

APPENDIX

**COMPARISON OF OLD AND AMENDED
ARTICLES 2 AND 2A**

As noted in Chapter One of RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH (West 2009), the American Law Institute and the Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Laws) adopted amendments to Articles 2 and 2A in 2003. Some additional changes were made to these amendments in 2005. These amendments have not been adopted in significant part in any state because they are very controversial.¹

Both Articles 2 and 2A have been amended as part of the process of revising other articles in the UCC.² Those so-called “conforming amendments” have been adopted by the states when the states adopted the other revised article. For example, when a state adopts Revised Article 7, it will also adopt the amendments to Article 2 that were proposed by the Article 7 Drafting Committee. The conforming amendments to Articles 2 and 2A that accompany revisions of other articles of the UCC are not controversial and have been routinely adopted by the states.

This Appendix provides a basis for comparison of the provisions of Articles 2 and 2A that existed before the 2003/2005 proposed amendments with the amended provisions (the ones that generated controversy and have not been adopted by the states).³ If a provision was not amended in substantive effect, this Appendix does not discuss it.⁴ The 2003/2005 proposed amendments are published in the yearly edition of WEST SELECTED COMMERCIAL STATUTES. As these comparisons are

¹ See LINDA J. RUSCH AND STEPHEN L. SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH 5 (West 2009).

² Those revisions are Article 1 (2001), Article 3 (1990 & 2002), Article 4 (1990 & 2002), Article 4A (1994), Article 5 (1995), Article 6 (1989), Article 7 (2003), Article 8 (1994), Article 9 (1999).

³ See also Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 DEL. L. REV. 41 (2003).

⁴ Some provisions were amended with stylistic or grammatical changes and those provisions are not discussed.

made, consider the policies behind the proposed amendments and whether such a change would be a change for the better based upon what you understand about the law of sales and leases.

SECTION 1. AMENDMENTS TO ARTICLE 2

A. SCOPE OF ARTICLE 2

1. *Amending the Definition of Goods*

The 2003 amendments did not alter the scope section of Article 2. UCC § 2-102. Instead, the definition of goods was amended. Amending the definition of goods effectively changes the scope of Article 2. The revised definition of goods in amended § 2-103(1)(k) is substantially the same as the definition in UCC § 2-105(1) except that it excludes two new items from the definition of goods.⁵ The first exclusion is of “information” and the second exclusion is of “foreign exchange transactions.”

The first exclusion, stating that goods does not include “information,” was the subject of heated debate lasting years. The term “information” is not defined in the final amendments. What does it mean to say “goods” does not include “information”? Of particular concern to the drafters was what body of law should govern software licenses. At the time the drafting process was started, the courts were wrestling with this issue. Should Article 2 be applied to software licenses or should such licenses be governed by common law contract principles?

The Article 2 drafting committee eventually proposed a drafting project that would provide a hub of basic contract law principles, with spokes containing provisions devoted to different types of transactions, such as sale of goods and licenses of information. That “hub and spoke” approach was eventually abandoned as unworkable and the ULC and the ALI formed a separate drafting committee to prepare Article 2B of the UCC concerning software contracting.

That separate drafting process meant that there had to be some way to define the scope of Article 2 in relation to the scope of Article 2B. Eventually the nomenclature that evolved out of that division into two drafting committees was that

⁵ The amended definition changes the term “things in action” to “choses in action” but that should not be a substantive change in meaning.

Article 2 would apply to “goods” transactions and Article 2B would apply to “information” transactions, and that such “information” transactions would include but not be limited to software licensing (for example, information transactions would also include database access contracts). Eventually, for various reasons, some substantive and some political, the Article 2B drafting committee was reconstituted as a stand alone committee to promulgate the Uniform Computer Information Transactions Act (UCITA) that would not be part of the UCC.⁶ That Act was eventually adopted in two states.

Because these two processes were ongoing at the same time, there was some degree of coordination regarding the relevant scope of each. The final resolution of the Article 2 scope as it related to the scope of UCITA was contained in the exclusion of “information” from the category of “goods.” In essence, the idea was to provide for downloaded software, or other electronic files or information as excluded from Article 2 because those types of transactions would be governed by UCITA. If the transaction was mixed and involved both tangible items and software, or other information, then the courts would have to decide whether to apply Article 2 to the transaction. The revised comment to § 2-103 indicates that the intent was to include within the scope of Article 2 transactions involving “smart goods” such as cell phones or other goods where computer programming was embedded within the good to make it function. In other cases where goods and information are both included, but it is not a “smart good,” the revised comment offers no guidance regarding whether Article 2 should apply to govern some or all of the transaction or whether the predominate purpose test would apply to help courts make that decision. If the amendments to Article 2 were adopted and the state had not adopted UCITA, and the transaction is excluded from the scope of Article 2, the common law would apply to govern the contract issues in the case.

⁶ Part of the controversy centered on the legal issue of the coverage of Article 2 to provide rights and remedies to licensees. Of particular concern was the intersection of contract principles under Article 2 with copyright principles under federal law. One problem was the extent to which a license of software was considered a “sale” of the copy of the software for the “first sale” doctrine under federal law. Another problem was the ability of a software licensor to override by the terms of the license the protections of “fair use” of copyrighted information as provided under federal law. *See, e.g.,* Amelia H. Boss, *Taking UCITA on the Road: What Lessons Have We Learned?*, 7 ROGER WILLIAMS U. L. REV. 167 (2001); Richard E. Speidel, *Revising UCC Article 2: A View From the Trenches*, 52 HASTINGS L.J. 607 (2001); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683 (1999).

To test your understanding of these ideas, revisit Problem 1-2 on page 25 and Problem 1-3(B) on page 26 in RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH.

The second exclusion from the definition of “goods” is for foreign exchange transactions as defined in amended § 2-103(1)(i). The effect of this exclusion is to prevent Article 2 from applying to currency exchanges that are settled through book entries, instead of through the physical exchange of currency. The purpose of this exclusion is to prevent Article 2's reclamation rights (UCC § 2-702(2) and § 2-502) from applying so as to unwind these types of transactions. Revisit Problem 1-1(B) on pages 22-23 of RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH. Would the amendment excluding foreign exchange transactions make any difference in your analysis of those problems?

2. Relationship to other law

The amendments to Article 2 also include an express provision that mediates the relationship between Article 2 and other law in a more explicit manner than UCC § 2-102. Section 2-108 provides that a transaction under Article 2 is subject to any applicable certificate of title law, consumer protection law, and statutes dealing with specialized goods, such as art products, human body products, or specialized transactions, such as franchises. It also explicitly provides that article 2 provisions will override the provisions of the federal Electronic Signatures in Global and National Commerce Act (E-Sign) except as it relates to provisions regarding the consumer protection provisions of that act.

B. CONTRACT FORMATION AND BARRIERS TO ENFORCEABILITY

There are three major types of changes to the contract formation sections. The first set of changes deal with electronic contracting. The second set of changes deals with the battle of the forms. The third set of changes deal with the statute of frauds.

The amendments to Article 2 change the word “writing” to “record” to allow for electronic files, such as emails. A “record” is defined uniformly throughout the UCC. *See* amended § 2-103(1)(m). “Sign” is also defined to apply to both tangible and electronic records. *See* amended § 2-103(1)(p). In addition, several new

provisions were added to make clear that electronic communication could be used in the formation of contracts. Thus new § 2-211 follows the Uniform Electronic Transactions Act and E-sign to provide that a record or signature cannot be denied effect because it is in electronic form and a contract cannot be denied legal effect because an electronic record was used in contract formation. Section 2-212 provides that normal attribution principles should be used to attribute electronic records or signatures to a person and new § 2-213 provides that a record has legal effect when it is received, regardless of whether someone is aware of its receipt. Section 2-211 also makes clear that no one is required to use electronics. At the time Article 2 was drafted, some expressed concern about whether computer programs that were used to find and purchase goods could evidence the “intent” to contract. Amended § 2-204 provides that electronic agents may be used in the formation of contracts even though no individual is reviewing the actions of the agent.

Review Problem 2-7 on page 60 of *RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH*. Would these amended and new provisions regarding the use of electronics in contract formation make any difference in the analysis of this problem? How do these provisions differ from what is already provided in the federal E-Sign act or the Uniform Electronic Transactions Act? (See *RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH*, at 75–76).

The second major change was to rewrite § 2-207 involving the battle of the forms. While the old § 2-207 involved two questions, was a contract formed and what are the terms, the amended § 2-207 addresses only the second question, what are the terms. It does not address the issue of contract formation, leaving that to the other sections in part 2 of Article 2. The provision that allowed for definite and seasonable expressions of acceptances to offers to contain additional or different terms and still operate as an acceptance was moved to amended § 2-206(3).

Once a contract is formed, the terms of the contract are determined based upon the terms that agree in the records of both parties, supplementary terms from the Code and any terms that are not in both records to which the parties agree. The key to the new section is what it means to “agree” to a term that is not in the record of both parties. New comments three and four to amended § 2-207 provide minimal guidance on how to apply that concept. Apply the amended § 2-207 to Problem 2-5 on pages 54–56 in *RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH*.

The revisions to the statute of frauds in amended § 2-201 are modest, even though there was extensive debate in the drafting process about whether to retain the statute of frauds at all. The dollar amount is raised to \$5,000 and the word “writing” is changed to “record” to accommodate electronic communications in the contracting process. The admission exception in subsection (3)(b) is expanded from statements made “in court” to statements “under oath.” This makes it clear that statements in answer to discovery such as those made during depositions, count for purposes of this exception to the “record” requirement. Finally, a new subsection (4) deals with the relevance of other statute of frauds to the effect that if amended § 2-201 is satisfied, other statute of frauds should not bar enforcement.

C. CONTRACT TERMS

1. *Warranties*

a. *Merchantability*

The implied warranty of merchantability was amended in one respect by adding to the statutory text of “fit for the ordinary purpose” the language “of that description” to key the fitness test to the described nature of the goods. Amended § 2-314(2)(c). The amended comment to § 2-314 proposed a solution to the divergence in the tests of merchantability and product defect by stating that the tests should be the same. This was a direct attempt to counter the divergence of tests for defective products under tort and contract principles as discussed by the court in *Castro v. QVC Network, Inc.* (RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH at 349–55).

b. *Title and noninfringement*

The warranty of title in amended § 2-312 was broadened to include a warranty that the buyer would not be unreasonably exposed to litigation because of a colorable claim to the goods. This amendment adopts the position of the *Colton v. Decker* court, quoted on page 142 of RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH. In addition, subsection (3) was broadened to make

clear that both the warranty of title and the warranty of noninfringement could be disclaimed.

c. Express warranty and remote sellers

The drafting process spent a considerable amount of time on the express warranty issues as those issues related to remote sellers. The result of the process was to revise § 2-313 to limit its application to buyers and sellers in privity and to add two new sections, § 2-313A and § 2-313B, to address the rights of buyers against remote sellers.

Section 2-313A addresses express warranty-like obligations that are in records that the remote seller furnishes and are expected to be provided to the remote purchaser of new goods. Section 2-313B addresses express warranty-like obligations that are made in advertisements or similar communications to the public concerning new goods. The remote seller's affirmations of fact, promises relating to the goods, and description of the goods create binding obligations to remote purchasers of the new goods if the person in the position of the remote purchaser reasonably believes that it creates an obligation. This "reasonable belief" test is a functional substitute for the basis of the bargain test. The distinction between affirmations of fact and "puffing" is maintained in evaluating the remote seller's statements. In addition, as to the advertisement or other public communications covered under new § 2-313B, the purchaser must have knowledge of the seller's representations and must have the expectation that the goods will comply with the representations. The tradeoff for this direct liability scheme was to allow the remote seller to limit or modify the remedies available to the buyer and to provide that the remote seller was never liable for the purchaser's lost profits.

To consider how these sections might work to provide a buyer remedies against an immediate seller and a remote seller, consider the facts from Problem 7-31(A) on page 326 of RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH. Assume that the Manufacturer also provides sales brochures that provide that the copier is one of the "fastest and most reliable" in the industry and uses "state of the art" technology to provide "crisp and clear" copies. Would Manufacturer's liability under old Article 2 and amended Article 2 be any different?

d. Remedial promise

The other innovation is that the concept of “warranty” regarding the quality of the goods was separated from the concept of the seller’s promise to take remedial action with respect to goods. Some courts had construed the seller’s promise to take remedial action as a warranty and thus subject to the basis of the bargain test and the cause of action accruing for breach of that promise on tender of the goods, instead of when the seller failed to provide the promised performance. Thus a definition of remedial promise was added in amended § 2-103(1)(n), and amended § 2-313(4) provides that the seller’s remedial promise creates an obligation to the buyer. A remote seller will also be responsible for any remedial promise it makes under new § 2-313A and § 2-313B. This construct in effect means that the basis of the bargain test does not apply to the remedial promise and that the cause of action for breach of a remedial promise accrues upon the seller’s breach of that promise. Amended § 2-725(2)(c).

e. Extension of warranty

Amended § 2-318 incorporates the concept of remedial promise and the warranty like obligations of remote sellers into the three alternative formulations. To illustrate, if an immediate seller has made a remedial promise, that remedial promise may be extended to parties not in privity with the seller under the applicable alternative. Similarly, if the remote seller has a warranty like obligation or make a remedial promise under either new § 2-313A or § 2-313B, those obligations can be extended to parties not in privity under the applicable alternative provision.

2. *Other terms*

a. *Delivery, payment,⁷ and inspection*

The amendments to Article 2 made a significant change to the delivery terms. The provisions defining the meaning of various shipment terms (§ 2-319 through § 2-324) were deleted. That deletion means that the meaning of shipping terms will have to be established through trade usage or other conventions to establish the meaning of the term. Of course, the parties may explicitly agree to what they mean in using the shipping term.

The elimination of the shipping terms provisions affects several important rights, including how to determine if the parties meant to preclude inspection before payment (see amended § 2-513(3)) and whether the parties meant to have a shipment or a destination contract. The presumption of a shipping contract, however, was not changed. UCC § 2-503, cmt. 5. In the context of shipping contract, amended § 2-504 now explicitly requires that the goods be conforming when the goods are put in the possession of the carrier.

When delivery is to be through a bailee, the amended § 2-503(4)(a) makes clear that the bailee must acknowledge to the buyer, the buyer's right to possession.⁸

b. *Risk of loss*

Amended § 2-509 eliminates the default rule that risk of loss passes in the case of a non-merchant seller upon tender of delivery to the buyer. The new default rule is that the buyer obtains the risk of loss upon receipt of the goods. How would that new rule change the analysis in Problem 4-6 on pages 169–70 in *RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH*?

⁷ The amendments to Article 2 also made some changes to provisions concerning payment by letter of credit. See amended § 2-325 (suspension of obligation to pay for goods when deliver a letter of credit and revival of obligation to pay if letter of credit is dishonored); amended § 2-506 (clarifying that if a financing agency issues a letter of credit, its rights are governed by Article 5), and amended § 2-514 (providing that rights concerning documents provided pursuant to a letter of credit are governed by Article 5).

⁸ Amended § 2-503(4)(b) also makes clear that the priority rules of Article 9 control to fix rights as against third persons.

Second, when delivery is made through a bailee, the risk of loss will pass when the bailee acknowledges to the buyer that the buyer has a right to possess the goods. This dovetails with the change to the tender of delivery provision noted above. *Compare* amended § 2-509(2)(b) *with* amended § 2-503(4)(a).

c. Warranty disclaimers

Warranty disclaimers for implied warranties in consumer contracts⁹ were significantly revised in amended § 2-316. To disclaim the implied warranty of merchantability in a consumer contract, the seller may provide in a record the following language in a conspicuous¹⁰ manner “The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract.” To disclaim the implied warranty of fitness for a particular purpose in a consumer contract, the seller may provide in a record the following language in a conspicuous manner “The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying the goods, except as otherwise provided in the contract.” Alternatively to disclaim both implied warranties, the seller may use words such as “as is” or “with all faults” and, if the consumer contract is evidenced by a record, must set those words forth conspicuously. In a nonconsumer contract, the seller can continue to use the method for disclaiming the implied warranties or it may use the new methods.

The only other substantive change to the disclaimer provision was to provide in amended § 2-316(b) that the seller must make a demand for the buyer’s examination of the goods in order for that examination to result in a disclaimer of the implied warranties.

⁹ A new definition of consumer contract was added to amended § 2-103(1)(d). *See also* the definition of consumer in amended § 2-103(1)(c).

¹⁰ Conspicuous is defined in amended § 2-103(1)(b).

d. Remedy limitations

The only significant change¹¹ to the ability of the parties to craft their own remedies is found in amended § 2-718(1) which allows for a greater likelihood that a liquidated damages clause would be enforced in a nonconsumer contract. The amendment provides that the reasonableness of the liquidated damages clause should be tested only by the reasonableness of the anticipated or actual harm. This would have the effect of making such clauses more enforceable. The rule for consumer contracts remains as under unamended Article 2. The language that unreasonably large liquidated damages clauses are void as a penalty was deleted because the enforceability of a liquidated damages clause is determined by the test stated in the section. Consider Problem 5-6 on page 194 in RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH. Would the analysis change under the amended § 2-718?

e. Parol evidence

The parol evidence rule, § 2-202, has been amended to separate the issues of “explanation” and “supplementation.” “Explanation” is dealt with in the new subsection (2) and indicates that evidence of usage of trade, course of dealing and course of performance are admissible to explain terms without a finding of ambiguity. This replicates what was in the prior comment to this section.

There is no substantive change to the treatment of “supplementation.” The comment to the section indicates that merger clauses are not conclusive on the question of the intent of the parties to integrate some or all of their terms into the record. Neither of these changes should not result in a change in the parol evidence analysis.

¹¹ A new sentence was added to state that if the remedy is a limited remedy, as opposed to a liquidated damages clause, the enforceability of the limited remedy is determined under § 2-719. That is a not a change in the law.

D. CONTRACT PERFORMANCE

1. *Assignment and delegation*

Even though amended § 2-210 was rewritten, it did not change in substance from the former provision as amended by revised Article 9. One new rule that did not appear previously is that a delegation that is accepted by the delegatee constitutes a promise by the delegatee to perform and is enforceable either by the delegator or the other original party to the contract.

2. *Termination*

Amended § 2-309 on termination provides that a term that specifies manner and timing of notice of termination is enforceable as long as it is not manifestly reasonable.

3. *Repudiation*

Amended § 2-610 adds a new subsection which provides for a definition of repudiation. This definition is based upon the Restatement (Second) of Contracts and the prior comment to this section. Thus a repudiation includes language that a person would reasonably interpret as indicating that a party will not perform, or conduct that would make it appear that performance is impossible. The new definition is a non-exclusive definition of repudiation and should not change the analysis of what constitutes a repudiation.

4. *Excuse*

The only significant change to the excuse provisions is to allow a seller to be excused from “performance” not merely excused from “delivery.” See amended §§ 2-614, 2-615.

E. BUYER'S REMEDIES

Amended § 2-711 has been reorganized to more fully list the buyer's remedies and adds a provision that allows for the buyer to recover damages in any manner that is reasonable if none of the other remedies are appropriate.

1. Obtaining the goods from the seller

Under amended § 2-716, the parties may agree to specific performance and the court is encouraged, although not required, to order specific performance if there is such an agreement. The new provision does not apply to consumer contracts.

2. Damages when the seller does not tender the goods

In the case of a repudiation, amended § 2-713 specifies when the market price should be measured for the purpose of calculating damages. That time is a reasonable time after the buyer learned of the repudiation.¹² In other cases, the time for measuring market price has been specified as the time for tender of the goods. How would the analysis of Problem 7-5 on page 268 in *RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH* change under the amended provision?

3. Rejection, Acceptance, and Revocation of Acceptance

Amended Article 2 retains the distinction between the perfect tender rule in § 2-601 and rejection based upon substantial impairment in an installment contract under § 2-612. Section 2-612 was amended to make clear that the substantial impairment must be to the buyer.

The provisions on giving notice of rejection in amended § 2-602 and taking care of the goods after rejection in amended § 2-603 and amended § 2-604 were

¹² Thus, amended § 2-723 no longer addresses the time for measuring damages in the case of a repudiation.

expanded to apply in the case of wrongfully rejected goods as well.¹³ The provision on particularizing notice was expanded from the case of a rejection to the case of a revocation of acceptance. Amended § 2-605. In addition, the notice must particularize the ascertainable defect if the seller had the right to cure, not just the ability to cure. Failure to particularize if required by amended § 2-605 does not bar all remedies, only bars the ability of the buyer to rely on the unstated ascertainable defect. How does the amendment to § 2-605 change the analysis of Problem 7-14 on page 279 in *RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH*? Finally, the notice provision in amended § 2-607 was changed to provide that if notice was not timely given in the case of accepted goods, the buyer was barred from a remedy only to the extent the seller was prejudiced by the lack of timely notice.

The right of the seller to cure in the face of a buyer's rejection was broadened to include a right to cure in a nonconsumer contract when the buyer revokes acceptance because of the difficulty of discovery. In addition, the right to cure was expanded as against a buyer who rejects goods in an installment contract. In order to be entitled to cure, the seller must have rendered performance in good faith and give a seasonable notice to the buyer. The cure must be provided at the seller's own expense and the seller must provide compensation to the buyer for the buyer's reasonable expenses caused by the breach and the subsequent cure. If the time for performance of the contract has expired, the seller may provide the cure if it is appropriate and timely under the circumstances. A cure must be of conforming goods. Amended § 2-508. Would these changes in the right to cure affect the analysis of Problem 7-18 on pages 281–82 in *RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH*?

One of the most important changes was to allow a buyer to use the goods, if such use was reasonable, after rejection or revocation of acceptance without making that use an acceptance of the goods. Amended §§ 2-608(4), 2-606, 2-602. Would these changes affect the analysis in Problem 7-27 on pages 297–98 in *RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH*?

¹³ The wrongfully rejecting buyer, however, is not entitled to reimbursement as provided for a rightfully rejecting buyer under amended § 2-603.

F. SELLER'S REMEDIES

Amended § 2-703 provides a more complete list of the seller's remedies and adds a provision that allows for the seller to recover damages in any manner that is reasonable if none of the other remedies are appropriate.

1. *Seller's ability to withhold or recover the goods*

Amended § 2-705 has broadened the right of the seller to withhold or stop delivery of the goods from the buyer if the buyer has repudiated or breached prior to delivery of the goods. The limitation on the seller's right to keep the goods from the buyer that depended upon the seller being able to stop delivery on a "carload, truckload, planeload, or larger shipments of express or freight" has been eliminated. In other words, the seller will have the right to withhold or stop delivery of goods in the event the buyer has breached prior to delivery even if the seller does not have the right to stop the entire container holding the goods affected by the buyer's breach. The bailee's liability for failure to deliver the goods if instructed to not deliver by the seller is governed by Article 7, § 7-303.

Once the goods have been delivered, the seller may have a right to reclaim the goods. The amendments broaden the credit seller's right to reclaim by eliminating the requirement that the reclamation demand be made within ten days of receipt of the goods. Instead the demand must be made within a reasonable time. Because the ten day time period is eliminated, the extension of the time period based upon a misrepresentation of solvency during the preceding three months has also been eliminated. Amended § 2-702(2). The cash seller's right to reclaim formerly provided for in the comments to § 2-507 has been codified in the statutory text of amended § 2-507(2), but remains unchanged in substance.

2. *Seller's damages or specific performance*

Generally the seller who has delivered accepted goods is entitled to the price. UCC §§ 2-709, 2-607. This remedy is akin to specific performance as it is the precise expectancy that the seller is entitled to under the contract. Amended § 2-716(1) provides that the seller may also be entitled to specific performance (by eliminating the section caption that restricts it to a buyer's remedy) as long as a

specific performance order is not allowed if the buyer's only obligation is the payment of money.¹⁴ Thus, a seller may be entitled, in an appropriate case, to a specific performance order requiring the buyer to accept the goods.

If the breaching buyer does not accept the goods, the seller will be entitled to damages. The amendments make several changes to the seller's damage remedies, the most notable of which is that the seller in a nonconsumer contract will be entitled to consequential damages, in addition to incidental damages and damages based on the price for the goods, the resale price, the market price, or lost profit. Amended §§ 2-710, 2-706, 2-708, 2-709.

The resale price based damage measure is unchanged except for an additional provision that makes clear that a seller's failure to resell pursuant to amended § 2-706 does not bar other remedies of the seller. Amended comment 11 states that the seller is free to choose between damages based upon resale or damages based upon the market price or the lost profit measurement.

The market price measurement in amended § 2-708(1) changes the time at which the market price is measured in the case of an anticipatory repudiation. In that circumstance, the market price should be measured at a commercially reasonable time after the seller learned of the repudiation. This parallels the change to the buyer's market price based remedy.

The seller's lost profit measurement in amended § 2-708(2) was changed to delete the language for due allowance for costs reasonably incurred and due credit for payments or proceeds of resale and to make clear that lost profit may be available if the resale remedy is inadequate. The revised official comment 1(e) notes that unreimbursed reliance costs are still recoverable.

Would any of these changes to the seller's damage remedies affect the analysis of Problem 9-6 on pages 398–99, Problem 9-7 on page 402, Problem 9-10 on page 406 in RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH?

3. Breaching buyer's restitution

The breaching buyer's right to restitution has been changed in amended § 2-718 to eliminate the statutory "liquidated damages" and broadens the right of restitution

¹⁴ The difference between a specific performance order for money and a judgment for money is that the former may be enforced through contempt proceedings.

to anytime the seller justifiably refuses performance whether it be because of the buyer's breach or the buyer's insolvency.

G. STATUTE OF LIMITATIONS

Amended § 2-725 makes significant changes to the statute of limitations. Most notably, it provides specific accrual rules that are keyed to the various types of breaches in a sales contract. The basic rule that a cause of action accrues when the breach happens is retained. That rule is then subject to several exceptions. In a breach by repudiation, the cause of action will accrue at the earlier of when the aggrieved party elects to treat it as a breach or at the end of the commercially reasonable time for awaiting performance. In a breach of a remedial promise, the breach occurs when the remedial promise is not performed when due. In a breach of warranty of quality as against an immediate seller, the cause of action accrues upon tender of delivery and, if required under the contract, completion of installation or assembly of the goods. In the case of a warranty-like obligation under new § 2-313A or § 2-313B, the cause of action accrues when the remote purchaser receives the goods. In the case of a breach of warranty of quality or breach of a warranty-like obligation, if the warranty or the obligation explicitly extends to the future performance of the goods and the discovery of the breach must await that discovery, the cause of action accrues when the breach is or should have been discovered. In the case of breach of warranty of title or noninfringement, the cause of action accrues when the breach is or should have been discovered. An action for breach of warranty of infringement, however, cannot be commenced more than six years after tender of delivery of the goods to the aggrieved party.

The other major change is to provide for a slightly longer limitations period and to attempt to restrict the ability of parties to reduce the limitations period by contract. A suit for breach must be brought within the later of four years after the cause of action accrued or one year after the breach is or should have been discovered, but no longer than five years after the cause of action accrued. The parties in a nonconsumer contract may reduce the limitations period but not to less than one year. The parties may not reduce the limitations period in a consumer contract.

H. RIGHTS OF THIRD PARTIES

1. *Buyer's rights to the goods*

Both section amended § 2-502 (prepaying buyer's rights to the goods) and amended § 2-716 (buyer's right to replevin) contain a vesting rule that provides when the buyer's rights vest. This vesting rule has importance to determine when the buyer's rights arise as against a seller's creditor as provided in amended § 2-402(1). Amended § 2-402(3) also provides that the seller's secured creditor's rights are subject to the entrustment rule in § 2-403(2). Would these changes make a difference in the analysis of Problem 10-4 on page 425 in RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH?

2. *Seller's rights to the goods*

Both amended § 2-702(3) and amended § 2-507 provide that the seller's reclamation rights are subject to the rights of a good faith purchaser for value or a buyer in ordinary course of business. Would these changes make a difference in the analysis of Problem 10-6 on pages 434–35 in RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH?

SECTION 2. AMENDMENTS TO ARTICLE 2A

Most of the amendments to Article 2A follow the amendments to Article 2. Other changes were made for reasons related to changes in other laws that intersect with Article 2A as it relates to leased goods. For example, the definition of lessee in ordinary course was conformed to the same requirements as buyer in ordinary course. Amended § 2A-103(1)(u). The changes to the intersection of the certificate of title laws with Article 2A were to dovetail those provisions with revised Article 9. Amended § 2A-105. Other changes were made to deal with particular leasing issues such as broadening the definition of finance leases to encompass subleases. Amended § 2A-103(1)(l).

A. LEASE FORMATION AND TERMS

The provisions of amended § 2A-204 and amended § 2A-205 mirror the changes to amended § 2-204 and amended § 2-205. The changes to amended § 2A-201 follow the changes to amended § 2-201, except that the amount of the lease contract subject to the statute of frauds was not changed. The changes from Article 2 regarding electronic contracting were also incorporated into Article 2A. See amended § 2A-222 through § 2A-224.

The changes to the warranty of title and noninfringement, amended § 2A-211, parallel the changes in Article 2, amended § 2-312. In addition, the warranty of title is slightly broadened in a nonfinance lease to include any claims that do not arise from the lessee's conduct instead of merely focusing on claims that arise out of conduct of the lessor alone. The changes to the implied warranty of merchantability in Article 2, amended § 2-314, were followed in Article 2A, amended § 2A-212. One set of significant changes to Article 2 were not followed in Article 2A. The changes to the express warranty section and the addition of remote warranty-like obligations was not encompassed within the amendments to Article 2A. The warranty disclaimer section, amended § 2A-214, incorporates the changes from amended § 2-316.

The changes to the parol evidence rule in amended § 2A-202 follow the changes to amended § 2-202.

The change to the risk of loss rule in amended § 2A-219 are the same as in amended § 2-509.

The changes to the liquidated damages provision in amended § 2A-504 partially follow the changes to amended § 2-718(1) by providing that if a limited remedy is involved, its enforceability is determined under amended § 2A-503. Otherwise, the liquidated damage provision in § 2A-504 was not changed.

B. BREACH AND REMEDIES

The definition of repudiation from amended § 2-610 was replicated in amended § 2A-402. Just as in amended Article 2, the lessor's excuse provisions were broadened to excuse "performance" instead of merely "delivery." Compare amended §§ 2A-404, 2A-405 with amended §§ 2-614, 2-615.

The lessor's ability to stop delivery in amended § 2A-526 was expanded in the same manner as the seller's ability under amended § 2-705. The changes to the

specific performance remedy in amended § 2-716 were followed in amended § 2A-507A. The buyer's ability to recover the goods in amended § 2-502 was similarly expanded in amended § 2A-522.

The lessor's and lessee's damage remedies are essentially unchanged except to allow for the lessor to recover consequential damages. Amended § 2A-530. The changes in Article 2 regarding the time for measuring market price based damages were not incorporated into the amendments to Article 2A. The breaching lessee's restitution right, amended § 2A-504(3), has been amended to follow the breaching buyer's restitution right in amended § 2-718.

The changes to the rejection, acceptance and revocation of acceptance provisions in amended Article 2 were followed in amended § 2A-510, § 2A-515, and § 2A-517. The lessee's obligations regarding rejected goods or goods as to which acceptance has been revoked were changed to conform to the buyer's obligations under amended Article 2. *See* amended §§ 2A-511, 2A-512. Similarly, the lessor's right to cure in amended § 2A-513 follow the changes in amended § 2-508. The lessee's obligation to specify defects in amended § 2A-514 is expanded in the same manner as in amended § 2-605. The lessee's obligation to give notice of breach as to accepted goods is the same as the buyer's obligation. *Compare* amended § 2A-516(3) *with* amended § 2-607(3).

The statute of limitations in amended § 2A-506 incorporates only one change from amended § 2-725, which is the restriction on the ability to reduce the limitations period in a consumer lease.