term

Section 2-305 allows parties to contract before they have agreed upon a price.[48] If the agreement gives either party the right to fix the price, the party so authorized must fix the price in good faith.[49] In *Autry Petroleum Co. v. BP Products North America, Inc.*,[50] the court ruled that, although there is no separate cause of action for failing to act in good faith under the U.C.C.,[51] allegations that the seller failed to set the price of the goods sold in good faith stated a cognizable cause of action. The buyers, jobbers who distributed BP's petroleum products to retail outlets, alleged that BP promised a 1% discount on the price to the jobbers, and then inflated the price to recoup the discount. The court held that, if true, this would be a violation of the seller's obligation to set the price in good faith.[52]

Warranties

Express Warranties

In *Rite-Aid Corp. v. Levy-Gray*,[53] the question for the court was whether a pharmacy made (and breached) an Article 2 express warranty when it gave a customer, along with the prescription drug it sold her, a "Rite Advice" patient package insert instructing her to "[t]ake with food or milk if stomach upset occurs unless your doctor directs otherwise." The customer took the first dose with water, experienced an upset stomach, and then began taking the medicine with milk. She also consumed other dairy products while taking the medicine. Her symptoms only improved when she stopped taking the medicine with dairy products, by which time she had developed a chronic autoimmune condition caused or exacerbated by having consumed milk and other dairy products while

45. *See* U.C.C. §§ 2-209(2), (3) (2002).
46. *Royster-Clark*, 714 N.W.2d at 540–41; *see* U.C.C. § 2-201(3)(c) (2002) (providing an exception to the statute of frauds to the extent that the parties have performed).
47. *See Royster-Clark*, 714 N.W.2d at 535–39.
48. U.C.C. § 2-305(1) (2002).
49. U.C.C. § 2-305(2) (2002).
50. No. 4:05-CV-113 (CDL), 59 U.C.C. Rep. Serv. 2d (West) 468 (M.D. Ga. May 1, 2006).
51. *See id.* at 471; *accord* PEB Commentary No. 10 (Feb. 10, 1994).
52. *See Autry Petroleum*, 59 U.C.C. Rep. Serv. 2d (West) at 471–72.
53. 894 A.2d 563 (Md. 2006).

HeinOnline -- 62 Bus. Law. 1565 2006-2007

taking her medicine.[54] The buyer sued for breach of warranty and prevailed in the trial and intermediate appellate courts. The Maryland Court of Appeals affirmed, finding that the above-quoted statement in the "Rite Advice" insert was an affirmation of fact that formed part of the basis of the buyer's bargain with Rite Aid under section 2-313.[55] Moreover, the "learned intermediary doctrine" did not shield Rite Aid from warranty liability based on its Rite Advice insert because, while the buyer relied on her physician to prescribe the appropriate medicine, she relied on Rite Aid's advice about the compatibility of the medicine and dairy products.[56]

Implied Warranties

In several interesting cases, courts had to determine whether the seller had breached an implied warranty. In *Strauss v. Ford Motor Co.*,[57] the court held that Jaguar automobiles sold without the hardware necessary to affix a state-required front license plate did not violate the implied warranties of merchantability or fitness for particular purpose because of the inconvenience to the buyer of having to obtain hardware necessary to affix a front license plate.[58] In *Moss v. Batesville Casket Co.*,[59] the court held that a casket with cracks and wood separation that were discovered when the body was exhumed two and a half years after burial was not unfit either for a particular purpose or its ordinary purpose because there was no evidence that the casket did not adequately preserve the decedent's remains. Although not accepting the seller's argument that the ordinary purpose of a casket was only to protect the remains until interment, the court found the children of the decedent presented no evidence that the remains were damaged in any way from the cracks in the casket.[60]

In *Rudloff v. Wendy's Restaurant of Rochester, Inc.*,[61] a customer allegedly broke a tooth when biting into a Wendy's hamburger. Because the customer swallowed the offending part of the hamburger, he could not prove whether the problem with the hamburger was due to (1) a piece of bone, gristle, or other substance natural to the meat; (2) a foreign object that was introduced into the meat during processing; (3) some other problem with the hamburger patty, such as being partially frozen; or (4) a problem with the bun, cheese, or condiments.[62] The court nevertheless denied the restaurant's motion for summary judgment on the customer's claim for breach of implied warranty of merchantability. While acknowledging that "you can't sue for finding a bone in your steak when you order

54. *See id.* at 566–67.
55. *See id.* at 572–73.
56. *See id.* at 577–79.
57. 439 F. Supp. 2d 680 (N.D. Tex. 2006).
58. *See id.* at 686–87.
59. 935 So. 2d 393 (Miss. 2006).
60. *Id.* at 401–02.
61. 821 N.Y.S.2d 358 (N.Y. City Ct. 2006).
62. *See id.* at 360.

HeinOnline -- 62 Bus. Law. 1566 2006-2007

a T-bone steak,"[63] the court concluded that whether the unidentified object in the hamburger that broke the customer's tooth could reasonably be expected to be in a ground meat patty and whether the customer could be expected to take steps to guard against the object were questions of fact for the jury.[64] In *Yarrington v. Solvay Pharmaceuticals, Inc.*,[65] the court held that lack of FDA approval did not make a drug unfit for its intended purpose and could only be the basis of a breach of warranty claim if the drug manufacturer had expressly warranted that the drug was FDA-approved.[66]

Privity of Contract

Most courts require privity of contract for a successful breach of implied warranty claim. Applying this rule, two courts facing similar factual situations rejected claims against an electric stun gun (Taser) manufacturer brought by survivors of two persons who were killed when police used a Taser on them. Both courts ruled that the survivors lacked privity of contract with the manufacturer and, therefore, were precluded from bringing an action for breach of the implied warranty of merchantability under the U.C.C.[67]

In *Cruickshank v. Clean Seas Co.*,[68] the court held that, while the Massachusetts version of section 2-318 did not require privity of contract in consumer transactions, that section did not eliminate the privity requirement in a commercial transaction.[69]

Title to Goods

One of Karl Llewellyn's greatest complaints about sales law before the Code was its inordinate emphasis on title, a concept he found arbitrary, simplistic, and rigid.[70] Not surprisingly, Article 2 stakes out a more Llewellian position: "This Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not 'title' to the goods has passed."[71] Llewellyn cut title to its irreducible minimum. Still, it lingers.

63. *Id.* at 365.
64. *See id.* at 365–69.
65. No. A05-2288, 60 U.C.C. Rep. Serv. 2d (West) 1090 (Minn. Ct. App. Sept. 26, 2006).
66. *See id.* at 1093–94.
67. Neal-Lomax v. Las Vegas Metro. Police Dept., No. 2:05CV1464 PMPPAC, 60 U.C.C. Rep. Serv. 2d (West) 361 (D. Nev. July 18, 2006) (finding the decedent was neither an intended beneficiary of the police-Taser contract nor a guest of the police under U.C.C. § 2-318); Sanders v. City of Fresno, No. Civ. A. 05-0469 AWISMS, 59 U.C.C. Rep. Serv. 2d (West) 1209 (E.D. Cal. July 7, 2006) (dismissing breach of warranty claim because California law required privity of contract in breach of warranty action).
68. 346 B.R. 571 (D. Mass. 2006).
69. *Id.* at 579–80.
70. *See, e.g.*, Karl N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. Rev. 159, 169 (1938) ("[Title] remains, in the Sales field, an alien lump, undigested. It even interferes with the digestive process.").
71. U.C.C. § 2-401 cmt. 1 (2002).

HeinOnline -- 62 Bus. Law. 1567 2006-2007

Deerfield Manufacturing, Inc. v. JEM Investment Properties, LLC,[72] concerned a dispute over the ownership of two presses. Nova, a dealer in used industrial equipment, bought a manufacturing plant containing a good deal of heavy machinery. Shortly thereafter, Nova began negotiating to sell the plant and most of its contents to JEM. JEM balked at acquiring the two presses at issue because it thought them overpriced. On December 5, 2003, Nova and JEM signed a contract for the plant and its contents, excluding the presses. The contract provided that Nova had to remove the presses within ninety days of closing or title to them would pass to JEM. The sale closed on February 4, 2004. Meanwhile, on November 18, 2003, Nova contracted to sell the presses to Deerfield, which paid in full the next day. Deerfield's purchase order read "FOB truck loaded" with a delivery date of "mid to late December." Nova's invoice stated that Nova "will dismantle and load presses on trucks provided by Deerfield. Preferred loading date is mid to late December, 2003." Deerfield subsequently asked that delivery be delayed, as it did not yet need the presses. Nova's owner had not told the salesperson about the deadline in the JEM contract, and Deerfield and Nova did not act until September 2004, by which time JEM had repaired the presses and started using them. JEM refused to surrender the presses to Deerfield.[73] Deerfield sued Nova for breach of contract and JEM for delivery of the presses or damages for nondelivery, while JEM countersued Nova for breach on the grounds that it had failed to disclose to JEM that it had sold the presses to Deerfield.

Both Deerfield and JEM sought partial summary judgment on which held title to the presses. Deerfield argued that the presses were to be delivered without moving the goods, bringing them within section 2-401(3); therefore, Nova had no title to transfer to JEM in December of 2003, not even voidable title, so JEM could acquire no title under section 2-403(1). In contrast, JEM argued that section 2-401(2) applied because the goods had to be moved in order for performance to be complete. As the presses had not been loaded when Nova sold the plant to JEM, Nova held voidable title, and thus could transfer clear title to a good faith purchaser for value.[74] In its summary judgment opinion, the trial court concluded that section 2-401(2)(a) applied, that Nova held voidable title, and that JEM gave Nova value by paying $475,000 payment for machinery; however, the court left open for trial the question of whether JEM was a *good faith* purchaser for value to which Nova could pass clean title.[75] Following a five-day bench trial, the court held that JEM was *not* a good faith purchaser because it knew at the time its purchase closed in February 2004—and, in any event, before title would have vested

72. No. 04-73934, 2006 WL 2711811 (E.D. Mich. Sept. 21, 2006); *see also* Deerfield Mfg., Inc. v. JEM Invest. Props., No. 04-73934, 58 U.C.C. Rep. Serv. 2d (West) 34 (E.D. Mich. Oct. 11, 2005) (opinion on cross-motions for summary judgment).

73. *See* 2006 WL 2711811, at *3–5.

74. U.C.C. § 2-403(1) (2002).

75. *See Deerfield Mfg.*, 58 U.C.C. Rep. Serv. 2d (West) at 41–45.

Citing to a leading Massachusetts case, *Mechanics Nat'l Bank of Worcester v. Gaucher*, 386 N.E.2d 1052 (Mass. App. Ct. 1979), the *Deerfield Manufacturing* court distinguished goods that the buyer could readily pick up from those that required special handling. As the presses could be removed

HeinOnline -- 62 Bus. Law. 1568 2006-2007

in it in May 2004—that Nova had sold the presses to a third party. As a result, JEM did not take title to the presses, and Deerfield had the right to demand them in September 2004.[76]

CONTRACT PERFORMANCE

A buyer to whom a seller tenders or delivers nonconforming goods may, after a reasonable opportunity to inspect the goods, accept or reject them.[77] Once a buyer has accepted nonconforming goods, the buyer may revoke its acceptance if the nonconformity substantially impairs the value of the goods to the buyer and the buyer accepted the goods either on the reasonable belief that the seller would cure the nonconformity or without discovering the nonconformity because of the difficulty in doing so.[78]

In *Waddell v. L.V.R.V. Inc.*,[79] the Waddells purchased and took delivery of a 1996 motor home on September 1, 1997. Shortly thereafter, the Waddells experienced

---

only by crane through the building's roof, they could not be delivered merely by designating them thus. The court also counted Deerfield's delay as making this something other than a routine and brief bailment until pickup. In addition, the court pointed to the "F.O.B. truck loaded" term in the contract, which requires that the seller load the goods on board. U.C.C. § 2-319(1)(c) (2002). Nova's invoice also required that it "dismantle and load the presses." As a result, the court found U.C.C. § 2-401(2) applicable rather than § 2-401(3)(b), so Deerfield had not taken title to the presses; if Deerfield held no title, then Nova's control could not have been a bailment. *Deerfield Mfg.*, 58 U.C.C. Rep. Serv. 2d (West) at 41–43.

The rest of the issues followed naturally. Deerfield insisted that Nova held no title of any kind, but, as the court pointed out, "[t]itle must be held by someone." *Deerfield Mfg.*, 58 U.C.C. Rep. Serv. 2d (West) at 43. If neither Deerfield nor JEM held title, then Nova must have held at least voidable title. If Nova held voidable title, then it could pass clear title to JEM if JEM was a good faith purchaser for value. The court concluded that JEM did provide value in its $475,000 payment for machinery. Though Deerfield argued that JEM excluded the presses in its purchase agreement, the court concluded that value could rest in JEM's failure to collect rent for the ninety days after the closing. *Id.* at 44.

The court's conclusion is unexceptionable, but the reasoning leaves something to be desired. It would have been sufficient to rest the decision on the shipping term and invoice, which clearly enough contemplated further action by the seller before delivery would be complete. *See, e.g.*, Crocker Nat'l Bank v. Ideco Div. of Dresser Indus., Inc. 839 F.2d 1104 (5th Cir. 1988). The court's discussion of the difficulty of removal obscures the result. Certainly this line has no statutory basis; indeed, the comment itself refers only to "the time when the seller has finally committed himself in regard to specific goods." U.C.C. § 2-401 cmt. 4 (2002). The seller, not the buyer; the comment makes no reference to the buyer's actions, aided or unaided, quick or slow. Nor is it obvious how size matters. Both the *Mechanics National Bank* decision, which the court cited to approvingly, and the decision in *Integrity Insurance Co. v. Marine Midland Bank–Western*, 396 N.Y.S.2d 319 (N.Y. Sup. Ct. 1977), which it distinguished, involved the sale of mobile homes, for example. Nor do the cases uniformly draw this distinction. *See, e.g.*, Superior Derrick Servs., Inc. v. Anderson, 831 S.W.2d 868 (Tex. Ct. App. 1992) (holding that delivery of a 210,000-pound mast occurred at the seller's place of business). Indeed, one court that adhered to the distinction also held that "had buyer fully paid for the goods and merely entrusted them in the care of the seller, the result would be different." Phoenix Steel Corp. v. Rittenhouse Org. (*In re* Phoenix Steel Corp.), 76 B.R. 373, 375 (Bankr. D. Del. 1987). Those are precisely our facts.

In an area, like this, normally answered by the contract the parties have made, there is much to be said for an unambiguous, even mechanical, default rule. The statute is clear enough about the passage of title whether the goods are or are not to be delivered physically; only uncertainty can arise from obliging a court to determine how much huffing and puffing it will take to move the goods.

76. *See* 2006 WL 2711811, at *7.

77. U.C.C. §§ 2-513, 2-601, 2-602, 2-606 (2002).

78. U.C.C. § 2-608(1) (2002).

79. 125 P.3d 1160 (Nev. 2006).

HeinOnline -- 62 Bus. Law. 1569 2006-2007

engine problems. Despite repeated attempts over 18 months, the seller was unable to solve the problems: the motor home continued to experience engine overheating and numerous problems with its air conditioning, heating, and electrical systems. The Waddells sued, *inter alia*, to revoke their acceptance of the motor home and to recover all out-of-pocket expenses they incurred due to the motor home's chronic problems, including their attorneys' fees. Following a bench trial, the trial court found that the chronic problems substantially impaired the motor home's value to the Waddells, entitling them to revoke their acceptance, and awarded the Waddells their out-of-pocket expenditures, as well as attorneys' fees in the amount of $15,000.[80] The Nevada Supreme Court affirmed. The court explained that substantial impairment requires finding that (1) the nonconformity impaired the value of the good to the buyer and (2) a reasonable person in the buyer's position would consider the extent of the impairment sufficient to deprive the buyer of the benefit of her purchase.[81] Here, there was ample testimony that the motor home's engine, heating, cooling, and electrical problems impaired its value to the Waddells, who intended to use the motor home as their primary residence and drive it around the country for two or three years. Moreover, the motor home spent a total of seven of the first 18 months the Waddells owned it at the seller's service department, during which time the Waddells could not use the motor home for its intended purpose. Finally, the court held that the Waddells did not fail to timely revoke their acceptance, despite having taken delivery of the motor home some 18 months before revoking their acceptance.[82]

RAD Concepts, Inc. v. Wilks Precision Instrument Co.[83] involved acceptance, rejection, revocation of acceptance, and the right of a party who is reasonably insecure about the other party's ability or willingness to perform to demand adequate assurance of performance and to suspend its own performance until it receives such assurance.[84] WPIC agreed to fabricate steel molds for certain components and to produce, according to RAD's specifications, and sell to RAD x-ray cassette holders incorporating those components. Due to problems with the initial samples, the parties ultimately agreed to two separate contracts: one for 242 holders using small screws; and another for 5,000 units using larger screws. RAD picked up the 242 small-screw holders without inspecting them, sold 76 of them, but failed to pay the bulk of the invoice price, claiming that the holders were nonconforming. WPIC sued for the unpaid balance. The trial court concluded that RAD had accepted the 242 small-screw units by failing to timely reject after having had a reasonable opportunity to reject and by selling 76 of the small-screw units to third parties—an act inconsistent with WPIC's continued ownership of the goods.[85]

80. *See id.* at 1162.

81. *See id.* at 1163 (quoting Jorgensen v. Pressnall, 545 P.2d 1382 (Or. 1976)).

82. *See id.* at 1165 ("Because Wheeler's was unable to repair the defects after a total of seven months, the Waddells were entitled to say "that's all" and revoke their acceptance, notwithstanding Wheeler's good-faith attempts to repair the RV. Also, the reasonable time for revocation was tolled during the seven months that Wheeler's kept the RV and attempted to repair the defects." (footnote omitted)).

83. 891 A.2d 1148 (Md. 2006).

84. *See* U.C.C. § 2-609(1) (2002).

85. *See RAD Concepts*, 891 A.2d at 1158–59 (citing U.C.C. § 2-606(1)(b), (c)).

HeinOnline -- 62 Bus. Law. 1570 2006-2007

Moreover, because RAD failed to show that the holders were so defective as to substantially impair their value, RAD had not properly revoked its acceptance of the 242 small-screw units.[86] Therefore, RAD was liable to WPIC for the balance due on the small-screw invoice.[87]

As for the contract for 5,000 large-screw units, the trial court found, *inter alia*, that RAD's failure to pay the balance due on the first invoice gave WPIC reasonable grounds to be insecure about whether RAD would pay for the 5,000-unit order, entitling WPIC to seek adequate assurances from RAD and to suspend its own performance pending RAD's assurances of performance.[88] It also held that RAD's failure to provide WPIC the assurances the latter sought and statements by RAD's authorized agent that RAD would not purchase the 5,000 large-screw units constituted an anticipatory repudiation that substantially impaired the value of the contract to WPIC and relieved WPIC of any obligation to further perform.[89]

The appellate court affirmed each of these rulings and added that, contrary to RAD's argument on appeal, RAD failed to timely retract its repudiation because WPIC had materially changed its position in reliance on RAD's repudiation prior to the attempted retraction and RAD's untimely attempt to retract was not accompanied by the adequate assurances to which WPIC was entitled.[90]

Offset/Recoupment

Section 2-717 authorizes a buyer, upon notice to the seller, to deduct any damages due from the seller for its breach of a contract from any amount the buyer owes the seller under the same contract.[91] The major limitation on this right is that the offsetting claims must arise under the same contract.

In *ITV Direct, Inc. v. Healthy Solutions, LLC*,[92] the parties entered into a distribution agreement requiring Healthy Solutions to assist ITV with marketing a food supplement that ITV would purchase from Healthy Solutions for resale. ITV purchased a quantity of the product from Healthy Solutions for which ITV did not pay after learning that the U.S. Food and Drug Administration and the Federal Trade Commission were investigating the claims Healthy Solutions was making about the product. ITV eventually sued Healthy Solutions for breaching the distribution agreement and Healthy Solutions sued ITV for the unpaid invoices. ITV sought to set off any unpaid amounts it owed Healthy Solutions against the unliquidated damages it claimed Healthy Solutions owed it for breaching the distribution agreement. The court denied ITV's setoff claim, concluding that the distribution agreement and the purchase orders were not the "same contract" for purposes of section 2-717.[93] Likewise, in

86. *See id.* at 1160 (citing U.C.C. § 2-608).
87. *See id.*
88. *See id.* at 1162–63 (citing U.C.C. § 2-609 & cmt. 3).
89. *See id.* (citing U.C.C. §§ 2-609(4) & 2-610).
90. *See id.* at 1167–71 (citing U.C.C. § 2-611).
91. U.C.C. § 2-717 (2002).
92. 445 F.3d 66 (1st Cir. 2006).
93. *See id.* at 71–72.

HeinOnline -- 62 Bus. Law. 1571 2006-2007

AmerisourceBergen Corp. v. Dialysist West, Inc., the court held that a buyer of multiple products could not withhold payments due for non-defective product lines because it alleged the seller breached with respect to one or more defective product lines.[94]

STATUTE OF LIMITATIONS

Section 2-725 imposes a four-year statute of limitations on claims governed by Article 2, unless the parties agree to a shorter period of not less than one year.[95] In *Daley v. Twin Disc, Inc.*,[96] the court made clear that unsuccessful attempts to repair goods during the statutory or contractual limitations period will not, without more, extend the limitations period or toll limitations during the attempted repairs—although "purposely prolonging the time for repairs beyond the statute of limitations" might do so.[97]

Accrual of a claim for breach is not subject to a discovery rule; however, if a warranty expressly extends to future performance, a cause of action for breach of warranty will not accrue until the breach is or should have been discovered.[98] Thus, in *Busche v. Monaco Coach Corp.*, the court held that limitations did not begin to run on a claim based on a five-year/50,000-mile express warranty on a motor home until the buyer discovered or should have discovered the breach of warranty.[99] Similarly, in *Carlisle Corp. v. Medical City Dallas, Ltd.*,[100] an express warranty that a roofing membrane would not "prematurely deteriorate to the point of failure due to weathering for a period of twenty (20) years from the date of sale" started the statutory four-year limitations clock "not upon initial delivery,

94. 465 F.3d 946, 950 (9th Cir. 2006). The court also held that section 2-717 preempted any equitable offset or recoupment claim AmerisourceBergen might assert. *See id.* at 951.

95. U.C.C. § 2-725(1) (2002).

96. 440 F. Supp. 2d 48 (D. Mass. 2006).

97. *See id.* at 52. This seems counterintuitive, given the number of courts that have tolled the period within which a buyer must timely revoke acceptance of nonconforming goods to allow good faith efforts to resolve the nonconformity. *See, e.g.*, Waddell v. L.V.R.V. Inc., 125 P.3d 1160 (Nev. 2006) (discussed *supra* notes 79–82 and accompanying text); North Am. Lighting, Inc. v. Hopkins Mfg. Corp., 37 F.3d 1253 (7th Cir. 1994) (applying Illinois law). The best explanation is that section 2-725(1) is more a statute of repose, setting an absolute outer limit on the time within which sellers are subject to suit. Notice that section 2-725(1) allows parties to shorten the time within which to bring suit, but not to lengthen it. *See* Central Washington Refrigeration, Inc. v. Barbee, 946 P.2d 760, 767 (Wash. 1997) (Guy, J., dissenting) ("A statute of limitation bars plaintiffs from bringing an already accrued claim after a specified period of time; a statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred. The language of U.C.C. § 2-725 unambiguously creates a statute of repose.... [A]ll claims must be made no more than four years after delivery, whether or not the buyer is aware of the product's defect.").

98. U.C.C. § 2-725(2) (2002); *see* Rembrandt Constr., Inc. v. Butler Mfg. Co., No. 270577, 61 U.C.C. Rep. Serv. 2d (West) 409, 410–11 (Mich. Ct. App. Nov. 21, 2006) ("The imposition of a discovery rule by the trial court for accrual of plaintiff's claim is directly contrary to both the clear and unambiguous language of the applicable statute and case law. Without a warranty extending to the future performance of the subject goods, a cause of action ... accrue[s] upon tender of delivery.").

99. No. Civ. A. 06-3801, 2006 WL 3302477, at *4 (E.D. Pa. Nov. 13, 2006) ("[P]laintiffs would have no legal remedy if the cause of action accrued on the date the motor home was tendered and the warranty was breached during the fifth year. Such a result would be illogical and undermine the protection under the warranty.").

100. 196 S.W.3d 855 (Tex. Ct. App. 2006).

HeinOnline -- 62 Bus. Law. 1572 2006-2007

but when a reasonable buyer should have discovered... premature deterioration to the point of failure because of weathering."[101] The buyer's warranty claim was not time-barred as a matter of law because the buyer filed suit more than ten years after a contractor installed the seller's membrane; nor was the buyer's claim time-barred as a matter of fact, despite persistent roof leakage as much as six years before the buyer filed suit, because roof leakage could have been caused by faulty workmanship installing the membrane, by premature deterioration of the membrane itself, or both, and the court found sufficient evidence to support the jury's finding that only months before the buyer filed suit did it have actual or constructive knowledge that the leakage was due to membrane failure.[102]

Economic Loss Rule

The economic loss rule, which is most often pled as a defense to a tort claim, typically operates to bar tort actions in cases based on a contractual relationship unless there is personal injury or damage to property other than the property that is the subject of the contract.[103] A number of states recognize a fraud exception to the economic loss rule.[104] In *KD & KD Enterprises, LLC v. Touch Automation, LLC*,[105] the buyer purchased a DVD vending machine system, which the seller represented as "not a prototype," "no longer in the testing stage of development," and suited to "enable plaintiff to operate an automated retail DVD store in very little space with very low operating costs." When the system failed to function as represented, the buyer sued for breach of contract and fraud. The court held that the economic loss rule did not bar the buyer's fraud claim because to hold otherwise would undermine the risk allocating purpose of the economic loss rule.[106]

101. *Id.* at 862.
102. *See id.* at 859–60, 862–64.
103. *See, e.g.*, Redarowicz v. Ohlendorf, 441 N.E.2d 324, 327 (Ill. 1982); Suffolk County v. Long Island Lighting Co., 728 F.2d 52 (2d Cir. 1984) (applying New York law).
104. *See, e.g.*, Kaloti Enters., Inc. v. Kellogg Sales Co., 699 N.W.2d 205, 219–20 (Wis. 2005); Citizens Ins. Co. v. Osmose Wood Preserving, Inc., 585 N.W.2d 314, 317 (Mich. Ct. App. 1998), *appeal denied*, 602 N.W.2d 578 (Mich. 1999).
105. No. CV-06-2083-PHX-FJM, 2006 WL 3808257 (D. Ariz. Dec. 27, 2006).
106. *Id.* at *2–3.

HeinOnline -- 62 Bus. Law. 1573 2006-2007

HeinOnline -- 62 Bus. Law. 1574 2006-2007