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Uniform Commercial Code Survey: Sales

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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 moveable at the time of identification to the contract.² The court in *Adel v. Greensprings of Vermont, Inc.*³ sided with a majority of jurisdictions in holding that water is a good, the provision of which by a privately-owned supplier is a transaction within the scope of Article 2.

In *Heuerman v. B & M Construction, Inc.*,⁴ the court reiterated that Illinois courts use the “predominant purpose” test, rather than the “gravamen of the action” test, to decide whether Article 2 governs “mixed” goods and services contracts,⁵ and held that a contract to provide gravel for a highway repair project was predominantly for services because the seller purchased the gravel from a third party, the seller’s primary business was trucking, not gravel sales, and nearly two-thirds of the contract price was for transportation charges.⁶ In a similar vein, the court in *Fallsview Glatt Kosher Caterers, Inc. v. Rosenfeld*⁷ ruled that an alleged agreement for “accommodations, food and entertainment,” as part of a “Kosher Passover experience,” was predominantly for services, and thus Article 2 did not apply to even the food portion of the contract.

CONTRACT FORMATION

In *Enpro Systems, Ltd. v. Namasco Corp.*,⁸ Enpro ordered steel plates from Namasco. Namasco attempted to limit warranty claims and remedies by the terms noted on the invoice it sent Enpro, which Enpro did not receive until three days

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1. See U.C.C. § 2-102 (2002).

2. See *id.* § 2-105(1).

3. 363 F. Supp. 2d 692, 56 U.C.C. Rep. Serv. 2d (West) 798 (D. Vt. 2005). As a result, the seller made and could breach the warranty of merchantability by providing water containing pathogens.

4. 833 N.E.2d 382 (Ill. App. Ct. 2005).

5. See *id.* at 388–89.

6. See *id.* at 389.

7. 794 N.Y.S.2d 790 (N.Y. Civ. Ct. 2005).

8. 382 F. Supp. 2d 874 (S.D. Tex. 2005).

after it received the goods. The court found that the parties' contract formed either when Namasco timely shipped goods conforming to Enpro's purchase order or when the goods arrived at Enpro's receiving department—each of which occurred prior to Enpro's receipt of Namasco's invoice. Accordingly, the court concluded that the invoice terms were not part of the parties' contract.⁹

STATUTE OF FRAUDS

Agreements to buy and sell goods for a price of \$500 or more must normally be evidenced by one or more signed writings to be enforceable.¹⁰ The court in *International Casings Group, Inc v. Premium Standard Farms, Inc.*¹¹ enjoined an output seller from terminating its relationship with the buyer, holding that the buyer was likely to prevail on the merits of its argument that an exchange of seventeen e-mail messages sufficiently evidenced the parties' agreement to a three-year output contract to satisfy U.C.C. section 2-201(1).¹² Although the e-mail exchanges referenced the parties' intention to reduce their agreement to writing, the court concluded that this was more likely a memorialization than a condition precedent to formation.¹³

Even when there is no writing signed by the person against whom enforcement is sought, the statute of frauds will not bar an action if the defendant is a merchant who received but did not object to a written confirmation sent by the plaintiff.¹⁴ The court in *R.F. Cunningham & Co., Inc. v. Driscoll*,¹⁵ recognizing a sharp split among other jurisdictions regarding whether a farmer can be an Article 2 merchant,¹⁶ held that a farmer with 37 years of experience harvesting and selling soybeans was a merchant for this purpose. In a troubling decision, a Texas court of appeals held that a merchant seller of cell phone battery pack components could not avoid a forum selection clause included in a buyer's written confirmations of orders placed over the telephone.¹⁷ The court's ruling totally misconstrues U.C.C. section 2-201(2). That provision may deny a merchant the ability to invoke the statute of frauds defense, but it does not deny the merchant the ability to challenge the existence of a contract and says absolutely nothing about the terms of the contract. The court's ultimate conclusion may, however, be correct under U.C.C. section 2-207, to which we turn next.

9. See *id.* at 880–81 (citing Texas's version of U.C.C. § 2-206(1)(b) (2002)). *Enpro* raises a number of additional Article 2 issues and should be on every commercial lawyer's reading list.

10. See U.C.C. § 2-201 (2002).

11. 358 F. Supp. 2d 863, 56 U.C.C. Rep. Serv. 2d (West) 736 (W.D. Mo. 2005).

12. *Id.* at 872–75, 56 U.C.C. Rep. Serv. 2d (West) at 744–48. The court found support in Missouri's enactment of the Uniform Electronic Transactions Act (UETA), MO. REV. STAT. §§ 432.200–432.295 (Supp. 2005). See 358 F. Supp. 2d at 873, 875, 56 U.C.C. Rep. Serv. 2d (West) at 748.

13. 358 F. Supp. 2d at 871, 56 U.C.C. Rep. Serv. 2d (West) at 742.

14. See U.C.C. § 2-201(2).

15. 790 N.Y.S.2d 368, 56 U.C.C. Rep. Serv. 2d (West) 237 (N.Y. City Ct. 2005).

16. See *id.* at 369, 56 U.C.C. Rep. Serv. 2d (West) at 238 (citing David B. Harrison, Annotation, *Sales-Farmers as "Merchants" Within Provisions of UCC Article 2*, 95 A.L.R.3d 484 (collecting cases)).

17. See *In re Kyocera Wireless Corp.*, 162 S.W.3d 758 (Tex. App. 2005).

BATTLE OF THE FORMS

Between merchants, additional terms in a written acceptance or confirmation can become part of the contract if the party receiving the acceptance or confirmation expressly assents or the terms are not material and the party receiving the acceptance or confirmation of them does not object.¹⁸ In *Borden Chemical, Inc. v. Jahn Foundry Corp.*,¹⁹ the court held that an indemnification provision included in Borden's invoice materially altered the terms of Jahn's purchase order and, therefore, did not become part of the contract. Borden argued that it had included an identical provision, to which Jahn had never objected, in numerous invoices it sent Jahn over a span of several years—establishing a course of dealing that made the indemnity provision part of the parties' contracts. The court disagreed because Jahn had added express liability language to the purchase orders at issue. Because Borden did not expressly condition its acceptance-by-invoice on Jahn's assent to any additional or different terms contained therein, the new purchase order language “undercut the parties' prior course of dealing and rendered the invoices' indemnity agreement a material alteration to Jahn's purchase order.”²⁰ Furthermore, Jahn's purchasing manager's initialing each of Borden's invoices containing the indemnity provision did not constitute an acceptance of any additional or different terms; rather, he did so solely for the purpose of Jahn's internal accounts payable procedures.²¹

In *Lively v. IJAM, Inc.*,²² the court held that the parties had formed their contract for the purchase and sale of a laptop computer when the buyer paid the purchase price and the seller shipped the computer; therefore, a forum selection clause included in the invoice accompanying the computer did not become part of the contract.²³ Because the buyer did not expressly agree to the forum selection clause, the court held that it was not part of the contract—either because the buyer was not a merchant or, even if he was a merchant, because the forum selection clause materially altered the terms of the pre-existing contract.²⁴

Resolving the parties' dispute in *AgGrow Oils, L.L.C. v. National Union Fire Insurance Co. of Pittsburgh, PA*²⁵ required applying the less-frequently-litigated U.C.C. section 2-207(3). AgGrow engaged Ibberson to design and build an oilseed processing plant, incorporating equipment manufactured by Anderson, about which Anderson made quantity and quality guarantees. When the equipment failed to live up to Anderson's guarantees, AgGrow sued Ibberson (and Ibberson's surety, National Union), and Ibberson sought indemnity from Anderson. The

18. See U.C.C. § 2-207(2) (2002).

19. 834 N.E.2d 1227 (Mass. App. Ct. 2005), review denied, 840 N.E. 2d 55 (Mass. 2005).

20. *Id.* at 1230. The court applied the material alteration test in U.C.C. section 2-207(2)(b), rather than the “knockout rule,” because Massachusetts' non-uniform version of section 2-207(2) applies to both additional and different terms. See MASS. GEN. LAWS ANN. ch. 106 § 2-207(2) (West 1999).

21. See *Borden Chemical*, 834 N.E.2d at 1232.

22. 114 P.3d 487, 58 U.C.C. Rep. Serv. 2d (West) 639 (Okla. Civ. App. 2005).

23. *Id.* at 492, 58 U.C.C. Rep. Serv. 2d (West) at 644. Compare *Enpro Sys., Ltd. v. Namasco Corp.*, 382 F. Supp. 874 (S.D. Tex. 2005) (discussed *supra* in text accompanying note 8).

24. *Lively*, 114 P.3d at 492–93, 58 U.C.C. Rep. Serv. 2d (West) at 644–45.

25. 420 F.3d 751 (8th Cir. 2005).

court found that Ibberson and Anderson had formed their contract through conduct: having exchanged written proposals and failed to reach an agreement on the material terms through their writings, the parties nevertheless performed as if they had agreed. Because both parties' writings incorporated Anderson's guarantees (which inured to AgGrow's benefit), those guarantees were terms on which the parties' writings agreed, and thus became part of the parties' contract.²⁶

WARRANTIES

IMPLIED WARRANTIES

A contract for the sale of goods normally includes an implied warranty that the goods are merchantable if the seller is a merchant engaged in the business of selling goods of that kind.²⁷ In *Krack v. Action Motors Corp.*, the court held that a used automobile dealer breached the implied warranty of merchantability when it sold a salvaged vehicle for the price of a non-salvaged used vehicle, even though the dealer had a clean certificate of title and did not know about the prior salvage.²⁸ The trial court held that, despite the defendant's innocence and the fact that the vehicle ran well, the plaintiff was entitled to recover more than \$9,700 because the value of this vehicle with a salvage history was roughly one-half that of a comparable, non-salvaged vehicle.²⁹ The appellate court affirmed, noting that the implied warranty of merchantability assigns the risk of *unknown* defects to a merchant seller, in order to protect buyers from loss sustained when the goods did not meet commercial expectations. In this case, a vehicle with a salvage history would not "pass without objection in the trade."³⁰ In the court's view, Connecticut's "very strong policy in favor of protecting purchasers of consumer goods" supported holding an innocent merchant seller liable for nonconformities.³¹

In *McDonald Brothers, Inc. v. Tinder Wholesale, LLC*,³² a building materials supplier (McDonald) purchased trim boards from a distributor of lumber products (Tinder) for resale to contractors. After the boards were installed in construction projects, several contractors notified McDonald that the boards were failing due to improper application of adhesive during the manufacturing process. McDonald paid substantial sums to repair and replace the boards but Tinder refused to reimburse McDonald, despite promising to do so. McDonald sued for, *inter alia*, breaches of an express warranty and the implied warranties of merchantability and fitness for a particular purpose. The court denied Tinder's motions to dismiss the express warranty and implied warranty of merchantability claims, but dismissed the implied warranty of fitness for a particular purpose claim because the

26. See *id.* at 754-55.

27. See U.C.C. § 2-314 (2002).

28. 867 A.2d 86, 56 U.C.C. Rep. Serv. 2d (West) 368 (Conn. App. Ct. 2005), *certification denied*, 871 A.2d 1031 (Conn. 2005).

29. See *id.* at 88, 56 U.C.C. Rep. Serv. 2d (West) at 369.

30. See *id.* at 89-90, 56 U.C.C. Rep. Serv. 2d (West) at 369 (citing U.C.C. § 2-314(2)(a)).

31. *Id.* at 90, 56 U.C.C. Rep. Serv. 2d (West) at 372.

32. 395 F. Supp. 2d 255, 57 U.C.C. Rep. Serv. 2d (West) 615 (M.D.N.C. 2005).

plaintiff's use of the boards was the ordinary use of the board and not for a particular or unique purpose.³³ The court relied on an official comment to U.C.C. section 2-315, which explains that this warranty "envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability."³⁴ The particular purpose alleged—installation in residential housing—was the ordinary purpose of the boards; therefore, the claim failed.

PRIVITY OF CONTRACT

Several cases discussed whether Article 2 permits a buyer to recover non-personal injury damages from a remote seller in the absence of privity of contract. In *Hyundai Motor America, Inc. v. Goodin*,³⁵ the Supreme Court of Indiana permitted a consumer buyer (Goodin) to recover damages for economic loss based on breach of the implied warranty of merchantability directly from a manufacturer. Goodin purchased a new Hyundai Sonata from an Indiana Hyundai dealer. Goodin experienced repeated problems with the vehicle's brakes, which were never resolved. Goodin sued Hyundai for breaching both an express warranty and the implied warranty of merchantability. A jury found Hyundai breached the implied warranty of merchantability, but not an express warranty, and awarded \$3,000 in damages. Hyundai appealed, claiming lack of privity precluded recovery of damages for diminution in value, and the intermediate court of appeals reversed. The Indiana Supreme Court vacated the court of appeals' decision and affirmed the trial court, holding that vertical privity was not required in a claim by a consumer against a manufacturer for breach of warranty even if the damages were solely economic loss.³⁶ The court noted that, while the origins of the privity requirement rested in nineteenth century law designed to limit tort liability for breach of warranty, privity was no longer required in tort.³⁷ The court explained, further, that even in a contract claim, the privity requirement has been eroded by the enactment of U.C.C. section 2-318, which eliminates horizontal privity requirements for certain plaintiffs who sustain personal injuries as a result of a breach of warranty.³⁸

The court then looked to authority from other jurisdictions. The court noted a split in authority among jurisdictions with the same version of section 2-318 as Indiana but was persuaded to eliminate the vertical privity requirement for economic loss because most products are sold through intermediaries, leaving con-

33. 395 F. Supp. 2d at 266, 57 U.C.C. Rep. Serv. 2d (West) at 621.

34. *Id.*, 57 U.C.C. Rep. Serv. 2d (West) at 622 (quoting U.C.C. § 2-315 cmt. 2).

35. 822 N.E.2d 947, 56 U.C.C. Rep. Serv. 2d (West) 339 (Ind. 2005).

36. *Id.* at 953–58, 56 U.C.C. Rep. Serv. 2d (West) at 346–50.

37. *Id.* at 951–53, 56 U.C.C. Rep. Serv. 2d (West) at 343–46.

38. *Id.* at 954–56, 56 U.C.C. Rep. Serv. 2d (West) at 348–50 (citing Indiana's version of U.C.C. section 2-318). Although section 2-318 does not address vertical privity or expressly permit recovery for economic loss, the court found that the section did not prevent a court from abolishing the privity requirement in such a case. *See id.* at 955–56, 56 U.C.C. Rep. Serv. 2d (West) at 349–50 (noting the official Code comments carefully explain that section 2-318 is neutral on issue of vertical privity).

sumers to discover defects in the goods after the sale;³⁹ vertical privity can insulate manufacturers from liability for inferior products;⁴⁰ eliminating the privity requirement may avoid a multiplicity of litigation, with each buyer suing its immediate seller up the distribution chain;⁴¹ manufacturers often focus their product promotion on the ultimate consumer;⁴² and, as some courts have observed, there is no good reason for a distinction between personal injury and economic loss, given that economic loss can be significant.⁴³ The court found that these factors outweighed the primary justification for a vertical privity requirement—allowing the parties to allocate risks associated with defects in the goods themselves—which the court concluded has been eroded by the protections the U.C.C. and federal law provide to consumers.⁴⁴

Indeed, the buyer's expectations in this case would be particularly frustrated by requiring vertical privity because a warranty disclaimer left no remedy against the immediate seller and the economic loss rule⁴⁵ barred any tort action against the manufacturer. Therefore, unless the privity requirement was eliminated, the buyer would be left with no remedy for Hyundai's breach of the implied warranty of merchantability. Holding that consumers are entitled to expect that goods will at least meet the minimum requirements of merchantability, the court eliminated the vertical privity requirement, thus allowing suit directly against the manufacturer.⁴⁶

In contrast, two federal district courts enforced the vertical privity requirement of state law. In *Monticello v. Winnebago Industries, Inc.*,⁴⁷ the court concluded that the disappointed buyers of a recreational vehicle could not sue the manufacturer

39. See *id.* at 957, 56 U.C.C. Rep. Serv. 2d (West) at 351; see, e.g., *Hininger v. Case Corp.*, 23 F.3d 124, 24 U.C.C. Rep. Serv. 2d (Callaghan) 58 (5th Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995) (applying Texas law); *Reed v. City of Chicago*, 263 F. Supp. 2d 1123, 50 U.C.C. Rep. Serv. 2d (West) 146 (N.D. Ill. 2003) (applying Illinois law); *Hubbard v. Gen. Motors Corp.*, No. 95 Civ. 4362, 1996 WL 274018, 39 U.C.C. Rep. Serv. 2d (West) 83 (S.D.N.Y. May 22, 1996) (applying New York law).

40. *Goodin*, 822 N.E.2d at 957, 56 U.C.C. Rep. Serv. 2d (West) at 352 (citing *Groppe Co., Inc. v. U.S. Gypsum Co.*, 616 S.W.2d 49, 32 U.C.C. Rep. Serv. (Callaghan) 35 (Mo. Ct. App. 1981)). For example, for products with a long shelf life, the consumer's claim against the retailer might be sustainable even though the retailer's or wholesaler's claim against the manufacturer is barred by the statute of limitations.

41. *Id.*, 56 U.C.C. Rep. Serv. 2d (West) at 352 (citing *Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849, 28 U.C.C. Rep. Serv. (Callaghan) 368 (Okla. 1979) (noting that requiring privity would result in chain of lawsuits to reach manufacturer)).

42. *Id.*, 56 U.C.C. Rep. Serv. 2d (West) at 352 (citing *Spring Motors Distrib., Inc. v. Ford Motor Co.*, 489 A.2d 660 (N.J. 1985)).

43. *Id.* at 957–58, 56 U.C.C. Rep. Serv. 2d (West) at 353 (citing *Hiles Co. v. Johnston Pump Co.*, 560 P.2d 154, 21 U.C.C. Rep. Serv. (Callaghan) 568 (Nev. 1977) (noting no valid reason to differentiate between economic loss and recovery for personal injury or property damage); *Groppe Co. v. U.S. Gypsum Co.*, 616 S.W.2d 49, 32 U.C.C. Rep. Serv. (Callaghan) 35 (Mo. Ct. App. 1981) (finding it unjust to deny potentially devastating economic loss when minor personal injury or property damage is directly recoverable from manufacturer)).

44. *Goodin*, 822 N.E.2d at 958, 56 U.C.C. Rep. Serv. 2d (West) at 354 (discussing the effect of implied warranty of merchantability and Magnusson-Moss Warranty Act on parties' freedom to bargain).

45. See *infra* notes 98–112 and accompanying text.

46. *Goodin*, 822 N.E.2d at 959, 56 U.C.C. Rep. Serv. 2d (West) at 355.

47. 369 F. Supp. 2d 1350, 57 U.C.C. Rep. Serv. 2d (West) 280 (N.D. Ga. 2005).

for breach of the implied warranty of merchantability under Georgia law because Georgia adhered to the privity requirement in contract claims and breach of warranty claims “clearly arise out of a contract.”⁴⁸

In *Caterpillar, Inc. v. Usinor Industeel*,⁴⁹ the court held that Illinois law required privity of contract in an action for breach of warranty, even though the remote buyer, Caterpillar, had been involved in selecting the allegedly defective steel used to manufacture truck bodies based on the manufacturer’s representations made directly to Caterpillar. Caterpillar, however, did not directly buy the steel; several companies that manufactured truck bodies for Caterpillar purchased the steel on Caterpillar’s advice from the North American distributor and alleged agent of the manufacturer. The court ruled that, despite the direct contact the manufacturer had with Caterpillar, Illinois law required either privity of contract or an assignment of the warranty for a remote buyer to sue a remote seller of the defective good.⁵⁰ Because Caterpillar had not purchased the steel directly, it had no claim for breach of express or implied warranties.⁵¹

Caterpillar argued there was an exception to the privity requirement where a manufacturer knows the identity, purpose, and requirements of the ultimate buyer and the goods are manufactured specifically to meet those requirements.⁵² The court first expressed doubt as to whether Illinois recognized such an exception.⁵³ The court then found that the case was not within any such exception because the manufacturer had not fabricated the steel for Caterpillar’s needs. Indeed, Caterpillar had told the manufacturer of its particular needs only after Caterpillar had tested the steel and found it satisfactory.⁵⁴

CONTRACT PERFORMANCE

RISK OF LOSS

In *Wilson v. Brawn of California, Inc.*,⁵⁵ an Internet clothes seller (Brawn) charged delivery and insurance fees on all orders and promised to replace any items lost or damage in transit. The plaintiffs challenged the insurance fee as an unfair trade practice, arguing that Brawn bore the risk of loss during transit as a matter of law; therefore, despite charging customers a \$1.48 “insurance fee,” Brawn was not assuming any risk it did not already bear. The trial court agreed but the appellate court did not, ruling that, because the contract was a shipment contract, the risk of loss passed to the plaintiffs once Brawn delivered the goods to the carrier;

48. *Id.* at 1361, 57 U.C.C. Rep. Serv. 2d (West) at 293.

49. 393 F. Supp. 2d 659, 56 U.C.C. Rep. Serv. 2d (West) 931 (N.D. Ill. 2005).

50. *Id.* at 677, 56 U.C.C. Rep. Serv. 2d (West) at 941–42.

51. *Id.* at 677–78, 56 U.C.C. Rep. Serv. 2d (West) at 941–44.

52. *Id.* at 678, 56 U.C.C. Rep. Serv. 2d (West) at 942.

53. *Id.*, 56 U.C.C. Rep. Serv. 2d (West) at 942 (citing *Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028, 5 U.C.C. Rep. Serv. 2d (Callaghan) 283 (Ill. 1988), and *Szajna v. Gen. Motors Corp.*, 503 N.E.2d 760, 2 U.C.C. Rep. Serv. 2d (Callaghan) 1268 (Ill. 1986), neither of which mentioned any such exception).

54. *Id.* at 679, 56 U.C.C. Rep. Serv. 2d (West) at 943.

55. 33 Cal. Rptr. 3d 769, 58 U.C.C. Rep. Serv. 2d (West) 300 (Cal. Ct. App. 2005).

therefore, by promising to replace any items lost or damaged in transit, Brawn was offering value in exchange for the insurance fee.⁵⁶

ACCEPTANCE, REJECTION, AND REVOCATION

In *Deaver v. Auction Block Co.*,⁵⁷ an online fish auctioneer (Auction Block) issued Deaver a “fish ticket” for and took delivery of his halibut catch, which Auction Block then resold at auction to the ultimate buyer, Seafood Products. The fish ticket, a standard form issued by the Alaska Department of Fish & Game, identified Auction Block as the buyer of Deaver’s halibut. The ticket indicated that Auction Block received Deaver’s halibut, specified a price of \$2.60 per pound, and made no allowance in the price for less than premium quality fish.⁵⁸ Seafood Products’ bid provided a fifteen percent price reduction for “number two” quality halibut. After Seafood Products received the fish from Auction Block and graded them, it found many of the fish (some 19,000 pounds worth) to be of “number two” quality because Auction Block apparently stored them in refrigerated sea water. As a result, Seafood Products paid Auction Block only \$2.21 per pound for the 19,000 pounds of “number two” halibut. In turn, Auction Block, which did not pay Deaver until Seafood Products paid it, paid Deaver less than the \$2.60 per pound indicated on the fish ticket—specifically, Auction Block paid Deaver what Seafood Products paid Auction Block, less a commission.⁵⁹

Deaver sued. Reversing the superior court’s dismissal of Deaver’s Article 2 claims, the Alaska Supreme Court first held that Auction Block was an Article 2 buyer despite its and Deaver’s understanding that it was merely providing a (virtual) marketplace for Deaver’s goods. The court then concluded that Deaver’s uncontested affidavit testimony that “he confirmed with Auction Block personnel on site that the fish were in ‘excellent condition’” established that Auction Block “had the opportunity to inspect the fish.” Because Auction Block “did not indicate to Deaver that any defects were present,” Auction Block “accepted” the fish “within the meaning of the UCC.”⁶⁰

In *Toshiba Machine Co. v. SPM Flow Control, Inc.*,⁶¹ SPM purchased two machine tools from Toshiba in 1998 for use in SPM’s manufacture of heavy-duty oilfield pumps. Toshiba overcame SPM’s initial hesitancy to purchase the first machine tool (the BMC-1000) by assuring SPM that Toshiba had developed new “orbit boring” software that would enable the BMC-1000 to perform the work SPM

56. *Id.* at 771–72, 58 U.C.C. Rep. Serv. 2d (West) at 302–03 (relying on U.C.C. §§ 2-503 and 2-509 (2002)). The court noted that charging for insurance in a shipment contract is not unusual. In fact, it something the Code expressly contemplates as part of a “C.I.F.” (cost, insurance, and freight) term. *See id.* at 772–73, 58 U.C.C. Rep. Serv. 2d (West) at 303–04 (citing U.C.C. § 2-320).

57. 107 P.3d 884, 56 U.C.C. Rep. Serv. 2d (West) 392 (Alaska 2005).

58. *See id.* at 886, 56 U.C.C. Rep. Serv. 2d (West) at 394.

59. *See id.* at 886–87, 56 U.C.C. Rep. Serv. 2d (West) at 396–97.

60. *Id.* at 892, 56 U.C.C. Rep. Serv. 2d (West) at 398.

61. 180 S.W.3d 761 (Tex. App. 2005). Like *Enpro Systems*, discussed *supra* in text accompanying note 8, *Toshiba Machine* thoughtfully discusses a number of Article 2 issues in addition to those discussed herein and should be on every commercial lawyer’s reading list.

needed substantially quicker than SPM's existing equipment. Toshiba delivered the BMC-1000 in March 1998 and dispatched a programmer to install the software on the BMC-1000. The programmer was unable to make the BMC-1000 perform to SPM's requirements despite repeated attempts. SPM offered to return the BMC-1000 to Toshiba for a refund of SPM's downpayment, but Toshiba assured BMC that a software solution was imminent. Thus assured, SPM ordered a second machine tool (the BMC-800) from Toshiba in July 1998. Toshiba refused to ship the BMC-800 until SPM paid the balance due on the BMC-1000; so, SPM paid Toshiba the \$742,500 due on the BMC-1000 and Toshiba shipped the BMC-800. SPM experienced similar performance problems with the BMC-800 and neither tool ever reduced SPM's production time by more than a fraction of the amount Toshiba had promised. SPM eventually purchased replacement tools from another manufacturer.⁶²

SPM sued and Toshiba counterclaimed for the unpaid balance on the BMC-800. The jury found for SPM, concluding that it had accepted but then revoked its acceptance of the machines. Toshiba appealed, arguing that SPM's extensive use of the BMC-1000 and BMC-800 precluded revocation. The court of appeals affirmed. Citing a number of cases, including the well-known *North American Lighting, Inc. v. Hopkins Manufacturing Corp.*,⁶³ the court of appeals held that SPM's use of the tools was reasonable in light of Toshiba's repeated assurances that a solution was forthcoming and, later, in order to mitigate its damages.⁶⁴

ANTICIPATORY REPUDIATION

Anticipatory repudiation can result from any action or language that reasonably indicates a party's refusal to perform or intention not to perform.⁶⁵ In *Ewanchuk v. Mitchell*,⁶⁶ the Missouri Court of Appeals held that repudiation can also result from a refusal to accept the other party's performance. The case involved a Missouri buyer who orally agreed to purchase two unique red and white Boston Terrier puppies from a breeder in Alberta, Canada. The buyer paid for the puppies; however, the parties could not agree on a delivery method. The buyer insisted that the puppies be shipped by air in one crate and the seller refused, fearing the puppies would fight and injure themselves. When alternative delivery options fell through, the seller offered to return the buyer's money. The buyer refused the offer and sued for specific performance.⁶⁷

The trial court entered judgment for the seller, ruling that the parties had not reached agreement on all essential terms and therefore there was no "meeting of the minds" and no contract.⁶⁸ Noting that Article 2 requires only that the parties

62. See *Toshiba Machine*, 180 S.W.3d at 768–70.

63. 37 F.3d 1253, 24 U.C.C. Rep. Serv. 2d (Callaghan) 1061 (7th Cir. 1994).

64. *Toshiba Machine*, 180 S.W.3d at 772–75.

65. See U.C.C. § 2-610 & cmt. 2 (2002). See generally Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565 (2001).

66. 154 S.W.3d 476, 56 U.C.C. Rep. Serv. 2d (West) 261 (Mo. Ct. App. 2005).

67. See *id.* at 477–78, 56 U.C.C. Rep. Serv. 2d (West) at 264–66.

68. *Id.* at 480, 56 U.C.C. Rep. Serv. 2d (West) at 266.

intend to be bound and that a court have a basis to provide a remedy,⁶⁹ the appellate court found that the parties had formed a contract because both parties admitted its existence and payment was made and accepted. The open delivery term could be filled in by the provisions of the Code;⁷⁰ therefore, the contract would not fail for indefiniteness.⁷¹

Nevertheless, the court upheld the judgment for the seller, ruling that the buyer, not the seller, had repudiated the contract. Because the buyer refused to take delivery of the puppies in Canada, and the Code did not give the buyer the right to insist on a particular method of delivery, the buyer repudiated the contract by words or conduct indicating his intent not to perform.⁷² After the buyer's repudiation, the seller was entitled to cancel the contract because the repudiation impaired the value of the contract to the seller, given the age of the puppies.⁷³

REMEDIES

In the most interesting of a rather sparse group of remedies cases, a divided Wisconsin Supreme Court dealt with the scope of the "special circumstances" exception in section 2-714(2) to normal market damages in *Mayberry v. Volkswagen of America, Inc.*⁷⁴ Mayberry purchased an automobile from one of the defendant's dealers for \$18,526. The automobile carried a two year/24,000 mile repair-or-replace warranty. After about a year of frequent trips to the dealer's repair shop, Mayberry sought to revoke her acceptance and sue for damages. Volkswagen refused the revocation. Mayberry continued to drive the auto, logging over 32,000 miles before she traded it in, receiving a \$15,100 trade-in allowance, which exceeded the fair market value of the car at the time of trade-in (\$14,200, according to the NADA Official Used Car Guide). The trial court granted Volkswagen summary judgment, holding that Mayberry's continued use barred revocation and that her trade-in exceeded the fair market value, thus barring any damages claim. The intermediate appellate court reversed.

Before the Wisconsin Supreme Court, Volkswagen argued that Mayberry was not entitled to recover breach of warranty damages measured by diminution in value under section 2-714(2) because "special circumstances"—namely, her having continued to use the car for an extended period and then traded it in for more than its fair market value—would cause Mayberry to realize a windfall. The court held the "special circumstances" test inapplicable. Mayberry sought merely her lost value, which is precisely the purpose of the section. As a result, the standard test of section 2-714(2), measuring the difference at the time and place of accep-

69. *Id.* at 481, 56 U.C.C. Rep. Serv. 2d (West) at 268; see U.C.C. § 2-204(3) (2002).

70. See U.C.C. §§ 2-308 & 2-309 (providing, in the absence of the parties' agreement, that delivery is to be made within reasonable time at the seller's location).

71. *Ewanchuk*, 154 S.W.3d at 481, 56 U.C.C. Rep. Serv. 2d (West) at 268.

72. *Id.* at 481-82, 56 U.C.C. Rep. Serv. 2d (West) at 268-69.

73. See U.C.C. § 2-610 (permitting an aggrieved party to resort to any remedy for breach if repudiation substantially impairs value of contract to him); U.C.C. § 2-703 (permitting an aggrieved seller to cancel its contract).

74. 692 N.W.2d 226, 56 U.C.C. Rep. Serv. 2d (West) 214 (Wis. 2005).

tance (not resale) between the value of the goods as promised and as delivered, would govern. Her continued use was irrelevant because she sought not to undo the deal, but to recover her lost value. Nor would Mayberry's gain from resale bar her recovery, though the court thought it might be relevant to mitigation. The court warned, though, that Mayberry's resale price "may be probative as to the value of the vehicle with defects at the time and place of acceptance."⁷⁵ Three justices issued a concurring opinion (written, curiously enough, by the author of the majority opinion) finding the "special circumstances" test relevant to allow the plaintiff's damages to be adjusted to conform to her actual damages.⁷⁶ This, thought the concurring justices, was consistent with the Article 1 directive to grant expectation.⁷⁷ So, Mayberry's profit from resale should be lowered to reduce her damages; otherwise, "the duty to mitigate would be meaningless."⁷⁸

The general points made in the court's opinion seem reasonable enough, but it and the concurrence contain some unfortunate dicta with respect to determining value. The discussions of resale price and value overstate the pertinence of resale price. True, prompt resale provides *some* evidence of the value of the goods at the time of purchase—but only some. First, value and price are not the same. Value accounts for idiosyncratic worth in a way that price does not.⁷⁹ Second, even if the buyer attaches no personal value to the goods, using resale price as a measure of initial value ignores the possibility that the buyer may have made a particularly good deal on resale. Possibly the goods appreciated (unlikely here, to be sure).⁸⁰ Possibly the buyer was a very shrewd bargainer on resale. Possibly the resale price was high because the buyer took less favorable terms elsewhere, whether on the price of the purchased auto or on her credit terms. Relying too heavily upon resale price assumes a smooth market with resale prices that do not reflect skill, on the one hand, or subsidization, on the other—strongish assumptions for the used car market, to say the least.

Nor is it sound to assume that any profit made by the buyer must go toward mitigating the seller's damages. To start, the concurrence's recital of a *duty* to mitigate is regrettable, if common. There is no duty to mitigate. If a breached-against party fails to mitigate, it will be treated as though it had; it will not have breached a duty with a resulting cause of action.⁸¹ Leaving this solecism aside, why should the buyer be deprived of the fruits of a favorable bargain? If a

75. *Id.* at 239, 56 U.C.C. Rep. Serv. 2d (West) at 228. The court cited a number of authorities, including White and Summers, to the effect that "the price obtained for defective goods on resale is probative as to the value of the goods actually received." *Id.*

76. *Id.* at 240–41, 56 U.C.C. Rep. Serv. 2d (West) at 230–31 (Wilcox, J., concurring) (citing 1 ROY RYDEN ANDERSON, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE § 10:10 (2d ed. 2003)).

77. See U.C.C. § 1-305(a) (2002).

78. *Mayberry*, 692 N.W.2d at 243, 56 U.C.C. Rep. Serv. 2d (West) at 234 (Wilcox, J., concurring). The same would apply to value added by successful repairs. See *id.*

79. See, e.g., Ellen A. Peters, *Remedies for Breach of Contract Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 269 (1963).

80. Cf. *Camrosa County Water Dist. v. Southwest Welding & Mfg. Co.*, 123 Cal. Rptr. 93, 17 U.C.C. Rep. Serv. (Callaghan) 780 (Cal. Ct. App. 1975) (buyer could recover as damages any increase in repair cost between the time breach was discovered and the time of trial).

81. See, e.g., 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.12, at 231 (3d ed. 2004).

breached-against seller resells at a profit, the Code provides that she may keep any gains, rather than use them to reduce the buyer's damages.⁸² A breached-against buyer should have the same rights, which give her an appropriate incentive to resell as effectively as possible. Mitigation requires that the buyer make reasonable efforts to reduce damages, not to give up any gain that it might realize from its superior abilities.⁸³ None of this is to say that resale price is irrelevant. But, making resale price probative requires that one make a great many assumptions about the resale market, and courts and litigators should be prepared to test these before jumping too easily to that conclusion.

Another decision used U.C.C. section 2-714 to devastating effect. In *Dixie Gas & Food, Inc. v. Shell Oil Co.*,⁸⁴ operators of gas station franchises alleged that Shell failed to act in good faith in setting prices under an open price term;⁸⁵ and, thus, that they should receive damages. Because the plaintiffs failed to allege that they had notified Shell of its breaches, Shell moved to dismiss. The court granted Shell's motion, holding that the plaintiffs' failure to allege giving notice of the non-conformities in pricing before filing suit warranted dismissal under section 2-714(1).⁸⁶

The court may have reached a sensible result, but may have reached it prematurely. It was correct that section 2-714 applies to cases involving errant pricing. Though most section 2-714 cases deal with breaches of warranties of quality, subsection one refers to "damages for any non-conformity of tender" and U.C.C. section 2-106(2) defines "conforming" in terms of the obligations of the contract.⁸⁷ Here, the obligations include the statutory duty of good faith under U.C.C. section 2-305(2). In any event, U.C.C. sections 2-712 and 2-713 apply only when the buyer has not accepted the goods; here, the plaintiffs had. The court was correct to apply section 2-714 and, thus, to import the notice rules of U.C.C. section 2-607(3)(a). However, the court may have ruled precipitously. True, the filing of a complaint is usually insufficient to constitute timely notice under section 2-607(3)(a), particularly when, as here, the buyers are merchants.⁸⁸ But this is not inevitable. If Shell knew of its breach already, the buyer's notice would serve no purpose and should not be required⁸⁹—particularly if cure or settlement would

82. U.C.C. § 2-706(6) (2002).

83. In any event, the reselling buyer might have been able to exact an even better price from its buyer had the goods been as promised.

84. No. 03 C 8210, 2005 WL 1273273, 57 U.C.C. Rep. Serv. 2d (West) 976 (N.D. Ill. May 25, 2005).

85. U.C.C. § 2-305(2) (2002).

86. *Dixie Gas*, 2005 WL 1273273, at *7, 57 U.C.C. Rep. Serv. 2d (West) at 979.

87. Article 1 defines contract as "the total legal obligation that results from the parties' agreement," which includes default terms. U.C.C. § 1-201(b)(12) (2002).

88. *Dixie Gas*, 2005 WL 1273273, at *6, 57 U.C.C. Rep. Serv. 2d (West) at 979 (citing *Tudor v. Jewel Food Stores, Inc.* 681 N.E.2d 6, 35 U.C.C. Rep. Serv. 2d (West) 132 (Ill. App. Ct. 1997)); see also, e.g., *Williams v. Mozark Fire Extinguisher Co.*, 888 S.W.2d 303, 26 U.C.C. Rep. Serv. 2d (Callaghan) 1116 (Ark. 1994); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 30 U.C.C. Rep. Serv. 2d (Callaghan) 709 (Ill. 1996); *Northwest Truck & Trailer Sales, Inc. v. Dvorak*, 887 P.2d 260, 25 U.C.C. Rep. Serv. 2d (Callaghan) 1124 (Mont. 1994).

89. See 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-10, at 611 n.1 (4th ed. 1995); see, e.g., *McDonald's Corp. v. Watson*, 69 F.3d 36, 28 U.C.C. Rep. Serv. 2d (Callaghan)

likely not have been advanced by notice.⁹⁰ Notice is not innately virtuous. If requiring it permits cure with consequent reductions in liability, allows sellers to prepare for negotiation and litigation, cuts off tardy claims, or gives suitable peace to the uneasy, then courts might fairly be strict about it in commercial settings. Otherwise, though, such a requirement has the vice of cutting off an otherwise meritorious claim with no countervailing virtue save consistency. The court could have denied a motion to dismiss and allowed the parties to demonstrate or deny the effects of late notice.⁹¹

If a limited remedy fails of its essential purpose, the injured party may recover damages provided for in the Code without regard to the limitation.⁹² *Atwell v. Beckwith Machinery Co.*⁹³ presented an unusual variation on an exclusive remedy's failure of essential purpose. Atwell contracted to purchase a "Caterpillar Certified Rebuild" tractor from Beckwith. Instead it received a "Beckwith Rebuild." A Caterpillar Certified Rebuild has had all parts on a particular list replaced, while a Beckwith Rebuild has only unusable parts replaced. Atwell sued for breach of warranty and recovered damages under section 2-714(2). Among the defenses Beckwith asserted at trial was a contractual limitation on remedies, which gave Atwell only the right to have defective parts repaired or replaced. The trial court held that this limitation did not apply because the issue was not the repair of defective goods, but the delivery of a non-conforming machine. The appellate court affirmed, though on a slightly different ground. It applied U.C.C. section 2-719(2) and held that the limitation failed of its essential purpose by depriving Atwell of the substantial value of its bargain.⁹⁴ Were Beckwith to repair or replace only the defective parts, it would provide Atwell with a Beckwith Rebuild, not the Caterpillar Rebuild for which Atwell had contracted.

This seems a sound result, reached on the whole by sound reasoning. Ordinarily this section provides something of a lemon law, where attempts at repair have proved unavailing and the goods will not perform as promised.⁹⁵ Alternatively, it can provide a method of recovery when the contractual remedy cannot be performed because of the seller's breach—if, for example, the warranted product is

174 (5th Cir. 1995) (applying Illinois law); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 30 U.C.C. Rep. Serv. 2d (Callaghan) 709 (Ill. 1996).

90. See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 155 F. Supp. 2d 1069, 45 U.C.C. Rep. Serv. 2d (West) 516 (S.D. Ind. 2001), *reversed in part*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *City of Wichita, Kansas v. U.S. Gypsum Co.*, 828 F. Supp. 851, 23 U.C.C. Rep. Serv. 2d (Callaghan) 96 (D. Kan. 1993), *aff'd in part, rev'd in part on other grounds*, 72 F.3d 1491 (10th Cir. 1996); *Mullins v. Wyatt*, 887 S.W.2d 356, 25 U.C.C. Rep. Serv. 2d (Callaghan) 715 (Ky. 1994).

91. Amended Article 2 would have changed the result in this case. It provides that failure to give timely notice does not bar a claim, but merely "bars the buyer from a remedy only to the extent that seller is prejudiced by the failure." Amended U.C.C. § 2-607(3)(a) (2003).

92. U.C.C. § 2-719(2) (2002).

93. 872 A.2d 1216, 57 U.C.C. Rep. Serv. 2d (West) 225 (Pa. Super. Ct. 2005).

94. *Id.* at 1224, 57 U.C.C. Rep. Serv. 2d (West) at 232; see U.C.C. § 2-719 cmt. 1 (2002).

95. See GREGORY M. TRAVALIO ET AL., *NORDSTROM ON SALES & LEASES OF GOODS* § 4.08[D], at 478 (2d ed. 2000); see also, e.g., *Clark v. Int'l Harvester Co.*, 581 P.2d 784, 25 U.C.C. Rep. Serv. (Callaghan) 91 (Idaho 1978); *Razor v. Hyundai Motor Am.*, 813 N.E.2d 247, 54 U.C.C. Rep. Serv. 2d (West) 737 (Ill. App. Ct. 2004), *aff'd in part, rev'd in part*, No. 98813, 2006 WL 1765427 (Ill. June 29, 2006).

destroyed because of a breach of warranty and the remedy provides merely for repair or replacement of defective parts.⁹⁶ Here the problem is that the remedy would yield goods inferior to those promised. While this is in a sense true whenever new goods must be repaired, here the difference was greater; Beckwith's failure to replace working parts on the Caterpillar list meant that the tractor was simply a different type.⁹⁷

ECONOMIC LOSS RULE

The economic loss rule bars recovery in tort for purely economic injuries arising from a breach of warranty.⁹⁸ In *The Conveyer Co. v. SunSource Technology Services, Inc.*,⁹⁹ Conveyer purchased a lifting device from SunSource, which Conveyer incorporated into a "stinger stacker" and then sold to a customer. Only weeks after Conveyer delivered the stacker to the customer, it collapsed due to the nonconformity of SunSource's lifting device. Conveyer sued for breach of the implied warranty of merchantability, strict product liability, and negligent misrepresentation. The trial court denied SunSource's motion for summary judgment on the merchantability claim, but granted summary judgment against Conveyer on its strict product liability and negligent misrepresentation claims, invoking the economic loss rule.¹⁰⁰

In *Sanitarios Lamosa, S.A. de C.V. v. DBHL, Inc.*,¹⁰¹ a plaintiff argued that it could pursue tort claims without being barred by the economic loss rule for three reasons. First, the plaintiff, a manufacturer of toilets into which it installed allegedly defective ballcocks designed by one of the defendants, argued that damage to reputation is not economic loss under Texas law.¹⁰² The plaintiff relied on a section of the Texas Civil Practice and Remedies Code that includes "injury to reputation" in a definition of "noneconomic damages."¹⁰³ The court rejected this reasoning, holding that court-made rules regarding *causes of action*, rather than statutory definitions governing *types of damages*, determine whether a claim sounds in tort

96. See, e.g., *Champlain Enters., Inc. v. United States*, 957 F. Supp. 26, 34 U.C.C. Rep. Serv. 2d (West) 1058 (N.D.N.Y. 1997); *Russo v. Hilltop Lincoln-Mercury, Inc.*, 479 S.W.2d 211, 10 U.C.C. Rep. Serv. (Callaghan) 768 (Mo. Ct. App. 1972).

97. See, e.g., *J.S. McCarthy Co. v. Brausse Diecutting & Converting Equip., Inc.*, No. Civ. A. 04-107-B-W, 2005 WL 946318, 57 U.C.C. Rep. Serv. 2d (West) 272 (D. Me. Ap. 22, 2005) (issue of fact whether proper goods delivered; if not, repair or replace remedy would not be sufficient), *report and recommendation adopted*, 2005 WL 1411895 (D. Me. June 14, 2005); cf. *Forest River, Inc. v. Posten*, 847 So. 2d 957, 51 U.C.C. Rep. Serv. 2d (West) 711 (Ala. Civ. App. 2002) (repair-or-replace remedy would fail of its essential purpose where it would not restore vehicle to its fair market value).

98. See *Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 958, 56 U.C.C. Rep. Serv. 2d (West) 339, 353 (Ind. 2005).

99. 398 F. Supp. 2d 992 (N.D. Iowa 2005).

100. See *id.* at 995.

101. No. Civ. A. H-04-2973, 2005 WL 2405923, 58 U.C.C. Rep. Serv. 2d (West) 534 (S.D. Tex. Sept. 29, 2005).

102. *Id.* at *3, 58 U.C.C. Rep. Serv. 2d (West) at 538.

103. *Id.*, 58 U.C.C. Rep. Serv. 2d (West) at 538 (citing TEX. CIV. PRAC. & REM. CODE § 41.001(12)).

or contract.¹⁰⁴ Under Texas law, a plaintiff must show either injury to property other than the product sold or “concrete, physical injury,” not merely “injury to plaintiff’s interests.”¹⁰⁵

Second, the plaintiff argued that its claims fell within the “mitigation of imminent harm” exception to the economic loss rule. Under this exception, a plaintiff who voluntarily injures its own property, other than the property that is the subject of the contract, may be able to avoid dismissal under the economic loss rule.¹⁰⁶ Because the plaintiff had damaged some of its toilets by removing the defective ballcocks to mitigate damages that might be caused by selling toilets that leaked, the court held that the claim was not barred by the economic loss rule.¹⁰⁷

Third, the plaintiff argued that the defective ballcocks caused damage to plaintiff’s “product line.” While this argument was not adequately briefed, and therefore not decided by the court, the court did address whether damage by a component to a product into which the component was installed constitutes damage to “other property.” The court held that it does not; thus, damage to toilet tanks caused by malfunctioning ballcocks was barred by the economic loss doctrine.¹⁰⁸

In a case of first impression, the Wisconsin Supreme Court decided that the economic loss rule does not bar a claim for intentional misrepresentation, i.e., fraud in the inducement.¹⁰⁹ Noting that courts have taken three approaches to an intentional misrepresentation exception to economic loss rule preclusion of claims,¹¹⁰ the Wisconsin court adopted a narrow fraud in the inducement excep-

104. *Id.*, 58 U.C.C. Rep. Serv. 2d (West) at 538.

105. *Id.* at *4, 58 U.C.C. Rep. Serv. 2d (West) at 539.

106. *Id.*, 58 U.C.C. Rep. Serv. 2d (West) at 540 (citing *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198 (5th Cir. 1995)).

107. *Id.*, 58 U.C.C. Rep. Serv. 2d (West) at 540.

108. *Id.* at *6, 58 U.C.C. Rep. Serv. 2d (West) at 542 (citing *Hinger v. Case Corp.*, 23 F.3d 124 (5th Cir. 1994), and *Alcon Aluminum Corp. v. BASF Corp.*, 133 F. Supp. 2d 482, 44 U.C.C. Rep. Serv. 2d (West) 432 (N.D. Tex. 2001)); see also *Milwaukee Mutual Ins. Co. v. Deere & Co.*, No. Civ. 04-4905 MJDJGL, 2005 WL 2105513, 58 U.C.C. Rep. Serv. 2d (West) 121 (D. Minn. Aug. 26, 2005) (holding that an excavator that caught fire and damaged a tree processor that had been installed on the excavator did not fall within the “other property” exception to the economic loss rule). *But see* *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150 (Ind. 2005) (holding that a homeowner *could* recover in tort when a defective stone façade allowed water to damage other parts of his home); *Indemnity Ins. Co. of N. Am. v. Am. Eurocopter LLC*, No. 1:03CV 949, 2005 WL 1610653 (M.D.N.C. July 8, 2005) (allowing a purchaser of a helicopter to pursue a tort claim against the manufacturer of a defective gearbox that was installed into the helicopter).

109. *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205 (Wis. 2005).

110. The court described the three positions as “(1) no exception; (2) a general exception for all fraud in the inducement claims; and (3) a narrow exception for fraud in the inducement where the fraud is not interwoven with the quality or character of the goods for which the parties contracted or otherwise involved performance of the contract.” *Id.* at 217. Interestingly, federal courts applying Wisconsin law had, at various times, predicted that the Wisconsin courts would adopt each of the three approaches. *Id.* at 218 (citing *Cooper Power Sys., Inc. v. Union Carbide Chems. & Plastics Co.*, 123 F.3d 675, 33 U.C.C. Rep. Serv. 2d (West) 803 (7th Cir. 1997), *Budgetel Inns, Inc. v. Micros Sys., Inc.*, 8 F. Supp. 2d 1137, 35 U.C.C. Rep. Serv. 2d (West) 1073 (E.D. Wis. 1998), and *Raytheon Co. v. McGraw-Edison Co.*, 979 F. Supp. 858 (E.D. Wis. 1997)).

tion. The court described the exception as not barring a claim “where the fraud is extraneous to, rather than interwoven with, the contract.”¹¹¹ A strong dissenting opinion described that limited exception as defying “consistent and principled application.”¹¹²

111. *Id.* at 219.

112. *Id.* at 226 (Abramanson, J., dissenting).