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SALES LAW IN IOWA UNDER THE UNIFORM COMMERCIAL CODE—ARTICLE 2

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This article is not meant to be the most exhaustive monograph on Sales law in Iowa. Rather, the intent of the author is to cover those concepts of the law of sales that have been most effected by the enactment of the Uniform Commercial Code.[1]

To gain a proper perspective from the outset it is necessary to discuss briefly some of the mechanical aspects of the Code. The Official Text of the Code was promulgated by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Because the Iowa Code conforms, for the most part, to that Official Text, the development of the sales law in Iowa can be related to the common law being developed throughout the entire United States.[2] Those changes that were made in the Official Text are clearly indicated by the annotators of the Iowa Code.[3] The *section numbers* used in the Official Text, beginning with 1-101 and ending with 10-104, are retained in the Iowa Code but rearranged slightly to comport with the numbering system used therein. Thus, Official Text section 1-101 becomes Iowa Code section 554.1101. The enactment of the Code does not terminate the applicability of *prior law* in all cases as the Code applies only to transactions entered into after its effective date; those transactions which took place prior to the Code are subject to the pre-Code laws.[4] As an aid to research,

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1 Effective date is July 4, 1966. IOWA CODE § 554.10101 (1966).

2 Only Louisiana has not enacted the Uniform Commercial Code.

3 *E.g.*, UNIFORM COMMERCIAL CODE, § 1-201(12) [hereinafter cited as UCC] was changed by substituting "a legal representation of a decedent's or incompetent's estate" for "an executor or administrator of an insolvent debtor's or assignor's estate." The state had no prior statutory definition that would fit into the official text but had to conform the Iowa Probate Code to the UCC.

4 IOWA CODE § 554.10101 (1966).

the publishers of the Iowa Code Annotated have included an appendix of prior laws.[5]

I. Checklist for a Sales Contract

There are a variety of reasons that make it necessary for the attorney to create a checklist to remind him of the essentials of sales contract formation. Many of the usual problems, such as a client's inquiry as to whether his conduct has formed a contract or whether the attorney will draft a contract for him, can be quickly solved if the attorney will consider the use of the following or a similar checklist:

(1) Is the client's problem regulated by the Code? Because the problem may have arisen prior to the effective date of the Code, it is essential to determine whether or not it is a Code regulated problem. The Code section 554.10103[6] is an omnibus repealer of all other Iowa law inconsistent with the Code and not specifically exempted by its enactment. Provision is made as to the validity of the transactions validly entered into before the effective date of the Code.[7]

(2) Does the client's problem belong in an unrepealed section of Iowa's laws? Even though the client's problem may have arisen after the effective date of the Code the problem may still be governed by other sections of Iowa law.[8] Not only are certain Iowa transactions not covered by the Code but also the attorney must be aware of supervening Federal authority.[9]

(3) Does the client's problem fall within his power to choose the applicable law to form his sales contract? Within certain limitations the Code provides that the client may, if he chooses, specify which jurisdiction's laws will govern the enforceability of the contract, and it also provides for the appropriate law applicable where no choice was made.[10] Prior Iowa law is consistent with the Code's permission as to choice of laws of the parties.[11] Apparently the Iowa courts tend to enforce a contract if valid in the jurisdiction in which the contract was created.

(4) Do non-Code concepts effect the client's problem? Unless the Code specifically displaces the prior law, the prior law will supplement the Code.[12] The Code makes no attempt to epitomize all the factors of commercial law that effect the validity or enforceability of a contract. Thus if the Code does not specifically cover an area, the rules of non-code law will apply. Extreme

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5 *Id.*
6 *Id.* § 554.10103.
7 *Id.* § 554.10104(2).
8 Iowa Code Comment, Iowa Code Ann. § 554.1104 (1967).
9 Iowa Code § 554.1105 (1966). The limitation most put on the choice is that the choice must bear a reasonable relation to the transaction. Of course, no standard of reasonableness is set forth; but presumably the conflict of laws decisions of Iowa will control that standard.
10 *See* Aluminum Co. of America v. Hully, 200 F.2d 257 (8th Cir. 1952); Haverly v. Union Constr. Co., 236 Iowa 278, 18 N.W.2d 629 (1945).
11 Iowa Code Comment, Iowa Code Ann. § 554.1105 (1967).
12 Iowa Code § 554.1103 (1966).

care must be taken to incorporate in the contract forming thoughts such concepts as whether or not the client has the capacity to make a contract, or the capacity to sue and other concepts not covered by the Code.

(5) Are there any conditions to be performed that make or will make a contract inoperative? The attorney must inquire as to the contractual status of the client. Very often there are conditions imposed upon him that prevent him from entering into a valid contract. *E.g.* Is he an agent whose authority is limited? Is he a partner that is unable to sign for the firm? Is a contract to become operative only upon the happening of a set of events or at a time set in the future, until the happening of which the client is unable to form a valid contract?

(6) Is the subject matter of the contract within the operational definitions of what is goods? If the client is involved in a transaction that does not concern goods, he is not operating under Article 2 of the Code. His rights, duties and obligations would be governed by non-Code law.[13]

(7) Does the client come under special class requirements that impose different duties and obligations than those not under those requirements? Banks, finance companies, merchants and people who in the ordinary course of business make advances against goods or documents of title, are a special class of people that presents a totally new concept to Iowa law.[14] Because of the wording of section 554.2104, the law may have imputed upon the client a special status which imposes additional duties in his dealing with others. If the client is a farmer, he may, under some circumstances, be a merchant under the Code. This means that in any dealings he must be honest in fact and must observe reasonable commercial standards of fair dealing in the trade.[15]

(8) Does the client's problem arise out of or become solvable by any of the provisions of the Statute of Frauds or Parol Evidence Rules? The Code's Statute of Frauds[16] substantially changes prior Iowa law.[17] Among the changes are the following: (a) The terms of the writing need not be set down with such degree of specificity that the omission of one or more terms would be fatal to the writing, but it need only reflect a reasonable basis for believing that the proffered oral evidence is grounded on an actual transaction;[18] (b) prior law specified no minimum amount[19] whereas, any contract less than $500 is outside of the Code Statute of Frauds, and in fact it is at least arguable that

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[13] Goods is defined in *Id.* § 554.2105. I will talk more of goods later. The scope of Article 2 is set down in § 554.2102. Article 2 applies to no transaction which, even if in the form of an unconditional contract to sell or a present sale, is intended as a security device. Nor does this article apply to any Iowa statutes regulating sales to consumers, farmers or any other specified class of purchasers.

[14] IOWA CODE § 554.2104 (1966).

[15] *Id.* § 554.2103(1)(b).

[16] *Id.* § 554.2201.

[17] Ch. 554, § 554.4 [1962] IOWA CODE.

[18] Prior Iowa law required that all material terms be set forth in the memorandum. Patterson v. Beard, 227 Iowa 401, 288 N.W. 414 (1939).

[19] Ch. 554, § 554.4(1) [1962] IOWA CODE.

the no price term need be mentioned at all; (c) a merchant may not plead the Statute of Frauds defense if he does not affirmatively object to the contract provisions or to the contract within ten days after receipt of a written confirmation of an oral agreement;[20] (d) part performance removes only the part that has been performed, not the whole contract.[21] As to the parol evidence rule there seems to be some controversy in Iowa.[22] There are Iowa cases that refuse the admission of any evidence of oral agreements that add to the written contract,[23] but the Code[24] would seem to reverse that line of cases.

(9) Has the client entered into a binding sales contract even though no formal contract requirements have been met? "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[25] Perhaps the emphasis ought to be placed on the words "made in any manner"—the formalities of contract law are definitely lessened by the use of the open term concept.[26] Of course, what number of open terms may be left open, such as price, quantity, credit terms and time payments, before the Iowa courts find that the parties lacked the intention to form a contract remains for future litigation.

(10) Has the client made an offer or accepted goods when his firm deals with another firm that uses standard forms of contract which contain wording different than the offeror's or offeree's forms? The major problem or concern here has come to be called the "Battle of Forms". Essentially, the terms of the standard order form of the offeror are not signed by the offeree; but, rather, the offeree sends back his standard form of acceptance and more than likely the two forms do not contain the exact terms. Because the terms are different, have the parties created a contract? Thus begins the "Battle of Forms". The Code substantially alters prior Iowa contract law[27] wherein additional or different terms to any offer have been treated as a counter-offer—not an acceptance. Apparently the mirror-image (the acceptance must conform exactly with the offer) was in force.[28]

(11) What remedy does the client seek and what are the remedies available to the client? Sections 554.2701-25 of the Code set forth all the Code

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[20] Lamis v. Des Moines Elevator & Grain Co., 210 Iowa 1069, 229 N.W. 756 (1930). Prior Iowa law seems to be in accord, but the merchant not only had to object to the stated terms, but had to know that the seller would act in accord with the written confirmation.

[21] IOWA CODE § 554.2201(3)(c) (1966). On the other hand, Ch. 554, § 554.4(1) [1962] IOWA CODE stated part performance permitted the enforcement of the entire contract.

[22] *See* Loth & Jennings, *The Parol Evidence Rule in Iowa,* 20 IOWA L. REV. 713 (1935).

[23] Weik v. Ace Rents, Inc., 249 Iowa 510, 87 N.W.2d 314 (1958).

[24] IOWA CODE § 554.2202 (1966).

[25] *Id.* § 554.2204.

[26] *Id.* § 554.2204(3). Subsections one and two of § 554.2204 are basically the same as prior Iowa law.

[27] *Id.* § 554.2207.

[28] National Produce Co. v. Dye Yarns Co., 199 Iowa 286, 201 N.W. 572 (1925).

remedies available to the client.[29] The mandate of the Code is that "unless displaced by the particular provisions of this chapter, the principles of law and equity,"[30] will continue in force and may be available to the client.

II. General Principles of the Code

A. *Code Concepts*

There are some rather remarkable concepts that this Sales Code has brought into Iowa sales law. These principles are specially unique because they are applicable not only to the sales article but to the entire Code. Those concepts which are most important include title, good faith, reasonableness, statute of limitations, unconscionability, special class of parties, and statutory analogy.

1. *Lump Concept Approach v. Narrow Issue Approach*

Under the Uniform Sales Act the attorney's first act in solving a sales problem was to determine in whom title rested. Depending on the outcome he was able to make a decision as to whether or not his client had any rights, duties or obligations in the subject matter of the dispute. This conceptualization of the sales problem as a function of title became known as the lump concept.[31] As opposed to this concept the Code takes a narrow issues approach in which each problem, for the most part, has a specific section of the Code devoted to its proposed solution. Of considerably less importance is the concept of title. It is not essential that a determination as to title ownership be resolved before the Code's provisions can be invoked. Title as a determinant of who bears the risk of loss and so who has the duty of insuring or has an insurable interest is no longer effective.

In instances when the Code is silent as to the rights, duties or obligations of a client and the problem does in fact rest on title[32] it may become necessary to make a finding as to the placement of title. Where a problem does require a title inquiry, the Code[33] sets up the rules of the passage of title. Title passes when the parties so agree,[34] when their contract calls for physical delivery of

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29 The remedies start at Iowa Code § 554.2701 (1966).

30 *Id.* § 554.1103.

31 1 W. Hawkland, A Transactional Guide to the Uniform Commercial Code 143 (1964) [hereinafter cited as Hawkland].

32 *E.g.*, some criminal laws must utilize sales law to determine whether or not a property interest rests in the party bringing the complaint. Another example is the setting up of a "tax event" by the tax officials in their determination of whether an item is taxable. *Accord*, Sears, Roebuck & Co. v. Power, 390 Pa. 206, 134 A.2d 659 (1957); Girard Trust Corn Exch. Bank v. Warren Lepley Ford, 12 Pa. D & C.2d 351, 1 UCC Rtg. Serv. 495 (C.P. Phil. Co. 1957). *See generally* Carrington, *A Foreward To The Study Of The Uniform Commercial Code*, 14 Wyo. L.J. 17, 25 (1959); Iowa Code Comment, Iowa Code Ann. § 554.2401 (1967).

33 Iowa Code § 554.2401 (1966).

34 *Id.* § 554.2401(1) (1966). Prior Iowa law in accord, generally. *See* Ch. 554, § 554.19 [1962] Iowa Code.

the goods,[35] when the contract provides for delivery by delivery of documents of title,[36] when the goods are identified to the contract[37] and when title revests upon the rejection, refusal or revocation of acceptance of the goods.[38]

2. *Good Faith*

The mandate of the Code is that the client will conduct his business in good faith. Good faith is defined as "honesty in fact in the conduct or transaction concerned."[39] The morals of the market place is outside the purview of the Code and this singular bit of legislated morality makes one's conscience the clerk of the market overt.

Once defined the Code carries the mandate to the next level by stating that "every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement."[40] While every court of law expects good faith dealing to be honest in fact, the realism of life was such that the courts very often interpreted such good faith dealing somewhat less than stringently, but the imposition of the obligation of good faith in performance or enforcement of a contract is a Code principle that is new to commercial law.[41]

Good faith has as coefficients of honesty in dealing the elimination of the enumeration with great specificity every right, duty, or obligation flowing between the parties to the contract and sufficient flexibility in language that would allow the courts to interpret the Code in light of the commercial mores in force at the time of the making of their decision. Thus what is not specifically regulated by the terms of the agreement must conform to the Code's mandate of good faith.

Ultimately, good faith as described by the Code is applied to a special class—merchants.[42] The merchant, because of his superior skill in the trade and superior bargaining position is expected to not only be honest in fact (good faith) but also to observe "reasonable commercial standards of fair dealing in the trade."[43]

3. *Reasonableness, Care, and Diligence*

The purposes of the Uniform Commercial Code in Iowa are: (1) to

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35 *Id.* § 554.2401(2) (1966). Prior Iowa law in accord, generally. *See* Ch. 554, § 554.20 [1962] IOWA CODE.

36 *Id.* § 554.2401(3)(a) (1966). Prior Iowa law in accord, generally. *See* Ch. 554, §§ 554.34-35 [1962] IOWA CODE.

37 *Id.* § 554.2401(3)(b) (1966). Prior Iowa law in accord, generally. *See* Ch. 554, § 554.20 [1962] IOWA CODE.

38 *Id.* § 554.2401(4) (1966). Prior Iowa law expanded. *See* Ch. 554, § 554.70 [1962] IOWA CODE.

39 *Id.* § 554.1201(19).

40 *Id.* § 554.1203.

41 There is no prior Iowa law comparable to the good faith obligation of the Code.

42 IOWA CODE § 554.2103(1)(b) (1966).

43 *Id.* For a discussion of the requirements of the good faith concept *see*, Bruacher, *The Legislative History Of The Uniform Commercial Code*, 58 COLUM. L. REV. 798, 812 (1958).

simplify, clarify and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices; and (3) to make uniform the law among the various jurisdictions.[44] These purposes can be changed by the agreement of the parties. However, "the obligations of good faith, diligence, reasonableness and care"[45] may not be varied or disclaimed by the parties. The parties may, in order to avoid violation of the Code, wish to set up their agreement in such a manner that the standards of performance are clearly stated and agreed upon.[46] In that event the contract's obligations will be measured by those standards but only if the agreed upon standards are not themselves manifestly unreasonable.

To these ends the Code is to be liberally construed. The freedom of the parties to enter into contracts of their own making is limited only insofar as the contract may not violate the underlying principles of the Code.

Because the Uniform Sales Act was totally permissive in the creation of the contract,[47] the attorney must take special caution not to form his contracts in the manner that he had been using. Not only does the Code insist on reasonableness, care, diligence, and good faith but also it has created a totally new perspective about abusive contracts in the doctrine of unconscionability.

4. *Statute of Limitations*

The Iowa Code[48] is absolutely silent as to the statute of limitations on sales contracts.[49] However, the rules of civil practice and procedure are not silent; and the Code does provide for its supplementation by non-Code concepts.[50] Thus, the statute of limitations on written contracts is ten years[51] and on unwritten contracts it is five years.[52]

The Code establishes the minimum number of years for actions based on contracts as one year.[53] The parties to the agreement may limit the statute to as little as one year but may not extend it beyond the statutory amount.[54]

The cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.[55] However, a problem arises when a warranty is involved. The general rule as to a breach arising out of the warranty is that a breach of warranty occurs when tender of de-

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44 IOWA CODE § 554.1102(2)(a)(b)(c) (1966).
45 *Id.* § 554.1102(3).
46 *Id.*
47 Even the Iowa version of the Uniform Sales Act, in Ch. 554, § 554.72 [1962] IOWA CODE, was far less confining than the UNIFORM COMMERCIAL CODE.
48 IOWA CODE § 554.2725 (1966).
49 UNIFORM COMMERCIAL CODE § 2-725 set up the limitation by stating "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued."
50 IOWA CODE § 554.1103 (1966).
51 *Id.* § 614.1(6).
52 *Id.* § 614.1(5).
53 *Id.* § 554.2725(1).
54 IOWA CODE §§ 614.1(5)(6) (1966) must be read with § 554.2725(1) in order to support this statement.
55 *Id.* § 554.2725(2).

livery is made. If, however, the warranty is one explicitly extended to the future performance and the breach would not be discovered until such future performance, the cause of action accrues when the breach is or should have been discovered.[56] The Iowa law face one glaring problem as a result of the Code's enactment. Where a party agrees with the Power Company to have gas lines installed in her home and to hook up to a gas fired kitchen range, the company warranted the gas lines to be safe and not dangerous. After installation she turned on the stove and the resulting explosion reduced her home to ashes and caused her great personal injury. She consulted an attorney two and one half years later. The problem was whether or not the statute of limitations has run on the potential action for personal injury because the Iowa Code[57] grants a two year statute of limitation for actions founded on injuries to the person whether based on contract or tort. Of course the injury to property was remediable because the limitations of actions on property, personal or real, is five years.[58] The second problem was with inconsistent statutes —the general provisions of the rules of civil procedure and the Code. As to this second problem the Code's[59] response may be of help since it provides that 'except as provided in the following section,[60] all acts and parts of acts inconsistent with this chapter are hereby repealed."

What has not been answered in this statute, as yet, is whether section 554.2725 is a procedural or substantive right granted by the Code. If procedural then the rules of civil procedure ought to govern;[61] but if substantive then the Code has created a new contract right in plaintiff[62] and the Code ought to govern.

In any event, as to terminating the action and bringing a second one based on the same breach, the second action will be permitted[63] if the first action was not terminated because of a voluntary discontinuance or was dismissed for failure or neglect to prosecute, if the first action was timely brought, and if the second action is brought within six months after the termination of the first action.[64] Tolling of the statute of limitations does not alter the prior Iowa law on point.[65]

5. *Unconscionable Contracts*

Because the doctrine of unconscionability is the single greatest weapon in

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56 *Id.*
57 IOWA CODE § 614.1(3) (1966).
58 *Id.* § 614.1(5).
59 *Id.* § 554.10103.
60 *Id.* § 554.10104.
61 *See* Natale v. Upjohn Co., 236 F. Supp. 37 (D. Del. 1964).
62 *See* Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964).
63 IOWA CODE § 554.2725(3) (1966).
64 The six month rule is effective even though invoking the six month extension brings the total time past the five or ten year statute of limitations for unwritten contracts. The effect would be to change IOWA CODE §§ 614.1(5)(6) (1966) from five years to five years six months and from ten years to ten years six months in special circumstances.
65 *Id.* § 554.2725(4).

all of commercial law legislation for the prevention of contract abuses a thorough presentation of the state of the law as it stands in the United States including a history of unconscionability is essential to a complete understanding of the Code concepts.

a. *Introduction.* All Code sections are, for this discussion of unconscionable contracts, left as originally promulgated.

i. *Caveat venditor*! Once before the doctrine of "seller beware" had been imposed on commerce. The imposition was a dying gasp of a dyadic community—the church and community of the middle ages. When the European world became secular the church lost its influence to control the price of goods.

The dim history of unconscionability can be traced to an exception to the Roman law concept of *caveat emptor*. *Laesio enormis* was an exception to freedom of contract. Under the doctrine of *laesio enormis* a contract involving the sale of land could be rescinded by the seller if the price received for it was less than half the value of the land sold.[66]

With the coming of temporal power the Church took the doctrine of *laesio enormis* and included in its precepts the sale of goods. Thus, the community put what was termed a fair price or "just price" (*jus pretium*) on those goods which were sold in the community. A charge in excess of that "just price" was forbidden since God did not intend that the community should pay more than a fair price for those goods.[67]

ii. *Anglo-American History.* Only the King's conscience protected the poor consumer, but the King's conscience worked quite slowly. Though not strictly accurate it might be said that the Statute of Frauds was one of the first statutes to protect the buying public. While not an unscionability statute, it did bridle the merchants unrestrained attitudes towards sales. The developmnet of the King's conscience into Equity courts was a major step forward in the development of a doctrine of unconscionability. Still, there was no such doctrine until section 2-302 of the Code was enacted by 49 states. Of course, equity has long been the arbiter of fairness. Equity interfered with private contracts not because they were unconscionable but because the making of the contract was founded upon either fraud, duress, mistake, undue influence, incapacity, illegality or was against the public policy. Unconscionability was not even thought of as a substantive or separate equitable right.[68]

The most often quoted definition of an unconscionable contract is: "A

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[66] Cellini & Wertz, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193 (1967).

[67] For a discussion of the times and the economics of the period read W. ASHLEY, INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY 126 (1894); and Dawson, *Economic Duress and the Fair Exchange . . . .*, 11 TUL. L. REV. 345 (1937).

[68] Unconscionability as a substantive right always lurked in the background of court decisions, but, until the enactment of the Code, was not enforced as a substantive right. *E.g.*, Harter v. Morris, 72 Ind. App. 189, 123 N.E. 23 (1919) (the court refused to enforce a contract until it determined that all parts of the contract were equal and were not hard or unconscionable).

contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other."[69]

In spite of the repeated use of the word "unconscionable", or its derivitives, the American courts continued to ground their decisions on the old saws of fraud, duress, etc. In *Hume v. United States*,[70] the court was quick to point out that even though a contract was extortionate and unconscionable on its face it is the fraud in the inception that prevents the enforcement of the contract even if no proof of actual fraud exists.

Because of the desire of the courts of law to find a means to rescind or reform contracts that were inequitable, some mental gymnastics were performed in pre-Code cases to arrive at the conclusion that some contracts, now called unconscionable, were unenforceable. Strange were the ways of these cases. Odd, that the courts did not merely refuse to enforce these contracts that were oppressive and unconscionable. Granted that relief from oppression was the province of the courts of equity, surely oppressive contracts could have been made a substantive legal right.

Two examples illustrate the point as to the mental gymnastics performed by the courts in order that justice be done. In *Kansas City Whsle. v. Weber Packing Corp.*,[71] the defendant sold 303 cases of catsup to the plaintiff, of which plaintiff sold thirty-two. The Food and Drug Administration found upon inspection, microscopic mold filaments in 67% of the sample taken. On that finding the government condemned and destroyed the remaining 271 cases. The plaintiff sought to recover the price of the goods plus interest thereon. The defendant refused to pay stating that the plaintiff's claim came after the ten day period for claims had run. Thus, the court was faced with the task of overcoming the disclaimer clause[72] and not enforcing an otherwise enforceable contract. The court held that the disclaimer pertained only to patent defects and not latent defects[73] and that since the forfeiture of the goods in this situation was binding on all parties[74] the court inferentially was conferring a substantive right on the plaintiff. Thus, in the court's desire to do justice the Law had one more tough decision with which to contend.

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[69] BOUVIER'S LAW DICTIONARY 1199 (Baldwin's Cent. ed. 1948). In Hume v. United States, 132 U.S. 406, 410 (1889), the Bouvier definition is given proper recognition. Bouvier took his definition from a long opinion handed down in February, 1750. *See,* Chesterfield (Earl of) v. Janssen, 28 Eng. Rep. 82 (K.B. 1750). In this case Lord Hardwicke (Chancellor), at 100, said of unconscionability:

> It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and which of such even the common law has taken notice.

[70] 132 U.S. 406, 410 (1889).

[71] 93 Utah 414, 73 P.2d 1272 (1937).

[72] Disclaimer clauses were valid and binding as to the waiver of defects in the goods sold if the claim was not made within the disclaimer period.

[73] Kansas City Whsle. Grocery Co. v. Weber Packing Corp., 93 Utah 414, 73 P.2d 1272, 1275 (1937).

[74] *Id.* at 1276.

The landmark case in unconscionability is *Campbell Soup Co. v. Wentz.*[75] In about three pages the chancellor set up what was to become the standard of conduct concerning unconscionability. However, while the court stated that it would not enforce unconscionable bargains[76] it did not say such bargains were illegal. Thus, the plaintiff could recover damages at law if damages could be shown. The effect of such a decision creates as much chaos as it does order. The harassment of the defendant could have continued to the point where the defendant, with a victory in equity in hand, would have been compelled to perform at law.

The facts of the case are simple. Campbell Soup Co. contracted with the Wentz brothers, who were farmers, to grow Chantenay carrots on the Wentz farm. The contract price was $30 per ton, but the open market price was $90 per ton. The Wentzes told Campbell they would not deliver the harvested carrots to the Company. Thereafter the carrots were sold to another. Because the Chantenay carrots were almost impossible to obtain on the open market, and certainly not at $30 per ton, the Company sued in equity for specific performance. The District Court found for the sellers and the Court of Appeals affirmed for the lower court. Sitting as a court of equity the Court of Appeals found that the provision of the contract "drives too hard a bargain for a court of conscience to assist."[77]

iii. *Meaning of Unconscionable.* No one knows what unconscionable means—it is not defined by the Code.[78] The mandate of the Code is that the court may, as a matter of law make a determination as to what is unconscionable and what is not. Thus the courts have the sanction of law to do what they have always done, but openly and not covertly. The sole purpose of the section is to give the Court policing power over contracts of sale,[79] in order to correct unfair or oppressive bargains as a matter of law, thereby establishing the minimum standards of decent commercial conduct.[80]

iv. *What Is Unconscionable?* The rule is that no unconscionable contract will be enforced. The Code provides for this rule in section 2-302 as follows:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract without the unconscionable clause, or it may so limit the application of any un-

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[75] 172 F.2d 80 (3d Cir. 1948).
[76] *Id.* at 83.
[77] *Id.* at 84.
[78] *See* 1 HAWKLAND, *supra* note 31, at 46. The law courts destroyed unconscionable contracts just as effectively as equity courts but used the doctrines of failure of consideration, lack of mutuality, offer and acceptance defects or even public policy to achieve that destruction.
[79] I suspect that even though the unconscionability section is in the sale of goods article that it is applicable throughout the Code. Unconscionability has as an element of good faith dealing—the Code's mandate is that there will be good faith in any transaction. *See* UNIFORM COMMERCIAL CODE §§ 1-201(19), 1-103.
[80] *See* Comment by Karl Llewellyn, *Hearings of N.Y.L. Revision Comm.*, February 15, 1954, 1 N.Y.L. Revision Comm. Rep. U.C.C. 177 (1954).

conscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

The meaning of this section simply stated is that the court, as matter of law, can: (1) find that the whole contract is too hard a bargain and so refuse to enforce it; (2) find that any clause or clauses are too hard to be allowed to stand as stated and so refuse to enforce that clause or clauses; or (3) find that the contract is acceptable as a whole but nevertheless limit its application in order to prevent an unconscionable result.

What the court cannot do is find as a matter of law that unconscionability arose after the contract was formed. The only relevant evidence admissible to overcome the contract is that evidence which illuminates the setting of the transaction at the time that the contract was formed. However, it must be remembered that other post contract events can make an otherwise valid contract unconscionable.[81] Thus in analyzing a section 2-302 problem it must be determined if the problem was foreseeable at the time of the making of the contract or if any part of it could have been interpreted as being unconscionable if enforced. The essential ingredient as to the unconscionability must have been present at the time of the contract and not usually something which developed in post-contract events.

The case of *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*[82] raises a most interesting interplay among sections 2-302 and 2-309 and the official comment to 2-302. One Code commentary states:

> That a clause or contract must be found unconscionable as of the time it was entered does not mean, however, that occurrence of future events may not be what makes the provision or contract a transgression of this section. Section 2-309 demonstrates this point. There it is provided that a termination clause may violate this section of its operation—for example, without the necessity of giving notice—would produce unconscionable results.[83]

Though not enforced by case authority the statement was prophetic and

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81 *E.g.*, UNIFORM COMMERCIAL CODE § 2-309 states that a clause dispensing with the necessity of notice of the termination of a contract may violate § 2-302 if such dispensation produces an unconscionable result. *See* Gimbel Bros., Inc. v. Swift, 7 UCC Rep. Serv. 300, 301 (N.Y. Civ. Ct. 1970) wherein the Court stated: "The doctrine of unconscionability is not a charter of economic anarchy. Contracts still bind and debts are still payable. A promisor can be relieved of his obligations, of course, but only when the transaction affronts the sense of decency without which business is more predation and administration of justice an exercise in bookkeeping."

82 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966). The plaintiff distributed defendant's products. Their contract contained a no notice termination clause. After six years the defendant exercised the termination clause, but gave ten days' notice, and ended the contract. Plaintiff contended that he had built up his business on defendant's products and to allow the defendant to terminate would be unfair. Held for the defendant—the court will look at conscionability at the time of the making of the contract.

83 R. DUESENBERG & L. P. KING, SALES & BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 4.08(2)(b) at 4-99 (1966).

Sinkoff so held. The interesting interplay of sections 2-302 and 2-309 revolves around the court's use of the official comments to section 2-302. If section 2-309 were strictly construed, the no notice termination clause might be considered unconscionable per se. The court used the official comments of section 2-302 to help decide the case though not consistent with the official comments of section 2-309 stating that "the precise question must at first be whether we can see a spectre of oppression in the termination clause of the instant contract *as of the time the contract was made.*[84]

The court was specifically clear in pointing out that it would not look to plaintiff's increase of business volume, its expansion and development of its facilities, its expenses incurred in reliance on the continuing relationship with defendant because *at the time of the making of the contract* the relationship was beneficial to both parties, maybe even favorable to Sinkoff, and so not unconscionable.[85]

The comments are not often invoked to form the basis for making a decision,[86] and even their use in the decision making process is rare. The comments were not enacted into law because they are gratuitous statements of the commissioners and on occasion, in conflict with the Code section itself.

b. *Procedurally Unconscionable Cases.* The derivative history of section 2-302 was not to establish norms of commercial fair play but rather to provide protection from judicial interference. If the parties to the contract intended, by their deliberations merged in their written agreement, to be bound, that intention was to be given effect free of the court's conscience.[87]

Blending into this *laissez-faire* attitude was a drop of fairness; but, fairness only to clauses that were standardized and only if the form clause when read into the contract made the entire contract unconscionable and only then if the contracting party had not read the form clauses before entering into the agreement. Later this attempt at fair play melted and the result was the complete reverse from the original idea of letting the bargaining parties bargain as they wish, subject to the public policy limitation, to have a court of law determine as a matter of law what is and what is not unconscionable.[88]

What is procedural unconscionability? The answer, if there is an answer, is shrouded by the comments to section 2-302 which have cited a few cases most of which seem to hold a sort of Holmesian "bad man" theory to form contracts.[89]

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[84] Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co., 51 Misc. 2d 446, 273 N.Y.S.2d 364, 366-67 (Sup. Ct. 1966).

[85] *Id.* at 367.

[86] *See generally* Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185 (1967).

[87] Subject, of course, to the omnipresent avenger—public policy. It would seem that anything against public policy is void or voidable.

[88] UNIFORM COMMERCIAL CODE § 2-302.

[89] Within these form contracts you should include contracts of adhesion. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 508 (1967) states that procedural unconscionability is really thought of as being not merely

The term "procedural" is used in not only the sense accorded to it by case law, that is in association with adhesion contracts, but also the literal[90] meaning of the word—the manner in which a legal right is enforced. Interestingly, the various authors do not so distinguish, yet not to do so makes any distinction unnecessary.

i. *Adhesion Contracts.* Are all consumer-merchant contracts adhesion contracts and, if so, are they all void? If not all void, then what is a good adhesion contract and what is a bad adhesion contract? Form contracts have been classed, almost, as bad *per se.* Apparently any clause in a consumer contract that injures the consumer, or comes as a surprise to him, or contains any wording that shocks the court's conscience is a bad adhesion contract or clause. What is becoming more apparent is that the merchant is becoming "gun-shy" and is assuming an affirmative disclosure posture in volunteering information to the consumer concerning the contract. If the doctrine expressed by section 2-302 can be translated into duty of affirmative disclosure then a step towards uniformity will have been reached.

Since the first enactment of the Code by Pennsylvania,[91] and subsequently by forty-eight other jurisdictions, the use of section 2-302 has not been applied. However in one case similar meaning was applied to a contract called an adhesion contract[92] and once to a pre-code case which said if the Code had been effective the decision would not be the same.[93]

Henningsen v. Bloomfield Motors Inc.[94] is illustrative of the point and is perhaps the most important case concerning unconscionability. Therein the plaintiff's wife was injured while driving an automobile purchased from the defendants, the dealer and the manufacturer, due to a defect in the automobile. The purchase order contained an express warranty, in lieu of all other warranties express or implied, that the vehicle was free from defects in materials and workmanship. While making such establishment rattling statements as social justice demands doing away with privity, it is the disclaimer that raises the problem of adhesion. The purchaser, because of his unequal bargaining position did not have a choice as to the disclaimer clause but had to buy the automobile with that disclaimer or not buy it at all.

The real impact is that even though parties to a contract are free to make a contract in whatever manner they choose[95] and modify their obligations as they choose[96] the omnipotence of section 2-302 is such that it vitiates the

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at a form contract level but on an adhesion contract level. It is unconscionable not because of form but rather because of some basic unfairness, oppression or whatever.

90 BLACK'S LAW DICTIONARY 1367 (4th ed. 1951).

91 PA. STATS. ANN. tit. 12A (1954).

92 Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960).

93 Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co., 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

94 32 N.J. 358, 161 A.2d 69 (1960). The *Henningsen* case is now accorded the status of being a landmark case and is cited as the leading case in New Jersey.

95 Assuming no illegality, of course.

96 UCC § 2-316 even dictates how to effectively disclaim implied warranties.

contract that the parties may have drawn if the court should find as a matter of law that to enforce it would be unconscionable.[97] The standard or form contract used by the defendants was the variety that equity courts have inveighed against since time immemorial. The fine print[98] in those contract paragraphs could never help but bring screams of anguish from the court.[99] There are, however, cases that do not follow the *Henningsen* decision.[100]

A second case in point but somewhat less pervasive is *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*[101] In this case the parties entered into a contract, for the purchase of beer at wholesale prices, containing a provision that the contract could be terminated without notice and without cause at anytime.[102] Plaintiff, the purchaser, was for all practical purposes the sole distributor of defendant's wares in a particular county though no exclusive rights were granted. After a somewhat unsatisfactory six year relationship, defendant gave a ten day notice of termination to plaintiff. "[W]hether we can see a specter of oppression in the termination clause of the instant contract *as of the time, the contract was made*"[103] was the first question the court addressed itself to. In finding no oppression, the court determined that there was no reasonable basis to find the contract was unconscionable.

Though the defendant was in a superior bargaining position there is no inference that adhesion principles ought to be applied. The test to determine procedural unconscionability, at least according to this court, was whether in the light of the *general commercial background* and *commercial needs of the particular transaction* the terms are so one-sided as to be unconscionable *at the time of the making* of the contract.[104] Thus the court's mandate appears to be that the application of a contract which may be harsh and one-sided is vitiated by the fact that if the contract was not so when formed it is not so when performed.[105]

ii. *Repossession.* Long the subject matter of special statutes governing judgment remedies, repossession has been inserted in Part 5 of Article 9 of

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97 It is not hard to reconcile freedom to contract with § 2-302. Freedom to contract was never a license to be outrageous but rather, historically, was always policed by public policy doctrines.

98 Henningsen v. Bloomfield Motors, Inc. 32 N.J. 358, 161 A.2d 69 (1960).

99 "An instinctively felt sense of justice cries out against such a sharp bargain." *Id.* at 388, 161 A.2d at 85.

100 *E.g.*, Rozen v. Chrysler Corp., 142 So. 2d 735 (Fla. App. 1962).

101 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

102 *Id.*

103 *Id.* at 735 (emphasis theirs).

104 *Id.* (emphasis mine).

105 The court apparently rationalizes that it can protect against unconscionable bargains but that it cannot guard against uneven bargaining positions or just bad bargains. Yet, the decision is wrong. The function of § 2-302 is to protect against harshness—in this case ten days' notice was insufficient time for plaintiff to find another supplier. Further the fact that plaintiff had expended sums to expand his business and in fact might not be able to continue business ought to have convinced the court that § 2-302 should have been applied. To view the contract when formed and not when performed violates the spirit of the section and of the Code—it is not a liberal interpretation of the Code [UCC § 1-102(2)(a)(b)].

the Uniform Commercial Code. Commencing with section 9-501 the default and repossession procedures are included.[106] Repossession procedures are not generally known for charitable kindness nor are they intended to be anything but the law's way of telling the deadbeat that he must pay his just obligations. Yet every now and then a twinge of conscience is felt and there arises a situation wherein no man is entitled to enforce his right.

In *Robinson v. Jefferson Credit Corp.*[107] the plaintiff bought an auto from defendant making weekly installments of $25.00 to pay off the debt. Four months later the defendant repossessed the auto because of default in payment. The plaintiff paid the creditor the arrears plus late charges and a special repossession fee. The defendant then refused to return the car because the corporation felt insecure about the debtor. Further, while the car was in the possession of the defendant the plaintiff did not make payments. The court found it difficult to understand a rationale that would allow the defendant to repossess the car, then collect past due payments and then fail to return the car. It was also difficult for the court to understand the defendant's contention that repossession may not be ordered, because the plaintiff failed to make payments while the defendant was wrongfully withholding plaintiff's property. The defendant was ordered to return the auto and plaintiff to make his arrears current. The defendant's conduct, even if allowed under the contract between the parties, was not the requisite standard of commercially reasonable conduct required under the Code (unconscionable).

Thus the pervasiveness of the Code is shown. Even though there is no unconscionability clause in Article 9, the court found no difficulty in using section 2-302 to decide a secured transaction problem.[108] Thus, the requirements of commercially reasonable standards of conduct must not be abrogated by contract, for though the defendant acted properly at first, his wrongful refusal to return the repossessed goods is unconscionable and proscribed by the Code.

iii. *Civil Procedure.*

(1) *Jurisdiction.* The general rule, that no state jurisdiction is compelled to entertain a suit between two non-residents, is a matter well documented in case law.[109] Such suits have no meaning for the state other than to clutter up their dockets. Thus, it is interesting that in three reported cases in 1967 the court was required by the terms of a contract to take jurisdiction in such cases. The plaintiff in each case was the same, only the defendants

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106 The Code does not use the word repossession but rather states that the secured party has the right upon default of the debtor to take possession of the collateral. Further, the secured party (Code talk for a creditor) may proceed without judicial process to get the collateral if he does not breach the peace.

107 4 UCC Rep. Serv. 15 (Sup. Ct. N.Y. 1967).

108 *Id.* at 16.

109 Bata v. Bata, 304 N.Y. 51, 105 N.E.2d 623 (1952) (New York courts have the power to decline as well as accept jurisdiction over actions between nonresidents.)

changed. These cases were *Paragon Homes v. Langlois*,[110] *Paragon Homes v. Crace*,[111] and *Paragon Homes v. Carter*.[112] In each the plaintiff was engaged in the home improvement business. A clause of the home improvement contract stated that the defendants agreed to submit to the jurisdiction of the Supreme Court of New York, Nassau County in the event any litigation arose. There was a default and plaintiff sought relief in New York but the court, on its own motion, denied relief and dismissed the action. The court indicated[113] that the clause's sole purpose was to harass and embarrass the defendants in the event of a suit, and that the cases did not involve parties situated on an equal basis. The procurement of the defendants' consent to redress all legal wrongs in New York was grossly unfair and unconscionable.

(2) *Affirmative Defense.* The adage "not pled—not said" gains new impact in procedural unconscionability when applied to section 2-302 of the Code. In *Asco Mining Co. v. Gross Contracting Co.*,[114] an action in replevin involving equipment sold by plaintiffs to the defendant on a bailment-lease contract, the plaintiffs at the time of trial, were in possession of the equipment which defendant sought to replevy. Defendant contended that oral modifications granted him an extension of time for payment and that oral modifications were permissible under section 2-209. Plaintiff on the other hand urged that this contract was not an Article 2 contract but one subject to Article 9. The court held that while this transaction could be placed within Article 9, nevertheless, the sales portion of the transaction was governed by Article 2 and that the parties themselves had treated the transaction as a sale.

On appeal the Court of Common Pleas ordered that a new trial be held because the trial court erred in granting the defendant's request to submit the question of unconscionability to the jury. However, it stated that unconscionability is a matter for the court, not the jury, and that it was an *affirmative defense* which the defendant failed to raise.[115]

(3) *Judgments.* Entering judgment in the event of a default is a well recognized remedy to enforce a contract right. However, holding a judgment unconscionable is a new concept.

In *Denkin v. Sterner*[116] the defendants had agreed, in writing, to buy certain equipment from the plaintiff. Among the clauses included was one that gave the seller, in the event of a default by the buyer, the right to enter judgment for the full amount of the unpaid purchase price and interest and costs plus all rights allowed under applicable law, including the Code. Defendant willfully defaulted and judgment was entered. On defendants' petition to open the judgment, the court allowed the judgment to be opened to

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110 4 UCC Rep. Serv. 16 (Sup. Ct. N.Y. 1967).
111 4 UCC Rep. Serv. 19 (Sup. Ct. N.Y. 1967).
112 4 UCC Rep. Serv. 1144 (Sup. Ct. N.Y. 1967).
113 4 UCC Rep. Serv. 16, 19 (Sup. Ct. N.Y. 1967).
114 3 UCC Rep. Serv. 293 (C.P. Butler County, Pa. 1965).
115 *Id.* at 296.
116 70 York Leg. Rec. 105, 10 D. & C.2d 203 (York County Ct. Pa. 1956).

contract to be unconscionable, relying on the public policy that to let the buyer beware is a poor business philosophy for a social order allegedly based upon man's respect for his fellow man.

The court showed little patience in dealing with these consumer predators who had consummated 349 transactions before they were put out of business. In these transactions every sales gimmick known was invoked thereby inextricably involving the victim. Not satisfied with the fraudulent representations as to their referral plans they even foisted atrocious goods on the people.

(3) *Fine Print.* In *Frostifresh Corp. v. Reynoso*,[124] the defendants, who were Spanish speaking people, agreed to buy a refrigerator-freezer. All negotiations were conducted orally in Spanish. The terms of the contract were entirely in English, which was neither explained nor translated to the defendant. The sales price was $900.00, to which a credit charge of $245.88 was added. The refrigerator-freezer cost $348.00. The court found for the plaintiffs but limited their recovery to the cost of the refrigerator-freezer less the down payment made together with interest from December 26, 1964. The court recognized that this contract was unconscionable.

On appeal to the Supreme Court of New York the holding of the District Court was reversed because the plaintiffs' damages were more than stated. The most important aspect of this case is that this is a seller's case. The court, instead of voiding the contract because of its illegality[125] is inferentially saying that the seller will get his gross profits if the buyer does nothing and his reasonable profits if the buyer does something. In either event the seller has used the Code as a weapon. The fly in the ointment is that Reynoso refused to return the goods.

ii. *Fraud.* Because so much has been read and said on this particular area of unconscionability any relevant additions to its body of knowledge cannot be made other than to show an example of fraud constituting unconscionability.

(1) *Lowballing.* In *Starr v. Freeport Dodge, Inc.*[126] the plaintiff is a buyer who signed an order for a new car which contained a clause that the order was not valid unless signed by the dealer. On the delivery day the salesman called the plaintiff and stated that an error had been made and that the car could not be delivered unless an additional $175.00 was paid. The plaintiff sued for the stated price. The defendant alleged that since the dealer never signed the contract there was none. The court remanded the case for a determination of the facts. However, it did state that any conclusion of law

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124 52 Misc. 2d 26, 274 N.Y.S.2d 757 (D.C. Nassau County, N.Y. 1966), *rev'd on other grounds*, 4 UCC Rep. Serv. 300 (Sup. Ct. N.Y. 1967).

125 Unconscionability is an illegality and so voids the contract, Reynoso's desire to keep the goods notwithstanding. It has long been the law that no man can expect a court to aid him if he found his cause of action in an illegality. *See* Holman v. Johnson, 1 Cowper 341 (K.B. 1775). Of course, unconscionability is not now considered an illegality but *Frostifresh* was an excellent opportunity to convince the court to enter § 2-302 on the rolls of those acts which formed the basis of that act.

126 282 N.Y.S.2d 58, 4 UCC Rep. Serv. 644 (D.C. Nassau County, N.Y. 1967).

that would work an unconscionable result would encourage, not discourage, fraud.[127]

Had the court not made this statement it would be an invitation to use every trick or deceit no matter how unconscionable to fulfill a contract.

iii. *No Meaningful Choice.* What is meaningful is a matter of looking at the total transaction to determine whether, in fact, both parties in the surrounding circumstances of that transaction had a choice in making their contract. In determining meaningfulness of choice one must look to the bargaining power of the parties, the manner in which the contract was entered into, the educational and cultural background of the parties, the opportunity to understand the terms of the contract and the circumstances giving rise to the transaction.[128]

(1) *Gross Inequality of Position.* In *Williams v. Walker-Thomas Furniture Co.*,[129] the appellant was a mother of seven whose sole means of support was a welfare check of $218.00. From 1957 to 1962 she bought a number of household items from the appellee on an installment contract. In the fine print was a clause which gave the furniture company the right to repossess any item previously bought and paid for in the event of a default in payment on latest item bought—a $514.95 stereo. Out of a total indebtedness of $1,800.00 she had made payments of $1,400.00 When she defaulted the appellee attempted to replevy every item bought since 1957 and was upheld by the lower court. The court held the contract unconscionable. Unconscionability has been generally recognized to mean that one of the parties does not have a meaningful choice in contracting with the other party. To determine what is meaningful one must look at all the circumstances surrounding the transaction.

An excellent dissent was made by Judge Danaher who commented that public oversight of relief funds is not a prerequisite upon the courts. Further, these relief clients need credit and only certain businesses will take a chance on these clients expecting their pricing policies will afford a degre of protection commensurate with their risk.[130]

d. *Oppressive.* Included in oppressive contracts are harsh contracts, lopsided contracts, one-sided contracts, imbalanced contracts and so on. The following cases mentioned in this section are examples of what is meant.

i. *Value.* In *American Home Improvement Inc. v. MacIver*,[131] the plain-

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127 *Id.*

128 *See generally* 1 A. CORBIN, CONTRACTS § 128 (1963).

129 350 F.2d 445 (D.C. Cir. 1965). *Thorne v. Walker-Thomas Furniture Co.*, was a companion case to *Williams* and is reported with *Williams*.

130 What is particularly fascinating about the *Williams* case is finding out why it is bad. Surely the variety of reasons mentioned or alluded to—no meaningful choice, sharp business practices, irresponsible business dealing, sales puffing, etc.—have no particular efficacy until you couple them with mother of seven, relief recipient and the ultimate injury, the "add-on". Yet the "add-on" clause is a common security device used almost universally.

131 105 N.H. 435, 201 A.2d 886 (1964).

tiff was to furnish and install fourteen combination windows, one door, and flintcoat the sidewalls of defendant's house. The financing statement calculated the amount due, and the payments per month but not the rate of interest. The defendant's motion to dismiss on the ground that the financing interest charges had not been stated was granted. The contract was held to be unconscionable and oppressive.

The total worth of the goods and services was $959.00. To this charge was added an $800.00 sales commission and $809.60 in interest and carrying charges on those goods, services and commission. The total cost was $2,568.60.[132] This violated the court's New England sense of frugality and fair play.[133] Thus the court dismissed the commission charges as having no value. The carrying charges work out to about 18% if you include the commission. The astonishing fact of this case is that the judge relied on § 2-302. He had a truth-in-lending statute[134] to rely on to which he gratuitously added his comment on the unconscionability of the contract.

ii. *Waiver Clauses.* Those clauses that dislcaim one thing or another are ripe with the opportunity to oppress.[135] In *Unico v. Owen,*[136] defendant's wife answered an advertisement in a New Jersey newspaper in which Universal Stereo Corporation offered 140 stereo albums for $698.00. As a bonus for the purchase thereof a Motorola stereo was included. Total price $698.00 plus official fee of $1.40 plus time-price differential of $150.32 minus a down payment of $30.00 which left a balance of $819.72 to be paid in 36 equal monthly installments of $22.77, commencing 12-12-62. The defendant signed a form note which contained on the reverse side an endorsement and the right to assign to Unico. Universal did endorse and assign to Unico. The note was interpreted in a manner that required delivery of goods prior to installment payments being due. The delivery of the records was to be at a rate of 24 albums per annum. That would take five years, yet payment was due within three years. Thus Universal had the use of the money for two and one-third years during which time they held 40 per cent of the albums. The defendant finally stopped payment after twelve albums and the stereo were delivered. Unico's lawyer advised the defendant that they held the note and payment was expected. Unico held itself out as holder in due course. Universal became insolvent in the meantime. The court held for the defendant holding that two companies were so intertwined in this transaction that they are really part of the original transaction, and so Unico was not a holder in due course. Further, the clauses in this note and contract were so unfair that to impose its conditions upon the consumer would be oppressive and unconscionable.

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132 *Id.*

133 Willging, *Installment Credit: A Social Perspective,* 15 CATHOLIC U. L. REV. 45 (1966).

134 N.H. REV. STAT. § 399-BL2 (Supp. 1965).

135 C x JPF = SD. This formula is an exercise in legal Newtonian physics—for every Consumer there is a Judicial Protective Fiction which has an equal and opposite reaction to Seller's Disclaimer. The more the seller attempts to disclaim or obtain waivers the more the courts will see to protect the consumer.

136 50 N.J. 101, 232 A.2d 405 (1967).

This contract and note contained waiver clauses that provided that the buyer agreed to waive the right to assert any claims against the seller that the buyer may have. Had the court recognized the plaintiff's assertion of holder in due course then the abuse and misuse possibilities would have been untold.

e. *Public Policy.* More judicial juggling is done under the guise of public policy than anyone cares to note. Fortunately public policy decisions do go undetected for they are not always capable of withstanding legal analysis of determining the decision-making process. The Doctrine of Unconscionability is based on public policy. It is appropriate that the courts ask the question "is it fair" to determine unconscionability. However, the considerations of profit and fair play must not be allowed to become inconsistent motives.

i. *Warranties-Disclaimers.* In *Dadourian Export Corp. v. United States,*[187] the Government invited bids on surplus cargo nets made of "Manila rope". The bidder was cautioned to inspect the goods. The sales terms provide that any failure to conform to the description would not give rise to a warranty claim. Plaintiff, the accepted bidder, did not inspect. The ropes were not all of Manila and plaintiff refused to pay. The government reclaimed and sold for less than the bid price. Judgment was for the Government upon plaintiff's action for rescission. On appeal the decision was remanded. The court found that Government warned the prospective bidder to inspect. Further, the buyer was put on notice of the disclaimer by all expressed or implied guarantees, warranties or representations. However, the resale by the Government may not have been reasonable.

The mistake in this contract went to the root and essence of the agreement. While sovereign immunity cannot be impugned, the sovereign must be fair. Section 2-302 was mentioned in the dissent without discussion. Yet, the use of the section, though unnamed, was equitable. If disclaimer clauses are frowned upon for non-government contracting parties[188] and found unconscionable and oppressive for them, then public policy dictates our government meet that standard.

In *Quality Finance Co. v. Hurley,*[189] the plaintiff was an assignee of a conditional sales contract by which an automobile was sold to the defendant. The contract contained disclaimer clauses and waiver of rights, remedies, and defenses against assignee that defendant may have against assignor. The defendant claims that the auto had never been delivered to him.[140] Plaintiff's action for money due was dismissed by the lower court. On appeal the decision was reversed because the trial court failed to make specific findings of fact on the questions of estoppel and whether or not the automobile had been delivered.

The court did find that such clauses are contrary to the policy in Massachusetts that the assignee takes subject to all actions which would have been

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187 291 F.2d 178 (2d Cir. 1961).
188 Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).
189 337 Mass. 150, 148 N.E.2d 385 (1958).
140 Odd! On one occasion he stated that the automobile had been stolen from him.

good against the assignor. Though 2-302 was cited in a footnote, it was not specifically used.

In *Willman v. American Motor Sales Co.*,[141] the plaintiff bought a new car valued at $4100 from defendant which was destroyed by fire. The plaintiff brought suit alleging breach of implied warranty of merchantability in that faulty brakes caused the fire. The defendant avers that the disclaimer in the sales contract relieved them from liability. The court held that the disclaimer by Chrysler and its dealer "was against public policy and void as a matter of law".[142]

f. *Reasonableness.* The essence of Article 2 is reasonableness.[143] Anything not reasonable is obviously not within the Code. However, reasonableness is an incalcuable term.[144]

In *Vlases v. Montgomery Ward & Co.*,[145] the plaintiff bought 2000 chicks which were selected from Ward's catalog from defendant. One month later 2200 chicks (a bonus of ten extra chicks for each one hundred ordered) were received by the plaintiff. He placed them in a coop that had been newly refurbished. As a hygienic precaution he even covered the dirt floor so that the chicks would not touch dirt. By the third week some chicks were diagnosed to have avian leukosis (a form of bird cancer). The flock had to be destroyed. The defendant maintained that the plaintiff did not prove his case and that the weight of evidence was against him. The court found for the plaintiff, holding that standards which are manifestly unreasonable may not be disclaimed by the defendant, and so unconscionable sales may not be enforced where, as in this case, the goods are totally worthless.

g. *Extra Sales Use.* Article 2 deals only with the sale of goods[146] not with the sale of anything else. Its sections supposedly relate only to goods,[147]

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141 44 Erie Co. L.J. 51, 1 UCC Rep. Serv. 100 (C.P. Pa. 1961).

142 *Id.*

143 *E.g.*, § 2-103(1)(b): "Good faith . . . means . . . reasonable . . ."; § 2-204(3): "Even though . . . and there is reasonably . . ."; § 2-205: "An offer . . . open . . . for a reasonable time . . ."; § 2-206(1)(a): "an offer . . . acceptance . . . in any . . . reasonable . . ."; § 2-206(2): "Where . . . beginning of . . . requested performance . . . within a reasonable . . ."; and on and on. The word reasonable appears everywhere in the Code.

144 Reason, reasonableness, rationality, and rationale are words constantly used at law but not really understandable. The short list below is indicative of why reason is not understandable. Reason is in each of the following different:

Logic:	Observation and Introspection; Deduction and Induction; Hypothesis and Experiment, Analysis, and Synthesis.
Ethics:	Ideal Conduct; Highest Knowledge.
Politics:	Ideal Social Organization; Ideal Legislative Functions.
Metaphysics:	Nature of Matter (Ontology); Mind (Psychology); Mind and Matter (Epistomology); Perception and Knowledge.
Intelligence:	Rote Knowledge; Common Sense; Combination of Logic and Ethics; Pedagogy.
Id:	Cogito Ergo Est; Ego.
Mathematics:	Rational Numbers; Irrational Numbers.
Law:	Just; Proper; Diligence; Fair, Conscionable; Equitable; Honesty.

145 377 F.2d 846 (3d Cir. 1967).

146 UNIFORM COMMERCIAL CODE § 2-102.

147 *Id.* § 2-105(1).

yet, the courts are using parts of Article 2 with increasing frequency. The following are only meant as examples of cases which do not involve "sale of goods" but to which the court applies Article 2 principles. These cases involve the areas of bankruptcy, bank deposits and collections, contracts of carriage, leasing and secured transactions.

i. *Bankruptcy.* Even though bankruptcy is a federal statute, the Federal courts have not hesitated to use the Code wherever the Code has furthered the fluidity of commerce or help do justice. *In re Dorset Steel Equipment Co.* and *In re Elkins-Dell Mfg. Co.*,[148] two cases reported together, the referee, the secured party[149] (Fidelity America Financial Corp.) and the results were the same. The facts are almost the same, the major difference between *Dorset* and *Elkins* being that Fidelity filed a secured claim against the estate of Dorset.

In both cases Fidelity advanced money to the bankrupts against their accounts receivable. The contract signed between the parties and Fidelity contained the following clauses: (1) the accounts could neither be sold nor assigned to anyone but Fidelity, (2) the bankrupts could borrow money only from Fidelity, (3) Fidelity upon notice given, and subject to a veto if made within five days, could alter the contract, (4) all the mail of the bankrupt could be opened by the lender, (5) the bankrupts could not enter bankruptcy without Fidelity's written permission, (6) a required minimum interest was to be paid each year, (7) Fidelity upon feeling insecure could accelerate and collect interest on future transactions for the remainder of the term of the agreement.

In both these cases the lender, a bankruptcy claimant, is asking the affirmative aid of the bankruptcy court. The aid having attached to the action, then equitable scrutiny was called upon to do justice.[150] The fact that these companies were constantly money starved makes it impossible for them to cross a bargaining table to protect themselves in this situation. The referee looked at the contracts as a matter of law to be passed upon from its own terms and therefore refused to enforce the contracts. The court, however, remanded the cases for a determination of unconscionability. The determination must be made judging the contract not just by itself but by the commercial risks each party bore.

The reasoning of the court is that the mere absence from Article 9 of an equivalent to § 2-302 does not mean that Article 9 is not under the effect of Article 2. The mandate of § 1-102 is such that it may reasonably be inferred that § 2-302 is applicable to any secured transaction.

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148 253 F. Supp. 864 (E.D. Pa. 1966).

149 UNIFORM COMMERCIAL CODE § 9-105(i) defines secured party as a lender, seller or other person in whose favor there is a security interest.

150 Bankruptcy courts are, for the most part, courts of equity. Thus their proceedings are proceedings in equity. The bankruptcy court's power extends not only to issuing orders, granting relief, securing judgments, but also to scrutinizing the conduct and dealing of the bankrupt and examining the claims of secured parties. *See* Local Loan Co. v. Hunt, 292 U.S. 234 (1934).

ii. *Bank Deposits and Collections.* It would not seem possible that a mundane and extra-structured section like Article 4 would become the subject of § 2-302. Unlike the bankruptcy cases where a remote sale of goods could be read into the case, an Article 4 case bears no reasonable resemblance to the sale of goods.

In *David v. Manufacturers Hanover Trust Co.*,[151] the plaintiff opened a checking account in the defendant bank by signing the bank's signature card. The card was insignificant except that a clause therein contained a waiver of jury trial in the event of litigation. Each monthly statement from the bank repeated the waiver. Subsequently the bank paid $750.00 out of the plaintiff's account which the plaintiff claims he neither made nor presented. The plaintiff sought a jury trial to which defendant objected stating that right had been waived. The court held that New York's public policy is against the inhibition of freedom to contract, and that the waiver of a jury trial must be by *clear agreement.*[152] To grant the bank's motion for non-jury trial would encourage contracting parties to impose unfair and oppressive contracts on the parties in an unequal bargaining position.

Even though this is an Article 4 case (§ 4-103) the court with no hesitation, and no reason, assumed that § 2-302 applied to this problem. No amount of substantive law of New York could have been applied[153] hence the court relied on Article 2 to police this contract even though it was not one for the sale of goods.

iii. *Contract of Carriage.* In *Transatlantic Financing Corp. v. United States*,[154] the plaintiff operated the ship, SS Christos, which was chartered by the United States government to carry wheat from the United States to a safe port in Iran. The contract recited the termini but not the route. The usual and customary route was from Texas to Iran via the Suez Canal. Because of the Israeli invasion of Egypt and the subsequent closing of the Suez Canal the plaintiff was forced to travel more than 3,000 miles beyond ordinary mileage thereby incurring an additional expense of $43,972 (a sum of which the added mileage was not contemplated in the original contract) for which recovery is sought in *quantum meruit.* The court affirmed the judgment against the plaintiff. In its rationale the decision spoke of 2-615[155] and § 2-614[156] and in the footnotes stated that there may be a point beyond which agreement cannot go. That point presumably would be manifestly in bad faith or unconscionable.

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151 4 UCC Rep. Serv. 1145 (1967) was reversed by 59 Misc. 2d 248, 298 N.Y.S.2d 847 (Sup. Ct. N.Y. 1969) on this point. However, reversal was, in the opinion of the author, improper.

152 *Id.* at 1147 (emphasis theirs).

153 Capital Automatic Music Co., Inc. v. Jones, 114 N.Y.S.2d 185 (Mun. Ct. N.Y. 1952).

154 363 F.2d 312 (D.C. Cir. 1966).

155 This section of the Code speaks of excusing the performance of the contract because of the failure of presupposed conditions.

156 This section states that without the fault of either party if performance becomes commercially impractical then if a commercially reasonable substitute is available such substitute must be tendered and accepted.

In *Transatlantic* the court found it necessary to base its decision on Article 2 even though no sale of goods was involved, indeed no article of Code is even remotely connected with this case. It was a contract of carriage—nothing more.

iv. *Leases.* While a sale and leaseback arrangement can easily slide into Article 2 because of the sale portion of the contract it is very difficult to understand why service, repair and use contracts have to be policed by an unrelated, unlitigated commercial weapon—§ 2-302. Because of the complexity and many varieties of leases it is difficult to deter the problems and issues they create.

In *Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc.*,[157] a lease was executed on April 12, 1965, and assigned on April 28, 1965, by the lessor to U-Vend, Inc. Because the machine assigned never functioned properly the defendants refused to make monthly rent payments. The plaintiff claims (no proof adduced) to be lessor's assignor. Conveniently the lease contained clauses that the lessee has no claims against lessor and that the assignee (the lessor in this case) is not responsible for servicing the machine. The court declined to make any decision upon the disclaimers nor to imply any covenants to repair and service the machine. It further refused to determine whether any clause contained in the lease was unconscionable and denied the motion by plaintiff for summary judgment for rent due on the machine leased.

Perhaps the court could by statutory analogy bring the rental of consumer goods (the subject matter of the lease was a coffee vending machine) within Article 2. The court's purpose for including the unconscionability section of the Code was to show that § 2-302 extends equity practice into the field of merchant law.[158]

In *Electronics Corp. v. Lear Jet Corp.*,[159] the plaintiff was the lessee of an aircraft manufactured by Lear and sold to defendant Chandler Leasing. The aircraft was not airworthy and so plaintiff returned it and sued for summary judgment for a declaration of rights and liabilities of the parties. The lease had a disclaimer clause as to the airplane's fitness or merchantability. The motion for summary judgment was denied on the theory that summary judgment cannot be granted when there is a claim of unconscionability grounded in extraordinary disclaimers of warranties. While this court does not cite to §§ 2-302 or 2-316, the law of both sections was applied to this lease.

v. *Secured Transactions.* Without a doubt the unique application of § 2-302 to non-Code situations ought to have led to the happy conclusion that any time a Code related case stands before the court that result would be an instantaneous and resounding declaration that the Doctrine of Unconscionability is king in the Code. This was not so in the following case.[160]

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157 3 UCC Rep. Serv. 858 (Sup. Ct. N.Y. 1966).
158 *Id.* at 859.
159 4 UCC Rep. Serv. 647 (Sup. Ct. N.Y. 1967).
160 *In re* Advance Printing & Litho Co., 277 F. Supp. 101 (W.D. Pa. 1967), *aff'd*, 387 F.2d 952 (3d Cir. 1967).

Rosenthal & Rosenthal, Inc. v. Bentz, which was an appeal by the trustee in bankruptcy on an order of the district court reversing a decision of the referee in bankruptcy, the district court held that the referee erred in reforming the corporate bankrupt's contract with *Rosenthal*. The referee's findings of fact were undisputed and so pursuant to General Order 47, the court was bound to accept the findings. However, the court found that the referee had misapplied the law and his conclusions had to be set aside.

The court recognized that the result reached in this case would be inequitable and even unconscionable on some creditors other than Rosenthal but the authoritative appellate decisions forced a finding other than for the referee. The circuit court's statement as to the referee's misapplication of the law refers to § 2-302. The referee had applied this section to find that Rosenthal's claim was unconscionable. The circuit court stated that[161] § 2-102[162] removes the unconscionability section from the purview of Article 9 of the Code and so § 2-302 cannot aid the trustee in avoiding payment of Rosenthal's claim.

e. *Merchants.*[163] Unlike prior law, the Code imposes on merchants, as a class of buyers and sellers, special rules of the conduct in commercial transactions. The new provision[164] is a recognition of general business habits in practice today.[165] To this class the Code ascribes a standard of commercial conduct that is higher than the standard imposed on a non-merchant.[166]

The concept of merchant is defined in three parts:[167] (1) Dealer; "merchant" means a person who deals in goods of the kind which are the subject matter of the transaction between the parties. The fact that he may also deal in materials other than those which are the subject matter of the transaction is not relevant to determining if a seller or buyer is a merchant.[168] (2) Knowledge; "Merchant" means that by his occupation a person holds himself out as having knowledge or skill peculiar to the goods which are the subject matter

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161 *Id.*

162 UNIFORM COMMERCIAL CODE § 2-102 specifically excludes the application of Article 2 to secured transactions. Of course, the section begins with the words, "[u]nless the context otherwise requires . . . ." This language is sufficiently ambivalent to support the referee—the context of this case required the use of § 2-302.

163 The provisions in the Iowa UCC most applicable to merchants are §§ 554.2103 (1)(b) (must be honest in fact); 554.2104 (defines merchant); 554.2201(b) (statute of frauds writing); 554.2205 (firm offers by merchants); 554.2207(2) (form offers and form acceptances problems); 554.2314 (warranty of merchantability); and 554.2603 (merchant buyer's duties to rightfully rejected goods).

164 IOWA CODE § 554.2104 (1966).

165 *E.g.*, It is common business habit to make a firm offer, open for a specified time, to another merchant. Such promises, unsupported by consideration, were unenforceable at common law; but, this is changed under the Code. Any offer if made by a merchant, in writing, signed, and open for a period of time is enforceable even if the offer is unsupported by consideration. *See* IOWA CODE § 554.2205 (1966).

166 *See Id.* §§ 554.2602 and 554.2603 (duties of a non-merchant and of a merchant after rightful rejection of seller's goods).

167 *Id.* § 554.2104(1).

168 The emphasis on "or" is so placed because § 554.2104(1) uses the disjunctive in establishing three criteria for determining whether a party is a merchant. Presumably satisfaction of anyone of the three criteria will impose the status of merchant on a party to the transaction.

of the transaction. Whether or not the party actually represents that he has such knowledge or skill is not material to a finding that a party is a merchant.[169] (3) Agency; "Merchant" means a party who hires an agent or any go-between who holds himself out as having the knowledge and skill concerning the goods which are the subject matter of the transaction. Presumably, where the Code is silent,[170] the determination of whether or not an agency situation exists is dependent on the laws of Iowa.

While a merchant may be a merchant for some transactions, he is not a merchant for all his transactions. If for example a furniture merchant orders the installation of a window unit air conditioner and upon delivery finds it to be a unit which he had not ordered he may reject the unit. The standard of case that must be given, until the seller picks it up, is that of a non-merchant and not the standard of care of a merchant. For the purpose hereof spoken the furniture merchant is an ordinary consumer and so the Code's mandate is different as to his standard of care as compared to a merchant.[171]

f. *Statutory Construction.* The basic rule is that this chapter of the Code "shall be liberally construed and applied to promote its underlying purposes and policies".[172] The underlying purposes and policies of the Code are: "(a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions."[173] Contra to prior Iowa law[174] the Code clearly states[175] that the section captions of each chapter are part of the Code. Thus when you are concerned about the statutory construction of the Code you must consider each section caption as part of the provision that you are looking at.

At no time may the attorney vary the language of the statute when to do so would negate the obligations of good faith, diligence, and reasonableness. Because the obligations cannot be specifically set down with precision and because of the possibility that you may be negating those obligations, it is wise, indeed encouraged by the Code, that the cautious attorney set down in the contract those criteria by which the conduct of parties will be measured.

B. *Definitions*

There are definitions of terms throughout the entire Code. However, the

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169 In this fashion it is well to keep in mind that certain people may not be merchants but can be held to be merchants, *e.g.*, farmers. Thus, it behooves the cautious attorney to make an indication of the status of his client if he does not wish his client to become a merchant by operation of law.

170 The Code states that where the Code is silent the rules of law and equity of Iowa will supplement the Code. IOWA CODE § 554.1103 (1966).

171 *See Id.* §§ 554.2602 and 554.2603.

172 *Id.* § 554.1102(1).

173 *Id.* § 554.1102(2)(a)(b)(c).

174 IOWA CODE § 3.3 (1966). This section was amended to except the Code from its prohibition concerning section captions as law.

175 *Id.* § 554.1102(3).

forty-six definitions found in chapter one[176] form the nucleus of words whose definitions are applicable to the entire Code. These definitions are not to supplant those found in other chapters but rather supplement them.[177] This Article will cover those definitions which because of their uniqueness in sales law, are of the greatest interest to the attorney.

1. *Goods*

Goods are not chattels personal or personal property; goods are movables. The sales chapter refers to goods in terms of movability not personalty.[178] Only goods are the proper subject matter of chapter on sales. "Unless the context otherwise requires, this article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction. . . ."[179]

a. *Goods are defined to include.* Goods include all things, including specially manufactured goods, which are movable at the time of identification to the contract.[180] The following items are of importance: (1) Movable is a new sales law concept. Whether or not an item is personal property is not as important as whether or not it is movable. Movability is a determinant of whether a good is a good. (2) Items that are specially manufactured. Though the Code states this concept in affirmative terms it is meant that an item can be a good whether or not it is specially manufactured. (3) If the goods cannot be identified it cannot be sold. And if the goods cannot be sold they are, obviously, not subject to Article 2 of the Code.[181]

"A contract for the sale of timber, minerals or the like, or a structure or its materials to be removed from realty, is a contract for sale of goods within this article if they are to be severed by the seller."[182] Section 554.2107 is read with § 554-2105, which is applicable only if the goods to be severed are severed by the seller. If the buyer is to do the severing the contract is considered to be one affecting realty, thereby involving the problems of the Statute of Frauds and the recording statutes pertaining to land.[183]

Growing crops or other things attached to realty that can be severed without harming the goods[184] (except timber, minerals or the like which we just

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176 *Id.* § 554.1201.

177 *E.g., Id.* § 554.2101(19) says good faith means honesty in fact, in the conduct or transaction concerned; and § 554.2103(1)(b) adds that in case of a merchant you must include the criteria of reasonable commercial standards and fair dealing of the trade in order to have a finding of good faith.

178 *Id.* § 554.2105.

179 *Id.* § 554.2102.

180 *Id.* § 554.2105.

181 Prior Iowa law is basically in accord with this concept. *See* IOWA CODE §§ 554.6, 554.18 (1962), *as amended,* IOWA CODE ANN. § 554.2105 (1966).

182 IOWA CODE § 554.2107(1) (1966).

183 Iowa Code Comment, IOWA CODE ANN. § 554.2107 (1967).

184 Prior Iowa law established the test as to fixtures in a somewhat different manner in that the courts looked to how the property was to be annexed to the property,

discussed) no matter who is to do the severing are within this article. In order to avoid the myriad meanderings of the various courts the Code used the phrase "severance without material harm"[185] to differentiate the concepts enunciated by the Code from the old law of fixtures. The hope of the drafters was to create a single test to determine if property was includable in this chapter. The test is simple: if the property can be removed without doing material harm to that to which it is attached the property is goods. Thus, for example, in determining whether a "wool crop" falls under Article 2 the pertinent question is whether the crop is movable or removable. In this case the "wool crop" will meet the test of movability and not fall under any other category to take it out of the sales article.

The farmer's crops, and the unborn young of animals are the proper subject of a contract of sale. The comments to the Code state that since the young of animals are often intended for sale they may be contracted for before they are born. There is no problem with the goods being in existence and identified in this case because the state of the art of animal husbandry is such that the period of gestation and breeding results are known and not speculative.[186]

Future goods are those which are not both existing and identified to the contract. No interest can pass in any future goods. And, any agreement as to such goods is merely a contract to sell, not a sale.[187]

b. *Goods that are not included in this article.* The money with which you pay for the goods that are for sale is not properly includable as the subject matter of the sale. This does not mean that money, for example, a rare coin, cannot be the subject of the contract. The rule of thumb is if the money is the commodity that is for sale then it is goods; but if it is not a commodity it is not goods. Thus you need only distinguish between money as a purchase price and money as a commodity in order to determine if the agreement falls within Article 2.[188]

Investment securities transactions are governed by Article 8 and are not normally considered within Article 2. However, the Official Comment to the Code does make the statement that Article 2 will apply to Article 8 transactions where it is sensible to so apply and Article 8 has no provision to cover the problem.[189]

The Uniform Sales Act § 4 included choses or things in action as goods.[190] Believing that all choses took the form of documents ,the UCC drafters excluded

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how the property annexed and the realty related to each other and the purpose for the annexation, *cf.* Lamble v. Schreiber, 236 Iowa 597, 19 N.W.2d 669 (1945).

185 IOWA CODE § 554.2107(2) (1966).

186 *Id.* § 554.2105(1).

187 *Id.* § 554.2105(2).

188 *Id.* § 554.2105(1).

189 UNIFORM COMMERCIAL CODE Comment 1, IOWA CODE ANN. § 554.2105 (1967). *See In re* Carter's Claim, 390 Pa. 365, 134 A.2d 908 (1957).

190 Prior Iowa law excluded things in action under the IOWA CODE § 554.77(1) (1962), *as amended,* IOWA CODE § 554.2105 (1966).

those choses of action from Article 2 and put them into Articles 8[191] and 9[192] which are the Statutes of Frauds for the respective Articles. Then because the drafters of the Code recognized that there were choses of action that were not documentary in form[193] they wrote a general Statute of Frauds[194] which covered all choses of action that did not fall within any provisions of Articles 2, 8 and 9. The Article 1 Statute of Frauds has a high value of $5000. To illustrate the operation of this jumble of sections it is necessary to give the facts of the only case, to date, to judicially construe these sections.

Defendant in *Cohn, Ivers & Co. v. Gross*,[195] granted a "call"[196] to the plaintiff who is a broker of "puts and calls" for 100 shares of SCM Corporation. Usually calls are worked through a market broker; however, in this instance defendant (owner of the 100 shares of SCM) dealt directly with the plaintiff. All negotiations between the two were oral, but the defendant worked through a brokerage house which sent a confirmation back to plaintiff that they did not have instructions from defendant as to this call. The lower court found that defendant had agreed to sell SCM at 30 3/4 plus a commission of $20.50 and that plaintiff was damaged when defendant did not deliver the shares. On appeal defendant contended that the agreement falls within the Statute of Frauds, and so, was unenforceable and should be reversed. The Court held that § 8-319 of the Code was not applicable because though a call is a chose in action concerning a security the call does not fall within the definition of a security[197] and that the call was not unenforceable under UCC §1-206 because the total price was less than $5000. Further, because the call was worth less than $500 UCC § 2-201 did not apply.

As is evident in this illustration no Code section stands alone. The interplay in the sections necessitates a broad based knowledge of the Code.

The definition of goods as being movables and the limitation upon the removal of things affixed to realty clearly means that realty is not the subject of a sales contract. In fact, if a transfer of real estate made in payment of goods is not within the operation of the Code[198] then it is obvious that the law of realty in Iowa will apply as to that portion of the sales transaction that is realty in nature. The Code does not affect the transfer requirements pertaining to real estate nor does it control the contractual obligations as to that transfer.[199] The primary reasons for the drafters not wishing to interfere with local

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191 *Id.* § 554.8319.
192 *Id.* § 554.9203.
193 *E.g.*, contract rights.
194 IOWA CODE § 554.1206 (1966).
195 56 Misc. 2d 491, 289 N.Y.S.2d 301 (Sup. Ct. 1968).
196 A call is an option or contract giving the holder of the call, at his choice, the right to receive an agreed upon number of shares of stock at an agreed upon price per share on, or before, or at a fixed date with the price being fixed at the market price of the granting of the option or contract. The price paid for such an option or contract is the "premium".
197 UNIFORM COMMERCIAL CODE § 8-102.
198 IOWA CODE § 554.2304(2) (1966).
199 Iowa Code Comment 3, § 554.2304(2) IOWA CODE ANN. (1967) contains an

realty statutes are that the language of the Code cannot legitimately encompass real estate transactions as well as sales and too many variations exist in realty statutes to produce the uniformity the Code strives for.

The single greatest change wrought by the Code is the change in prior Iowa law under the Uniform Sales Act.[200] Formerly, if any part of the consideration in a sales transaction was realty the whole transaction was removed from the Uniform Sales Act and was governed by the laws pertaining to realty. Under the Code the transaction would still be granted in Article 2 with the exception that the transferor's obligations as to the transfer of realty must conform to the real estate laws of Iowa.

Any transaction, even if in the form of an unconditional contract to sell or in the form of a present sale, intended to operate as a secured transaction is not within Article 2 of the Code.[201] The line as to what is a secured transaction and what is an Article 2 transaction is exceedingly fine. However, a good rule of thumb is that if the essence of the contract is to sell the goods even though the seller retains a security interest then Article 2 is appliable.[202] Article 9 covers secured transactions and Article 2 covers sales transactions. The Code is very clear in delineating the spheres of operation of both articles. Naturally a problem will arise that fits right on the crack between the two. The most recurrent cause giving rise to questions concerning the relationship between Articles 2 and 9 is a declaration of bankruptcy. At no time is there a more unorganized scramble to secure a position than when a trustee, a seller and creditors are vying for the available assets of a bankrupt party. At no time is it more important to determine when a sale has taken place or when a secured transaction has taken place. It is impossible, whenever credit is extended, to truly separate the two articles: "Even though a contract may be controlled by Article 2 of the Code, it may also be governed by Article 9, with the consequence that the "transaction" here relates to the original contract of sale, and not alone to the security or title-retention part thereof. "Article 9 relating to secured transactions and Article 2 are closely intertwined."[203]

2. *Buyer*

The simplest definition of buyer is one who "buys or contracts to buy goods".[204] The Code's change of the Uniform Sales Act's definition[205] was in the omission of the words "any legal successor in interest of such person" fol-

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excellent explanation of the complexities that arise when the purchase price of goods is the transfer of realty.

200 IOWA CODE § 554.10(3) (1962), *as amended,* IOWA CODE § 554.2102 (1966).

201 *Id.* § 554.2102.

202 *Compare In re* Halferty, 136 F.2d 640 (7th Cir. 1943) *with* Peuser v. Marsh, 218 N.Y. 505, 113 N.E. 494 (1916).

203 *In re* Kokomo Times Pubg. & Prtg. Corp., 5 UCC Rep. Serv. 954, 962 (S.D. Ind. 1968).

204 IOWA CODE § 554.2103(1)(a) (1966). The Code does not substantially change in impact prior Iowa law concerning the definition of buyer. IOWA CODE § 554.77(1) (1962).

205 UNIFORM SALES ACT § 76.

lowing the definition of buyer.[206] The more complicated meaning extends to a buyer in the ordinary course of business.[207] A buyer in the ordinary course of business is one who acts in good faith, without knowledge of prior interest or ownership in the subject matter of the sale, and who buys from one who is in the business of selling goods of the kind involved in the transaction. Excepted from this rule[208] are pawnbrokers, bulk transfers and secured transactions. This Code definition is taken from Uniform Trust Recipts Act, § 1, and is expanded to clearly set forth who is to be protected by its wording. The wording of buyer has its greatest impact in § 554.2403, the codification of the common law good faith purchaser for value rule,[209] and Article 9.[210]

To briefly compare the common law rules as to a bona fide purchaser with the Code rules it can be said that at common law the bona fide purchaser was one who bought the goods in good faith, paid value for the goods, purchased the goods in the ordinary course of business from someone in the business of goods of that kind, and had no knowledge of any supervening interest in the object of the sale.[211] Meeting these criteria put the purchaser in an unfavorable position. The general rule stated that the transferor transfers only that which he has to transfer.[212] To protect the bona fide purchaser the doctrines of voidable title[213] and estoppel[214] were invoked.

Section 554.2403 is the touchstone of this problem:

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value . . . . . .
>
> (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business.

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206 Because of IOWA CODE § 554.2210 (1966) (delegation and assignment) the drafters left out the "legal successor in interest" phrase.

207 *Id.* § 554.1201(9).

208 *Id.*

209 Iowa has changed the Code's statement as to entrusting (analogous to the operation of a factor) in so far as a farmer is concerned. *See Id.* §§ 554.2403(2) and 554.1201(37).

210 *Id.* § 554.9307.

211 *See* Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N.W. 260 (1941); Baehr v. Clark, 83 Iowa 313, 49 N.W. 840 (1891); Perkins & Gray v. Anderson, 65 Iowa 398, 21 N.W. 696 (1884); Hesser v. Wilson, 36 Iowa 152 (1872).

212 Hessen v. Iowa Auto. Mut. Ins. Co., 195 Iowa 141, 190 N.W. 150 (1922).

213 Voidable title doctrine meant that as soon as the transferor transferred the goods to the bona fide purchaser the true owner lost his right to the goods. Voidability applied only to the true owner and the transferor. 2 S. WILLISTON, SALES §§ 311, 348 (rev. ed. 1948). Of course, if the title was void *ab initio* this doctrine did not apply. However, what was a void title depended too often on the equities of the situation and the mental dynamism of the judge.

214 The doctrine rested on the owner clothing the transferor with some indicia of ownership, other than mere possession (unless the possession was such that it was to a dealer of those kinds of goods), upon which the purchaser relied when he made his purchase. *Id.* § 312-16.

(3) "Entrusting" includes delivery and any acquiescence in retention of possession of any condition expressed between the parties to the delivery or acquiescence and regardless of whether procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles or Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).[215]

To determine whether or not a purchaser is a purchaser as contemplated by the Code it becomes necessary to look at the following items:

a. *Transaction.* Are goods the subject matter of the sale? If not, then there is no concern about making a determination as to whether or not a purchaser falls under the Code.[216] If the transaction does fall within the scope of Article 2 as to goods, is the transaction one for the sale of goods or one for security?[217] If the transaction was neither of the above then was it one of entrustment?[218]

b. *Buyer.* Whether or not the purchaser is a buyer in the ordinary course of business is a determinant of whether he will receive title to the goods that he bought.[219] Is the buyer a good faith purchaser for value? The Code does not specifically mention the bona fide purchaser for value but inferentially, protects such purchaser.[220] It may be argued that the language of § 554.2403(1) though not specifically referring to the bona fide purchaser for value nevertheless covers those situations wherein such a purchaser was protected by the common law courts.[221]

c. *Entrusting.*[222] Anyone who clothes a merchant with the apparent authority and the indicia of ownership to sell goods in which the merchant deals will run the risk of having his rights defeated by the bona fide purchaser. If goods are entrusted to the possession of a merchant who deals in those goods, the buyer in the ordinary course of dealing will be able to defeat the title because

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215 IOWA CODE § 554.2403 (1966). The second sentence in this section is an Iowa addition to cover problems concerning farmers and secured transactions.

216 *Id.* § 554.2102 (this Article applies to transactions in goods).

217 *Id.*

218 *Id.* § 554.2403(2).

219 *Id.* §§ 554.1201(9), 554.2403.

220 *Cf. Id.* §§ 554.1201(9), (19), (33), (44) and 554.2403.

221 The four recurring situations wherein the bona fide purchaser prevailed over the true owner and which situations are codified in *Id.* § 554.2403(1) are:

(a) Fraud: Where the vendor so deceived a true owner as to his identity the bona fide purchaser may receive good title from him.

(b) Trick: Where the vendor so tricked the true owner so as to have committed larcenous fraud the bona fide purchaser may receive good title.

(c) Bad Check: The vendor's bad check to the true owner will not prevent the bona fide purchaser from receiving good title.

(d) Non-Payment: Where the vendor failed to pay for the goods even though it was listed as a "cash sale" he may give good title to a bona fide purchaser.

222 *Id.* § 554.2403(2)(3).

the merchant will be able to transfer the entruster's rights in those goods. Any delivery and acquiescence in retaining goods regardless of agreements between the entruster and entrustee or regardless of criminal intent will have the result that title may be passed to a buyer in the ordinary course of business.

The study of § 554.2403 can be frustrating. The enactment of this section, in part extends the prior Iowa law of this section;[223] however, because the Code is not really unambiguous in this area it can be expected that any litigation that arises will give the Courts some difficult issues.

3. *Seller*

A seller "means a person who sells or contracts to sell goods."[224] The determination of whether a party is a seller is not an easy question to answer. For example: Suppose a florist in state X orders the delivery of flowers through a florist in state Y. Is the florist in state Y a seller or a mere agent through whom delivery was made?[225] Suppose Auctioneer sold dealer X's car to dealer Y. Auctioneer took Y's check, deposited it in his own account, issued his own check, minus commissions, to X and discovers that Y's check is bad. Is Auctioneer a seller so that he may retain possession under § 554.2407(2) and § 554.2411?[226] Suppose the patient at a hospital agrees to the insertion of a "surgical pin" into his hip. The hospital supplies the pin and it proves to be defective. The patient sues under the warranty of fitness section of the Code.[227] Is the hospital a seller under the Code?[228] Suppose Manufacturer makes bicycles. He sells to Retailer. Retailers sells a bike to X. X is injured and sues Manufacturer as the seller of the bicycle. Is Manufacturer a seller?[229]

4. *Termination and Cancellation.* The Iowa Code Comment to § 554.2106(3) and (4) states that these definitions are new to Iowa law. While that may be true of subsection (3) (termination) it probably is not true of subsection (4) (cancellation). "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach.[230] "Cancellation" occurs when either party puts an end to the contract for breach by the other. The effect of the cancellation is the same as termination plus the cancelling party has any remedy for breach of the whole or any unperformed part of the contract.[231]

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223 Iowa Code Comments, IOWA CODE ANN. § 554.2403(2).
224 IOWA CODE § 554.2103(1)(d) (1966).
225 Yes. O'Brien v. Isaacs, 32 Ill. 2d 105, 203 N.E.2d 890 (1965).
226 No. Tulsa Auto Dealers Auction v. North Side State Bank, 3 UCC Rep. Serv. 1041 (Sup. Ct. Okla. 1966).
227 IOWA CODE § 554.2315 (1966).
228 No. Dorfman v. Austenal, Inc., 3 UCC Rep. Serv. 856 (Sup. Ct. N.Y. 1966).
229 No. Tomczuk v. Town of Cheshire, 26 Conn. Super. 219, 217 A.2d 71 (1965).
230 IOWA CODE § 554.2106(3) (1966).
231 *Id.* § 554.2106(4). This section is probably not new to Iowa because cancellation is a synonym for breach. The author does not see any substantive or procedural difference between "cancellation" and breach.

There is a significant difference between the termination and cancellation. In the former the contract comes to an end *not* by the voluntary act of one of the parties but by a grant of power in the agreement or under a power by operation of law. Termination bars all remedies which are not based upon an antecedent breach and discharges all executory obligations. Cancellation, on the other hand has the same effect but in addition preserves to the nonbreaching (cancelling) party any remedy he may have for the breach of any unperformed part any remedy he may have for the breach of any unperformed part or whole of the contract.[232]

Any use of cancellation of contract is not to be construed to mean that the declaring party has renunciated or discharged any claim in damages for an antecedent breach.[233] The terms are new but the concepts are excellent commercial laws. Simply stated, a termination of contract can only arise as a result of a grant of power provided for in the agreement or by operation of law. It is not a breach. Cancellation is the putting to an end a contract because of the breach of one of the parties. The remedies for termination discharge all executory obligations but preserve any rights based on a prior breach. The remedies for cancellation are those that arise because of a breach. The effect of a cancellation is the same as a termination.[234]

5. *Conforming*

Goods or conduct or any part of either conform to a contract when they are in accord with the obligations of the contract.[235] While this rule seems relatively simple, the framers of the Code help understand its meaning by stating that the conforming goods subsection is generally meant to continue the policy wherein the seller cannot require acceptance until he has exactly complied with his contract obligations.[236] The application of this section is complex.

To illustrate the complexity of § 554.2106(2) it is necessary to point out that "where a tender or delivery of goods so fails to conform . . ."[237] the conforming party has the right of rejection. Where there has been a conforming shipment followed by a breach that the seller can place the risk of loss on the breaching party.[238] The title passes to the buyer at the time and place at which the seller completes his performance.[239] If the goods fail in any respect to conform to the contract the buyer has the right to reject the goods, or accept

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232 *Id.* § 554.2703(f) lists as one of the seller's remedies his right to cancel but says nothing about the nature of cancellation. The non-breaching party would cancel and pursue his rights just as if he were a cancelling party.

233 *Id.* § 554.2720.

234 To date there have been few cases on either part of the Code. *See* Byrd v. Moore Ford Co., 116 Ga. App. 292, 157 S.E.2d 41 (1967) (cancellation); United States v. P.&D. Coal Mining Co., 251 F. Supp. 1005 (W.D. Ky. 1964) (termination).

235 IOWA CODE § 554.2106(2) (1966).

236 Iowa Code Comment, IOWA CODE ANN. § 554.2106(2) (1967).

237 IOWA CODE § 554.2510(1) (1966).

238 *Id.* § 554.2510(3).

239 *Id.* § 554.2401(2).

the goods or reject in part or accept in part the delivery of goods.[240] After a reasonable time for inspection the buyer will signify to the seller his acceptance or nonacceptance of the conforming or nonconforming goods.[241] The acceptance with knowledge of nonconformity prevents a buyer rejection or revocation.[242] Where a nonconformity substantially impairs the value of the contract the buyer may revoke his acceptance in whole or in part.[243] And where delivery is in installments the buyer may reject any installment if there is a nonconformity.[244]

There are other problems that arise due to a nonconformity.[245] However, the single greatest effort that must be made is in determining what is a conforming performance. Rarely is contract draftsmanship so specific that the specificity of terms preclude ambiguity and therefore no arguable differences as to the intent of the parties concerning the goods. Thus the first job of the attorney is to make sure that he is talking of conformity, or lack of it, when he is called upon for help.

III. Formation of Sales Contract

A. *Form*

There are innumerable form books[246] that supply an idea of the contents necessary to draft a binding contract. The form listed below is just one example of a sales contract.

1. It is essential to the formation of a contract to identify the parties:

Date
_____ Seller, Located at
(name of seller)
_____, and _____
(place of business) (name of buyer)
Located At _____ Agree As Follows . . . .
(place of business)

2. Following the identifying salutation the parties must include quantity, quality and description classes which is the single most important group of clauses in the contract:

The Seller Agrees to Sell and Deliver to the Buyer and the Buyer Agrees to Accept and Pay for the Following Goods:
_____ (describe the goods).

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240 *Id.* § 554.2601.
241 *Id.* § 554.2606.
242 *Id.* § 554.2607.
243 *Id.* § 554.2608.
244 *Id.* § 554.2612.
245 *Id. See* William F. Wilke, Inc. v. Cummins Diesel Engines, Inc., 250 A.2d 886, 6 UCC Rep. Serv. 45 (Ct. App. Md. 1969); Zabrieskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968); Campbell v. Pollack, 221 A.2d 615, 3 UCC Rep. Serv. 703 (R.I. 1966).
246 *E.g.*, R. Anderson, Uniform Commercial Code, Legal Forms (1963); W. Willier and F. Hart, Forms and Procedures Under the Uniform Commercial Code (1969).

The quantity, quality and description clause must be drafted with caution. It is imperative that the clause be as specifically drafted as the client and his protection demands. These clauses are not the place to be sloppy in contract draftsmanship.

3. Price arrangements may be handled in any manner agreed to by the parties:

(A) The Buyer Agrees to Pay to the Seller $_____ (herein you record the cash[247] expected) For the Goods Delivered, or

(B) The Buyer Agrees to Pay to the Seller $_____ (herein you would set down any credit terms or arrangement agreed to by the parties).

4. Place, manner and date of delivery are not essential to the enforcement of a Code contract; but, since the Code specifies[248] the place, manner and time of delivery, it would be wise to insert clauses in the contract accommodating these terms:

The Seller Will Deliver the Goods to the Buyer At _____ _____ (insert place of delivery) By _____ (insert the carrier to be used), On or Before _____ (date of delivery).

5. Section 554.1105 permits the parties to pick that forum whose laws will control the enforcement of the contract:

The Rights, Duties, and Obligations Created By This Agreement Shall be Governed by the Laws of _____ _____ insert herein your choice of forum)

_____	_____
Buyer	Seller
_____	_____
Address	Address

B. *Contract Law and the Code*

It is generally held that a sale or agreement takes place where one person, called a seller, transfers his property or interest therein to another person, called a buyer, for a consideration, called a price.[249] Obviously, the law expects the intentions of the parties to be manifested by the contract in which the terms of the agreement shows the seller ready to give up ownership of his personal property to the buyer.

It has been said that sales law is really more specific contract law. While it is true that sales law is more specific, it becomes apparent to any student of

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[247] Cash is used advisedly. Cash means payment not only in hard currency but any form of payment that is commercially reasonable, for example, payment by check. Section 554.2511(2): "Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business . . . ."

[248] IOWA CODE §§ 554.2503, 554.2504 (1966).

[249] *Id.* § 554.2106(1).

the Code that not many of the contract rules apply to the law of sales. Thus the Code drafters set down a fairly comprehensive[250] set of rules for the law of sales as is commonly practiced today.

Section 554.2204 sets forth the general tone of the formation of a sales contract. Its very intonation violates basic contract principles of specificity and clear enunciation of all subject matter of the agreement. The Code states; "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[251] The informality of sales contract requires only that the parties have intended to bind themselves and that an appropriate remedy in the event of some problem arising is a reasonable certainty. A contract without the threat of the power of enforcement is not a contract.[252] However, an attorney would be unwise to abandon his caution concerning completeness in contracts. Thus, in drafting a contract, the artful attorney includes all terms that are necessary for the protection of his client.

A contract for the sale of goods may be made in any way that shows sufficient agreement, even the conduct of the parties, which recognizes the contract's existence. Unless the Statute of Frauds[253] is applicable, the contract need not follow particular formality. One of the singular innovations to contract law is that the Code recognizes as an existing contract any agreement that manifests an intention that a contract does exist—even by conduct, where the writings do not establish a contract. However, some special provisions[254] are required.

Contract law has always required that contracts be definite in all terms that are essential in order to make a contract enforceable. The Code states that even though one or more terms are not set forth there may still be an enforcable contract.[255] A contract may be formed even though every term as to performance and price is left open[256] so long as the parties *intend* to be bound. The open terms, so long as they do not evidence an intention not to contract, will be implied either by the Code or commercial practices or both. It is far better to reduce all terms of the agreement to writing than to leave the contract open for interpretation that may not be the meaning intended by the parties. As a last *caveat*, the greater the number of open terms the greater the possibilities exist to prove that the parties formed no intent to make a contract.

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250 Certainly the largest of all of the Articles of the Code.

251 IOWA CODE § 554.2204(1) (1966).

252 No authority; but the logic of the sentence is such that the statement is irrefutable. The possibilities for philosophical debate are probably interminable.

253 IOWA CODE § 554.2201 (1966).

254 *Id.* § 554.2207(3).

255 *Cf.* Annot., 58 A.L.R.2d (1958) for an annotation on those contracts which are not certain as to terms.

256 IOWA CODE §§ 554.2204, 554.2305 (1966).

C. *Offer and Acceptance*

Section 554.2206, which is labelled "offer and acceptance in formation of contract", concerns itself more with acceptance than with offer. The section is specific as to the alternative ways to accept an offer; but, it is not clear as to what is an offer. As to acceptance the Code in subsections (1) (a) and (b)[257] is in substantial agreement with prior Iowa law. Prior Iowa law as to subsection (2) is changed. But whether or not notice of acceptance, as mentioned herein, is specifically necessary is in doubt.[258] Because the Code is silent as to the time when an acceptance must be made, assuming the offer is silent, and is silent as to when an acceptance is effective, it must be assumed that prior Iowa law in these matters is still applicable.[259]

In regard to ambiguous offers, [§ 554.2206(1)(a)]; contract law says that an offer creates a power in the offeree to accept, reject or counter-offer the offer. How and when the acceptance is made, rests in the offeror and any attempt to circumvent this right results in the negation of the offer, assuming the offer is clear.[260] Often, however, the means of acceptance is ambiguously stated; and even where the offeree wishes to comply by the specified method he cannot do so. Thus the innocent offeree suffers when the burden of clarity should rest on the offeror. The Courts, cognizant of the fact that not all offers are the patterns of draftsmanship, state that where the terms were ambiguously uttered the reasonable acceptance of the offer would be enforceable. As to what are reasonable the courts state that:

> . . . [C]ontracts depend upon the meaning which the law imputes to the utterances, not upon what the parties actually intended; but, in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable. The standard is what a normally constituted[261] person would have understood them to mean, when used in their actual setting.[262]

Then if an offer is worded: "Ship immediately. I offer to buy one hundred of your widgets", the response given by the Code is that such an offer is, unless otherwise unambiguously indicated by the language or circumstances, an offer to make a contract shall be construed as inviting acceptance in any

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257 *See* Gipps Brewing Co. v. De France, 91 Iowa 108, 58 N.W. 1087 (1894); Lucas v. Western Union Tel. Co., 131 Iowa 669, 109 N.W. 191 (1906); International Transp. Ass'n v. Des Moines Morris Plan Co., 215 Iowa 268, 245 N.W. 244 (1932); Siebring Mfg. Co. v. Carlson Hybrid Corn Co., 246 Iowa 923, 70 N.W.2d 149 (1955). These cases hold that acceptance can be made by any means, that when acceptance becomes effective depends on the medium of acceptance that if acceptance mirrored the offeror's medium then acceptance was on dispatch but if the acceptance did not use the offeror's medium it was effective on receipt by offeror, and that an offer may be accepted by performance.

258 Port Huron Mach. Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843 (1928) (notice of beginning of performance to form an acceptance not necessary). On this point the Iowa Code Comment, IOWA CODE ANN. § 554.2206 (1967) is interesting.

259 *See* note 257 *supra.*

260 *See* G. GRISMORE, CONTRACTS § 45 et seq. (rev. ed. 1965).

261 Judge L. Hand's way of saying reasonable.

262 New York Trust Co. v. Island Oil & Transp. Corp. 34 F.2d 655, 656 (2d Cir. 1929). *See also* RESTATEMENT OF CONTRACTS § 71(c) (1932).

manner and by any medium reasonable in the circumstances.[263] What this section hopes to cure are badly worded offers. But the best cure is a carefully executed offer.

Section 554.2206(1)(b) puts to an end what one Code draftsman calls the "unilateral contract trick".[264] Suppose the offeree receives an offer which reads, "Send quickly. I want to buy one hundred of your widgets." Acceptance here looks to an immediate shipment; but, is ambiguous as to the manner of shipment. This section states that, unless the contrary is unambiguously stated, an offer calling for a current shipment may be accepted by making the shipment called for or by a prompt promise to make the shipment. A *caveat* to this section is to make sure the shipper notifies the offeror that the shipment (if one is made) is an accommodation shipment if the conformity of the shipment is in doubt. Of course, such notice probably makes an accommodation shipment a counter-offer.

Section 554.2206(2) does not alter contract rules as to the method of accepting offers looking to unilateral and bilateral contracts. However, it may change prior Iowa law concerning performance binding the offeror even though no notice of commencement of performance is given to the offeror.[265] According to the comments to the Code, "[t]he beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to the offeror . . . . For the protection of both parties it is essential that notice follow in due course to constitute acceptance."[266] Though not a much litigated section of the Code [§ 554.2206] there is one case in point that sets down the rule very succinctly. Upon the failure to return a 14.37 carat ring to Harry Winston, Inc. the defendant, Waldfogel, found that he had accepted the ring sent to him on memorandum. The affidavits in the case do show that the defendant admitted the receipt to the ring, but never returned it. Aside from a Statute of Frauds[267] problem which was resolved when the court found the defendant accepted the ring, the court states that the acceptance occurred when the buyer failed to reject it or performed an act inconsistent with the seller's ownership.[268]

The Code is specific as to the handling of firm offers.[269] A new concept to Iowa sales law is the irrevocable offer unsupported by consideration.[270] Offers open for what appears to be an irrevocable time are known as firm of-

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263 IOWA CODE § 554.2206(1) (a).
264 W. HAWKLAND, SALES & BULK SALES 6 (1958).
265 *See* note 258 *supra.*
266 Iowa Code Comment, IOWA CODE ANN. § 554.2206 (1967).
267 Because this transaction was conducted orally, in person or by telephone, the Statute of Frauds was pled as a defense to the action. The Court, having found that the defendant accepted the ring, stated that the Statute of Frauds had been satisfied pointing out that an oral contract is enforceable with respect to goods for which payment has been made and accepted or which goods have been received and accepted. UNIFORM COMMERCIAL CODE § 2-201(3) (c).
268 Harry Winston, Inc. v. Waldforgel, 292 F. Supp. 473, 480 (S.D.N.Y. 1968).
269 IOWA CODE § 554.2205 (1966).
270 Prior Iowa law: Maytag Co. v. Alward, 253 Iowa 455, 112 N.W.2d 654 (1962).

fers. However, the prior law is not affected by the Code unless the offer, which assures that it will be held open for a period of time, or if no period is stated a reasonable time—but in no event longer than three months, that is lacking consideration and is *made* by a *merchant.* Thus the old rule that an offer unsupported by consideration may be revoked at any time prior to acceptance is still the law. However, should that offer be made by a merchant, in a writing that is signed,[271] then that offer is irrevocable even though there is no consideration supporting it.

Firm offers are not revocable for lack of consideration if made by a merchant, wherein the merchant states it will be held open, if the offer is stated in writing, and is signed by the merchant.[272] Should the offeree's form be used and it contains words of irrevocability then in order for the words of irrevocability to be effective they must be separately signed by the offeror.

The Code does not use the term counter-offers but rather "additional terms in acceptance or confirmation."[273] Suppose S writes to B saying, "I will sell nylon stockings for $1 per pair." B immediately writes in reply, "I accept. Ship to me one week from date of receipt of this reply. I will remit check upon receipt of goods." The question is whether or not we have an enforceable contract?

If contract principles were involved, the answer to the last question would be no. B did not unconditionally accept S's offer. He interjected two new terms—shipment in a week and payment by check. S, under contract principles had the privilege, where the offer is silent, of making delivery at his place of business and to be paid in cash if no other payment terms were arranged. Of course if each party executes there is no problem. The problems, as to the existence of a contract, arise when one party is unsatisfied. There is no contract in such a case by old contract principles. This principle, the mirror-image rule, is still valid where sae of goods is not involved.[274] Under the Code the results are different:

(1) If the acceptance contains terms not included by the offer (either by way of addition to or change in) the acceptance is a counter-offer, if the acceptance is expressly conditioned upon the assent to the new terms listed in it.

(2) If (1) is not the case then a definite and seasonable acceptance whether oral or in writing is an acceptance even if there are terms in the acceptance not contained in the offer.

(3) However, if the parties involved are merchants their contract will consist of:

(a) those terms on which the writings of the parties agree,

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271 Signed does not necessarily mean subscribed. IOWA CODE § 554.1201(39) (1966) says, "(Signed) includes any symbol executed or adopted by a party with present intention to authenticate a writing."

272 *Id.* § 554.2205. Radically changes prior Iowa law.

273 Taken from, paraphrased and added to HAWKLAND, *supra* note 264, at 8-10.

274 *See* National Produce Co. v. Dye Yarns Co., 199 Iowa 286, 201 N.W. 572 (1925); and RESTATEMENT OF CONTRACTS, §§ 60, 62 (1934), Iowa Annotations.

(b) the new terms stated in the acceptance unless the new terms:
(i) were excluded by the offer's expressly limiting itself to acceptance strictly to the terms in the offer or
(ii) materially alters the terms of the offer or
(iii) are objected to by the giving of notice of objection within a reasonable time after the new terms are given.

(4) but, if the parties involved are non-merchants then their contract would consist of (relating to (2) above):

(a) those terms on which the writing of the parties agree,
(b) any new terms provided for by the sales article of the Code.[275]

This section is intended to meet the needs of those parties that regularly use form offers and form acceptances as part of their every day business life. However, the simplistic explanation above belies the wave of indignation expressed in litigation and periodicals. The section has come to be called "The Battle of the Forms." Reading just a few of the footnoted authorities will explain the problem in great detail.[276]

The Code is specific as to what constitutes acceptance of goods:

(1) Acceptance of goods occurs when the buyer
(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
(b) fails to make an effective rejection (subsection (1) of Section 554.2602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
(c) does an act inconsistent with the seller's ownership; . . . .

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.[277]

The word acceptance is dispersed throughout the Code and the judicial use of the word will determine its definitional impact on those sections utilizing the word acceptance.

To summarize the current uses of the term, the courts have stated that unless the buyer notifies the seller that the goods have been rejected they have been accepted.[278] The processing and delivery of goods by the buyer to a third party is an acceptance.[279] Further, the buyer's dominion over the goods is an

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[275] IOWA CODE § 554.2207 (1966).
[276] Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962); Matter of Doughboy Indus., Inc. v. Pantasote Co., 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962). Davenport, *How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law*, 19 BUS. LAW. 75 (1963); Weeks, *Battle of the Forms Under the Uniform Commercial Code 2-207*, 52 ILL. L.J. 660 (1964).
[277] IOWA CODE § 554.2606 (1966).
[278] John E. Smith's Sons v. Latimer Foundry & Mach. Co., 19 F.R.D. 379 (M.D. Pa. 1956), *aff'd* on procedural grounds 239 F.2d 815 (3d Cir. 1956).
[279] Sincavage v. Howells, 8 Pa. D. & C.2d 515, 47 Luzerne L. Reg. 186 (1957).

acceptance.[280] Any rejection of goods must be timely made.[281] The taking possession of an automobile plus the signing of a conditional sales contract is acceptance.[282] The courts also hold that material breach is sufficient reason to revoke an acceptance.[283] The use of goods is acceptance.[284] Nonconformity is sufficient cause for revocation of acceptance.[285] Within these brief statements there are numerous uses of acceptance which indicate that any acceptance problem that may be encountered will be multifaceted and require extreme care in its determination.

D. *Terms*

Prior contract law often failed to enforce agreements where there was an indefiniteness as to terms.[286] Too often these agreements failed not because of a material defect in term but because the agreement was not definite in all respects. The Code puts an end to this commercial chaos by stating; even if one or more terms are left open a contract for sale does no fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.[287] The rule then is that even if one or more terms are indefinite a binding contract is formed if the parties intend that there be a contract and that contract has a reasonably certain basis for the award of an appropriate remedy if necessary.

Whether or not the omitted terms must be "minor" is not at issue. While Mr. Williston[288] wished to limit such open terms to those minor in nature and railed against its inclusion in Article 2 of the Code the drafters prevailed and the Code, as stated above, will admit a contract that lacks terms, important or not, if that is what the parties intended and there is a reasonably certain basis to give an appropriate remedy.

The leading case on the general theory of enforceability of open term contracts is *Pennsylvania Co. v. Wilmington Trust Co.*[289] In that decision the court found that the drafters of the Code "intended that the omission of even an important term does not prevent the finding under the statute that the paries intended to make a contract."[290]

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280 Lang v. Fleet, 193 Pa. Super. 365, 165 A.2d 258 (1960).

281 Julian C. Cohen Salvage Corp. v. Eastern Elec. Sales Co., 205 Pa. Super. 26, 206 A.2d 331 (1965).

282 Rozmus v. Thompson's Lincoln-Mercury Co., 290 Pa. Super. 120, 224 A.2d 782 (1966).

283 Lanners v. Whitney, 247 Ore. 223, 428 P.2d 398 (1967).

284 Marbelite Co. v. City of Philadelphia, 208 Pa. Super. 256, 222 A.2d 443 (1966).

285 Revocation here raises the problem of notice. *E.g.*, Periodic reports as to the condition of goods is notice, Babcock Poultry Farm, Inc. v. Shook, 204 Pa. Super. 141, 203 A.2d 399 (1964); notice is not necessary where plaintiff is a third party beneficiary under the Code, Tomczuk v. Town of Cheshire, 26 Conn. Supp. Ver. 219, 217 A.2d 71 (1965); failure to include date of purchase in notice not fatal, Nugent v. Popular Markets, Inc., 353 Mass. 45, 228 N.E.2d 91 (1967).

286 *See* RESTATEMENT OF CONTRACTS § 32 (19343, Iowa Annotations.

287 IOWA CODE § 554.2204(3) (1966).

288 Williston, *The Law of Sales in the Proposed Uniform Commercial Code,* 63 HARV. L. REV. 561 (1950).

289 39 Del. Ch. 453, 166 A.2d 726 (1960), *aff'd,* 172 A.2d 63 (1961).

290 *Id.* 166 A.2d at 732. In this case the subject matter of the sale was securities.

What omitted terms cause a contract to fail has not been the subject of much litigation. However, there are some decisions, some comments, and some authority on the point. The more terms that are left open the greater the likelihood that there would be a finding that the parties did not intend to form a contract.

1. *Open Term—Price*

The general rule is that the parties to an agreement can conclude a contract for sale even if there is an open price term.[291] Prior Iowa law was reluctant to form a contract where there was not some arithmetical certainty to allow the determination of the price.[292] The open price is validated and dependent upon the parties dealing in good faith—no price can be fixed in bad faith.[293]

If there is no intention to be bound until a price term has been fixed then the parties have no contract until the price is fixed.

Should the contract fail due to the lack of definiteness in a price term then (a) the buyer must return any goods he has received or, if he cannot return them, he must pay for them. The price in this case would be the reasonable price for the delivered goods at the time and place for their delivery. The Code specifies that "their reasonable price" not *the* reasonable price of the goods will be paid,[294] and (b) the seller must, upon return of the goods, refund any monies paid on account.[295]

If the parties do intend that a contract be concluded even if no price has been settled then the price is to be fixed in the following manner: (a) The price is the reasonable at the time of delivery where the parties cannot agree as to price,[296] or (b) if the parties are silent as to price then a reasonable price at the time for delivery will be the price,[297] or (c) if the parties or standards are to determine the price and it is not so determined[298] then the price will be a reasonable one at the time for delivery.[299]

If the parties agree that price is to be fixed by some means other than by them and one of them is at fault for the price not being fixed then the innocent party may: (a) fix a reasonable price[300] or (b) treat the contract as con-

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The proper disposition of this case ought to have been on other than Article 2 grounds. However, Iowa Code Comment, IOWA CODE ANN. § 554.2105 (1967), would permit the use of Article 2 by analogy to those cases which are based on a sale and are not provided for elsewhere in the Code. *Contra, In re* Carter's Claim, 390 Pa. 365, 134 A.2d 908 (1957) (corporate stock not proper subject of sale). *Accord,* in a case arising out of Pennsylvania Co., Wilmington Trust Co. v. Coulter, 41 Del. Ch. 548, 200 A.2d 441 (1964), the court affirmed, once more, the Chancellor's decision.

291 IOWA CODE § 554.2305 (1966).
292 Kelley v. Creston Buick Sales Co., 239 Iowa 1236, 34 N.W.2d 598 (1948).
293 IOWA CODE § 554.2305(2) (1966).
294 *Id.* § 554.2305(4) (emphasis added).
295 *Id.*
296 *Id.* § 554.2305(1)(b).
297 *Id.* § 554.2305(1)(a).
298 *E.g.,* price determined by the market or by an agent.
299 IOWA CODE § 554.2305(1)(c) (1966).
300 *Id.* § 554.2305(3).

celled.[301]

If the price is to be fixed by a subsequent agreement by the parties to the contract and one of them refuses to enter into negotiations to set the price, then the defaulting party has breached his duty and the nonbreaching party has his remedies.[302]

The point is clear—if the parties wish to be bound regardless of whether the price term is settled they should so state, clearly and unequivocally. If they do not wish to be bound this too should be stated as affirmatively as the wish to be bound. As to what is a reasonable price—the triers of the fact will probably make that determination.[303]

2. *Open Term—Delivery*[304]

The time, place and manner of delivery may be left open by the parties to an agreement. Of course, they may make an agreement providing the terms of delivery which would be controlling. For the most part the Code has not changed prior Iowa law but has added the concept of delivery by document of title.[305]

Where the place of delivery is not agreed upon in the contract but the goods are identified to the contract and known to be at some place other than the situs of the contract then the situs of the goods is the place of delivery. The normal place of delivery is the seller's place of business or, in some situations, his residence.[306]

Delivery may be made by documents of title.[307] Where customary banking channels are used to deliver the documents of title[308] care must be exercised because other sections of the Code may be applicable.[309]

Where the time of delivery is not set up by agreement then the goods and title documents must be delivered within a reasonable time.[310] As to what is a reasonable time the courts are not in agreement. What is not a reasonable time is more easily answered. As one court has held, performance within a reasonable time has obviously expired after four years.[311] To illustrate the difficulty reasonableness can raise suppose an agreement is concluded with the agreement remaining silent as to time of performance. A failure to make an offer of per-

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301 *Id.*
302 The remedies are found in *Id.* § 554.2701 et seq.
303 Mickelian Sales Co. v. Nathan Gilbert & Sons, 4 UCC Rep. Serv. 852 (U.S. Dept. Agriculture 1967).
304 IOWA CODE § 554.2308 (1966).
305 Iowa Code Comment, IOWA CODE ANN. § 554.2308 (1966).
306 IOWA CODE § 554.2308 (a), (b) and 554.2501 (1966).
307 *Id.* § 554.2308(c).
308 *Id.* § 554.1201(15) defines document of title to include almost any document that evidences possession or a right to possession to a whole or part of an identified mass of goods.
309 *E.g.*, where the bank has issued a letter of credit on the documents then Article 5 may be applicable.
310 IOWA CODE § 554.2309(1) (1966).
311 Frick v. Rad-O-Lite, Inc., 46 Erie Co. Legal J. 98 (County Ct. Pa. 1960).

formance within a reasonable time may be a breach of contract. However, the requirement that the parties act in good faith may force the complaining party to give notice before he invokes the remedies available to him. Given the same hypothetical, if performance were tendered immediately, the Code does not answer whether that is reasonable. Under some market conditions, *e.g.*, a wildly fluctuating market, immediately would be reasonable. When there is a premature tender of performance the receiving party would be in a position to suspect that a breach is in the making and should call for assurances of performance[312] if he deems himself insecure in expecting the performance of the contract. As to what conduct may give rise to insecurity which permits a demand for assurances of performance the comments to § 554.2609 list: (a) a buyer who falls behind in his account, (b) the delivery of defective parts, (c) letting franchises to more than one franchisee where one was allowed, or (d) the shipment of nonconforming goods.[313] As to what amounts to adequate performance is somewhat subjective but a guaranty by way of surety of Mr. Millionaire Gotbucks ought to be adequate.[314]

Where the manner of delivery is not agreed upon the goods must be delivered in a single delivery and the whole price is payable on that delivery.[315] As a general rule in sales law the "obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract."[316] Involved in § 554.2310 are special rights of the seller to ship under a reservation and its corollary the buyer's right to inspect. Because the Code has established payment for goods concomitant with delivery the presumption is that unless otherwise agreed upon all transactions are cash transactions. If there is to be delivery or payment in installments it must be so stated in the agreement since no right is conferred by the Code to do either. Of course, there may arise physical limitations or other reasons for not making delivery or payment in a single installment as for example the buyer's facilities cannot handle a single installment delivery. Where delivery is made in installments when a single installment delivery was expected the question that arises is whether or not payment can be made in installments? The Code's answer[317] is that if price can be apportioned the seller can demand payment for each lot delivered.

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312 Assurances of performance under the Code are not markedly different from prior Iowa law. *See* Mihills Mfg. Co. v. Day Bros., 50 Iowa 250 (1878). The Code's uniqueness is in its preparation for an anticipatory breach or repudiation. Basically IOWA CODE § 554.2609 (1966) empowers the party expecting performance to make a demand on the performing party for assurances that the contract will be performed as agreed upon. Any time there is a belief that the contract will not be performed and the demandant has reasonable grounds for his insecurity he can ask for assurances of performance. What is reasonable is determined by the facts surrounding the reason for the demand. Such demands must be made in good faith defined § 554.1201(19); § 554.1203, and where merchants are involved reasonableness will be determined by commercial standard [§ 554.2609(2)] and good faith [§ 554.2103(1)(b)].

313 Iowa Code Comment 3, IOWA CODE ANN. § 554.2609 (1967).

314 Of course what is adequate or satisfactory is not going to be the same in every instance. *See Id.* Comment 4, § 554.2609.

315 IOWA CODE § 554.2307 (1966).

316 *Id.* § 554.2301.

317 *Id.* § 554.2307.

3. Open *Term—Payment*

"Unless otherwise agreed upon tender of payment is a condition to the seller's duty to tender and complete any delivery."[318] The condition here would be concurrent, unless otherwise agreed upon. Where the goods are tendered by the seller, the buyer is not required to pay until he inspects the goods. His inspection may be made at any reasonable place and time and in any reasonable way.[319] Payment becomes due at the time the buyer is to receive the goods even where place of shipment and delivery are the same.[320] If delivery is to be by lot[321] then payment is due by the lot delivered.[322] If the agreement of the parties included a credit period that period runs from the time the goods are shipped. Any delay in shipment or post-dating the invoice will delay the beginning of the credit period by that period of delay in shipping or post-dating of the invoice.[323] Where the title documents are tendered by the seller, the buyer, unless the contract is to the contra, may await delivery of the goods and may inspect before payment.[324] Of course, if the agreement calls for delivery by documents of title then delivery is made when the proper documents are turned over to the buyer.[325]

When the place of payment is not agreed upon and the goods are tendered by the seller, then payment is due at the place of delivery even if the place of delivery and shipment are the same.[326] Where documents of title are to be delivered then the place of payment is where the documents are to be delivered regardless of where the goods are to be received.[327]

Unless agreed upon to the contra, payment may be by any means or in any manner current in business usage. If legal tender is demanded then the seller must give sufficient time for the buyer to procure it.[328] The Code rule as to payment by any means current in business usage overcomes the "forced breach" situations which were common under the Uniform Sales Act and at common law. The presumption that all transactions were cash transactions, unless stated to the contra in the agreement, was the prevailing Iowa law.[329] Under such a presumption a seller who was to deliver goods at a certain price would wait till the last possible minute, long after the buyer could be expected to have cash on hand, to deliver the goods. And so, the buyer not having cash, seller would refuse his

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318 *Id.* § 554.2511.
319 *Id.* § 554.2513(1).
320 *Id.* §§ 554.2310(a) and 554.2103(1)(c).
321 *Id.* § 554.2105(5). A lot is a single article or a parcel which is the subject matter of a sale. The Code distinguishes "lot" from "commercial unit" [§ 554.2105 (6)] which is a whole unit, the division of which would impair the value of the whole.
322 *Id.* § 554.2307.
323 *Id.* § 554.2310(d).
324 *Id.* § 554.2310(b); § 554.2513(3).
325 *Id.* § 554.2310(c).
326 *Id.* § 554.2310(a); § 554.2103(1)(c).
327 *Id.* § 554.2310(c).
328 *Id.* § 554.2511(2).
329 Hughes v. Keokuk & Hamilton Bridge Co., 204 Iowa 1229, 210 N.W. 451 (1924).

Frauds, (5) creates special rules applicable to merchants, (6) tells when a modification that fails may act as a waiver, and (7) deals with a retraction or attempted retraction of a waiver. This section is unique and the best way to protect a client is to put all modifications in writing whether or not it is required by the Code.

Each section of Article 2 may have some effect on another section. While § 554.2209 speaks at some length about modification as an overt act of speech or agreement § 554.2208(3),[349] a totally new concept to Iowa law, may effect a modification merely by a course of performance. When one party accepts or acquiesces in a course of performance, different than the course of performance that is agreed upon, it is *prima facie* evidence that the course of performance taken is the one agreed upon, if the non-objecting party had knowledge of the change in performance and had opportunity to object to it.[350] Repeated changes are necessary in determination of a course of performance.[351] Now, what may constitute a course of performance sufficient to indicate the agreement of the parties may also show that there has been a modification of the contract.

A waiver is retractable.[352] However, if a course of performance is taken to mean a change in the agreement it must bear the burden of repeated occasions of change to prove that there was a change in the original. If there is not a change by repeated occasions, then there might be an interpretation that the acquiescing party has agreed to a change in the agreement. In any event the one party may wind up with a contract not originally agreed upon.

How the contract is to be construed is not the subject of chance but rather poor contract draftsmenship which casts doubt as to the meaning of the agreement. The practical construction of any agreement is as follows: (1) look to the express terms of the agreement;[353] (2) where the words are not clear, look to course of performance;[354] (3) where neither of the first two are clear, look to the course of dealing between the parties;[355] (4) in the event that all other determinants fail, look to the usage of the trade wherein the parties are dealing.[356]

1. *Formality of Modification*

No matter with what formality[357] a contract was entered into that contract

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[349] Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

[350] IOWA CODE § 554.2208(1) (1966).

[351] Iowa Code Comment 4, IOWA CODE ANN. § 554.2208 (1967).

[352] IOWA CODE § 554.2209(5) (1966).

[353] *Id.* § 554.2208(2).

[354] *Id.*

[355] *Id.* Course of dealing is defined in § 554.1205(1).

[356] *Id.* § 554.2208(2). Usage of the trade is defined in § 554.1205(2).

[357] *E.g.*, assume that a contract was put under seal. In some states a seal affixed

can orally be modified, as long as the modification was made in good faith,[358] is not unconscionable,[359] and does not fall within the Statute of Frauds.[360]

An oral modification of the contract is not fatal to the modification or to the contract if the modification removes the contract from the Statute of Frauds.[361] In the following cases the Statute is satisfied whether or not the modification or contract is within or without the Statute: (a) Payment[362] made and accepted. In this case tender of payment is not payment. Whether or not an advance is payment is not resolved.[363] Payment can take many forms, *e.g.*, cash, check, goods and so on. (b) Delivery, actual or constructive, made and accepted will remove the oral modification from the operation of the Statute.[364] (c) Judicial admission[365] by the party against whom the contract is being enforced either in court[366] or pleadings or testimony or otherwise[367] will suffice to take the modification out of the Code.[368] (d) Specially made goods are not within the operable rules of the Statute.[369]

The parties may agree that no modification or rescission can be made unless it be done in a signed writing.[370] There is no answer as to what constitutes the "signed agreement" and "signed writing" as used in § 554.2209(2) as yet. The general rule of thumb is that where the Code is silent, apply local law.[371] Where this agreement appears on a form used by a merchant then the other party must specifically sign that part of the form that prohibits oral modifications in order for the prohibition to be effective.[372]

2. *Modification and Truth-in-Lending*

Regulation Z[373] of the Consumer Credit Protection Act[374] makes a most

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to a contract acted to extend the statute of limitations on that conract. Prior Iowa law, Ch. 537, § 537.1 [1962] IOWA CODE provides, as does IOWA CODE § 554.2203 (1966), that the seal has no legal effect.

358 *Id.* § 554.2103 defines it as far as merchants are concerned and § 554.1201(19) defines it generally but even together the mandate is that the parties will act honestly; and if a merchant not only honestly but within the bounds of reasonable commercial standards. The comments to § 554.2209, number 2, indicate that modifications must be made in good faith but, "the effective use of bad faith to escape performance on the original contract is barred." In any event good faith modification is the only escape mechanism permissible under the Code.

359 Because of the ubiquitousness of § 554.2302 it is felt that all transactions, no matter at what time conducted, are subject to the scrutiny of the court.

360 *Id.* § 554.2209(3).

361 *Id.* § 554.2209(3); § 554.2201.

362 *Id.* § 554.2201(3)(c).

363 *See* Annot., 170 A.L.R. 245 (1947).

364 *See* S. WILLISTON, SALES § 92 (rev. ed. 1948).

365 Admissions are either judicial or extrajudicial. *See* WIGMORE, EVIDENCE 1058 (3rd ed. 1940).

366 This is to say that the admission is of record or is made in connection with the judicial proceeding.

367 No one is sure of the meaning "or otherwise".

368 IOWA CODE § 554.2201(3)(b) (1966).

369 *Id.* § 554.2201(3)(a).

370 *Id.* § 554.2209(2).

371 *Id.* § 554.1103.

372 *Id.* § 554.2209(2).

373 12 C.F.R. 226 (1969).

374 82 Stat. 146 (1968).

drastic change in the Code. Under the Code no change in contract terms can take place without prior notice, unless otherwise agreed upon. Under the Regulation[375] such a change is permitted. It would be extremely wise to check this Regulation and the Consumer Credit Protection Act before drafting, defending or advising on contract matters. The Regulation states:

> *Change in terms.* If any change is to be made in terms of an open end credit account plan previously disclosed to the customer, the creditor shall mail or deliver to the customer written disclosure of such proposed change not less than 30 days prior to the effective date of such change or 30 days prior to the beginning of the billing cycle within which such change will become effective, whichever is the earlier date. . . .
> [This regulation applies to] persons who in the ordinary course of business regularly extend, or offer to extend, or arrange, or offer to arrange, for the extension of consumer credit as defined in paragraph (k) of § 226.2[376]

However, the Regulation effects both creditors, who must comply with it, and debtors, who are the recipients of that compliance.

The point of these sections, above quoted, is that the Code's rules as to modification of a contract are changed when one of the parties to an agreement is a creditor as defined in Regulation Z. Unless the agreement between the parties is a cash transaction it is difficult to understand how the Regulation would not be applicable to every lender and borrower. If the transaction is one in which credit is extended by one who fits the Regulation then should he wish to modify credit terms he may do so *unilaterally* as long as he gives the debtor thirty days notice that a change is going to be made.

As if the Regulation was not unique enough with its provision for unilateral modification of an existing contract, albeit that it covers credit terms only, the Uniform Consumer Credit Code makes a similar provision, but arranges for a longer period of warning, calling for a thrice repeated notice concerning a forthcoming change. However, the UCCC's mandate, is that the change will work no excesses on the debtor.[377] Of course, the UCCC is not law in Iowa; but, it does have many excellent concepts that make it worthy of consideration for inclusion in our laws.[378]

The insertion of a clause that prohibits unilateral modification, or permits unilateral modification only with sufficient notice (a time you agree to) and only where no additional expenses are incurred, is the satisfactory protective measure.

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375 12 C.F.R. 226.7(e) (1969).
376 12 C.F.R. 226.1(a) (1969).
377 UNIFORM COMMERCIAL CREDIT CODE §§ 2.416, 3.408.
378 *E.g., Id.* § 2.501 provides a buyer who has been "high pressure" into buying goods he does not want with the right to cancel a home solicitation sale until midnight of the third business day after the day on which he signed the agreement to buy the goods.

3. *Rescission*

The right to rescind a contract under the Code[379] falls into two categories: (1) rescission where the parties are merchants, and (2) all other situations, *e.g.*, merchant—nonmerchant and nonmerchant—nonmerchant transactions.

a. *As Between Merchants.*[380] A signed agreement, which prohibits rescission of that agreement unless there is another signed agreement waiving the nonrescission clause cannot be rescinded unless such a provision was incorporated in a form supplied by a merchant, and the provision in the form was separately signed by the other party.

b. *All Other Situations.* The basic rule is that a nonrescission clause which prohibits rescission except by another writing voiding that agreement cannot be modified or rescinded.[381]

The Code uses the word rescission in two other significant sections, both dealing with remedies one of which never had an Iowa counterpart[382] and the other had changed existing Iowa law.[383] In § 554.2720 the drafters are protecting the unwise users of words like "cancellation" or "rescission" the use of which could result in a loss of accrued rights. Expressions such as "rescission" or "cancellation" or any similar terms are not to be construed as a discharge in any form of any claim in damages for an antecedent breach. If the such words are used, the most practical construction would be to treat those words as relieving the parties from further performance of their contracts. Unless the renunciation of a right is clearly the intent of the parties there is no renunciation. The problem is solved by stating either that there is a "reservation of prior rights" or the action taken is "without reservation of rights." Section 554.2721 changes Iowa law which did not permit a fraud action to follow a rescission.[384] The comments to this section indicate that the narrow, common law limitations must give way to the more modern and mercantile remedies. Thus the remedies for fraud under this section are made to coincide with the remedies available for nonfraudulent breach. Thus a claim for rescission is not a bar to an inconsistent claim or remedy. Whether or not rescission is a necessary prerequisite to an action for fraud is not clear. In one case under this section the court held that where a vendee discovers the vendor's fraud one of the vendee's remedies is to rescind the contract and another is to affirm the contract and sue for damages for the fraud.[385]

One buyer agreed to have a siding peddler, who made certain warranties on the durability and other promises, put artificial stone on his house. The buyer, after the work had been done, discovered a fraud and sued to rescind

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379 IOWA CODE § 554.2209(2) (1966).
380 *Id.* § 554.2104(3).
381 *Id.* § 554.2209(2).
382 *Id.* § 554.2720.
383 *Id.* § 554.2721.
384 Reinertson v. Struthers, 201 Iowa 1186, 207 N.W. 247 (1926) (*dictum*).
385 Wade Ford, Inc. v. Perrin, 111 Ga. App. 794, 143 S.E.2d 420 (1965).

the contract, recover the purchase price, and to recover punitive damages and out-of-pocket expenses. The Court in *Marks v. Lehigh Brickface, Inc.*[386] held that the plaintiff need not return, nor offer to return the artificial stone because it would be useless to do so. Further, the buyer has a lien on the stone until the purchase price was refunded. An interesting aspect of this case is that an Article 2 remedy, rescission, was permitted on what was essentially a real property transaction (once the stone was affixed to the house there was no economical way to return the party to status quo). A more interesting aspect would be to consider this same case in light of truth in lending.

4. *Rescission in Truth-in-Lending*

The right to rescind a contract is granted in two places in the consumer protection act.[387] Both titles are similarly worded but it is Regulation Z that is most flexible of the two. "Except as otherwise provided in this section, in the case of any credit transaction in which a security interest is or will be retained or acquired in any real property . . . the customer shall have the right to rescind that transaction until midnight of the third business day[388] following the date of consummation of that transaction. . . ."[389] The Court, in the *Marks* case above, would have been able to rely on the new law and solve their problem with its use. The buyer would have notified the seller, in writing, of the rescission within three days and within ten days of receipt of the notice the creditor must take appropriate action to return buyer's money, property, and take steps to terminate the security interest. The buyer will, upon the performance of the creditor, return the property or its reasonable value if impracticable. If the creditor does nothing after the buyer's tender, which tender comes only *after* the creditor returns the buyer's money, for ten days, the buyer is vested with title and has no obligation to pay for it.

The Act is worded slightly different in the first few lines stating, "except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property. . . ."[390] The Regulation omits the word "consumer" and adds "or will be retained". This omission and addition leaves the reader with the possibility that Regulation Z is applicable to any credit transaction while the Act pertains only to real property transactions. The Regulation could be read: (1) in the case of any credit transaction in which a security interest is or will be retained. . ., the customer shall have the right, (2) in the case of any credit transaction in which a security interest is acquired in any real prop-

386 73 Dauphin County R. 244 (C.P. Pa. 1959).
387 Consumer Credit Protection Act § 125 (1968); Regulation Z, 12 C.F.R. 226.9 (1969).
388 Which is any day except Sunday, New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving and Christmas.
389 12 C.F.R. 226.9(a) (1969).
390 Consumer Credit Protection Act § 125(a) (1968).

erty. . ., the customer shall have the right. In either event the *Marks* type case today could be resolved by the use of these new titles provided of course the plaintiff met the requirements the titles set forth.

5. *Parol Evidence Rule*[391]

Directly in issue in every modification is the parol evidence rule's most threatening question whether the written agreement is the final expression of the parties. Generally, the rule protects the parties from a false assertion of an oral modification by preventing the admission of any modification unless it is in writing. The rule under the Code attempts to prevent only false assertions. It does not invalidate the subsequent modification of an agreement by stating the prerequisites for a subsequent modification. There is no need for this rule except for the fact that either the party, or parties, have discovered that the written agreement does not contain all the terms, or they have changed their minds thus creating a new agreement which tends to result in litigation.

Basically the rule is not only a rule of evidence but also a rule of substantive law that delimits the law of contract.[392] The Code is silent as to whether it includes oral contracts. Nor does it mention the effect of fraud, duress, accident, mistake, or ambiguity. Therefore the pre-Code law of Iowa will apply in these instances and evidence as to the happening of these items should be admitted in evidence.

Where there is a writing which the parties agree is a final expression (integration of all terms is an expression often used) the parol or extrinsic evidence rule states that the writing may not be contradicted by evidence of any prior agreement, or contemporaneous oral agreement. The writing may be explained or supplemented by a course of dealing between the parties, usage of the trade, or by evidence of consistent additional terms. However, parol evidence will not be allowed if the court should find the writing to be the complete and exclusive integration of the parties.[393]

Iowa has generally tended to permit course of dealing and usage of the trade to aid in interpreting written agreements.[394] However, where the words of the contract are so clear as to admit no other interpretation, then usage of the trade may not explain, contradict or supplement the agreement.[395]

Where the written contract is the complete integration of all terms between the parties pre-Code cases permitted no proof of parol modifications which change the plain words on the contract.[396] But if the contract was not the final integration of the bargaining of the parties then parol proof was admitted to

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391 For a master's explanation of the pre-Code rule *see* Corbin, *Parol Evidence Rule*, 53 YALE L.J. 603 (1944).
392 Fogelson v. Rackfay Constr. Co., 300 N.Y. 334, 90 N.E.2d 881 (1950).
393 IOWA CODE § 554.2202 (1966).
394 Winn v. Rudy-Patrick Seed Co., 249 Iowa 43, 86 N.W.2d 678 (1957).
395 Paramount Pictures v. Maxon, 226 Iowa 308, 284 N.W. 119 (1939).
396 Blecher v. Schmidt, 211 Iowa 1063, 235 N.W. 34 (1931).

complete the agreement.[397]

The Code is for the most part in accord with prior Iowa law insofar as course of dealing and usage of trade is concerned. As to § 554.2202(b) the pre-Code Iowa cases are hard to reconcile and so it is not obvious whether the Code changes pre-Code law.[398] The obvious safeguard would be to insert in any contract for sale a clause that states, "this contract is a complete record of all the terms to which the parties agreed and reduced to writing."

6. *Waiver*

The basic rule is that any claim arising out of an alleged breach can be discharged, in whole or in part, without consideration, by a written waiver, signed and delivered by the aggrieved party.[399] Should there be an attempted modification or rescission which fails to meet the requirements of a "no modification or rescission except by writing" clause, or a modification that brings the modified agreement within the operation of the Statute of Frauds, then that attempt may operate as a waiver to the contract duties.[400] As to an attempted modification or rescission leading to a waiver it is relevant to show that conduct[401] or course of performance may effect the waiver. "The fact that the parties continued to transact small items of business and to try to work out their accounts does not constitute a waiver of the breach."[402] The waiving party has the right to retract his waiver. The retracting party must give the other party reasonable notice that the waiver is being retracted[403] or that "strict performance will be required of any term waived."[404] Under certain circumstances there is no right to retract a waiver.[405]

A waiver may only be retracted once made. A unilateral retraction of any sort other than a waiver may amount to a repudiation and therefore is a cancellation of that contract where the repudiation makes performance of the contract impossible.[406]

A waiver may be retracted only after reasonable[407] notice[408] is givven to

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397 Fudge v. Kelley, 171 Iowa 422, 152 N.W. 39 (1915).

398 *See* Iowa Code Comment, IOWA CODE ANN. § 554.2202 (1967).

399 IOWA CODE § 554.1107 (1966). This section changes Iowa law. *See* note 342 *supra*.

400 *Id.* § 554.2209(4). This section is intended to prevent a modification by a writing clause from limiting actual conduct of the parties in respect to their agreement. Iowa Code Comment 4, IOWA CODE ANN. § 554.2209 (1967).

401 C.I.T. Corp. v. Jonnet, 419 Pa. 435, 214 A.2d 620 (1965).

402 Willred Co. v. Westmoreland Metal Mfg. Co., 200 F. Supp. 55, 58 (E.D. Pa. 1959).

403 IOWA CODE § 554.2209(5) (1966). This section does not directly say this but it is certainly inferential from the language.

404 *Id.* § 554.2209(5).

405 Pre-Code Iowa law in accord, Terry v. American Ins. Co., 202 Iowa 1291, 211 N.W. 716 (1925).

406 *See* IOWA CODE §§ 554.2610, 554.2611.

407 Defined, *Id.* § 554.1204. Even though this section speaks of reasonable in relation to time it is not outside the scope of the definition to include reasonable notice as being a corollary of reasonable time and by analogy apply the definition of time to notice.

408 *Id.* § 554.1201(26).

the nonwaiving party that the contract is to be performed in strict compliance with the terms as originally agreed upon.

In accord[409] with prior Iowa law, a retraction that "would be unjust in view of a material change of position in reliance on the waiver"[410] is not permitted. Presumably, the principle of estoppel will end here because the Code's language does not admit an interpretation other than, perhaps, the Restatement of Contracts § 297 (position materially changed). Restatement of Contracts § 90 states that estoppel will operate where there has been a promise, which the promisor could reasonably expect to cause the promisee to change his position in a definite and substantial manner, and which does in fact cause the promisee to change his position in a definite and substantial manner, and is justifiedly relied on and injustice could be prevented only by enforcement of the promise. Waiver is equivalent to estoppel in this section of the Code.[411] To determine whether or not there is an estoppel in the making it is relevant to determine whether there is a consideration[412] given for the promise. If not, it is questionable whether the facts, or Iowa law, will support an application of estoppel.

G. *Statute of Frauds*[413]

The sales Statute of Frauds applies only to those goods contemplated by Article 2 of the Code. Should a problem arise in the sale of securities[414] or in secured transactions[415] or in personal property not otherwise covered in the Code,[416] then the Article 2 Statute of Frauds is not applicable.

Since 1677 when the Statute was first enacted by the Parliament of England[417] and its subsequent introduction into America it has a history of producing more litigation than any other concept in commercial law. It was not long before the commercial world discovered the problems under the Statute of Frauds. Decisions concerning the Statute of Frauds turn on every conceivable question of fact and stretch of the imagination.

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409 Terry v. American Ins. Co., 202 Iowa 1291, 211 N.W. 716 (1925).

410 IOWA CODE § 554.2209(5) (1966).

411 *See* 1 HAWKLAND, *supra* note 31, at 162.

412 Estoppel is a substitute for consideration; and if consideration is paid then estoppel will not lie because the waiver will have been supported by a paid for privilege.

413 IOWA CODE § 554.2201 (1966).

414 *Id.* § 554.8319 is the sale of securities Statute of Frauds.

415 *Id.* § 554.9203 is the secured transaction equivalent of the Statute of Frauds.

416 *Id.* § 554.1206. This Statute of Frauds is a catch-all for the remnants of the pre-Code Statute. Included herein are choses in action, *e.g.* an oral promise of a corporate officer regarding a bank deposit [*see* Annot., 95 A.L.R. 1137 (1935)], general intangibles, *see* § 554.9106, and transactions excluded by § 554.9104.

A most unique concept, not comparable to any pre-Code Iowa law, this section says that an oral promise for the sale of personalty not within some other section of the Code can be enforced, as a claim or defense *without* a writing up to $5000.

In order that the contract be enforceable for any amount above $5000 there must be some writing that shows a contract for sale, at a stated price which reasonably identifies the subject matter of the contract and is signed by the party against whom it is to be enforced or his authorized agent, has been made.

417 28 Car. II, c. 3, § 17 (1677).

The drafters of the Code, in order to lessen the chaos, promote commercial fluidity and make the commercial rules more simple and understandable, emphasize that formality in contract requirements often do harm by establishing stringent rules that even the most meticulous attorney will violate. However, they also note that some formal requisites must be used in order to prevent fraud, unfair advantage or dishonesty.

The examples of inequities in the old Statute are numerous. At common law, if a confirmatory memorandum was mailed after an oral agreement between the parties and accurately confirmed the oral conversation, reciting the terms and was signed by the party to be charged, the recipient of the memorandum could merely sit on that writing watching the market fluctuate and act accordingly to his benefit. The receiving party could prevent the Statute from being used as a defense to his action but the sending party could not use the Statute to protect himself.[418] The Code probably corrects this abuse in that the Statute can operate against the receiving party as well as the sending party.[419]

There is a tactic known to commercial practice which the Code does not correct. That is the situation of the receipt of a phony confirmatory memorandum whereon reference is made to a nonexistent agreement. If the buyer objects the sender cannot invoke the Statute and is free to prove the existence of a contract to the court. If the buyer does not object, then he can invoke the Statute and the fraudulent seller has no cause of action. There it is best not to take affirmative action on the rejection of the memorandum.

With the exceptions of the changes allowing greater latitude in the content of a writing, employing a stricter rule concerning the nonresellable goods, the deletion of earnest money as an exception to the Statute, and a new concept concerning merchants, the Code carries forward the same principles first enunciated in 1677 and later in the Uniform Sales Act.

1. *Contracts of Sale Subject to the Statute of Frauds*

Any contract for the sale of goods and which goods are sold for a price of $500 or more is subject to the Statute.[420] Among the contracts which fall within the Statute are those for present or future[421] sale of goods, contracts to sell future goods,[422] contracts of barter where the bartered goods are personalty,[423]

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418 HAWKLAND, *supra* note 264, at 28.
419 IOWA CODE § 554.2201(1) (1966).
420 *Id.*
421 *Id.* § 554.2106(1). Defined in this section is a "contract for sale" (which includes a present or future sale), "sale" (passing of title for a price), and a "present sale" (a sale accomplished by the making of the contract).
422 *Id.* § 554.2105(2).
423 *Id.* § 554.2304. The Code permits payment for goods to be made in "money, goods, realty or otherwise." Because barter involves payment with something other than money, and because the Code states that such payment comes under its rules it is felt that barter contracts can fall within the Statute. Of course, the value of the goods is a question of fact and a matter of proof.

contracts for services,[424] contracts to buy back or accept returned goods,[425] and contracts to bequeath personal goods.[426]

If the agreement between the parties is not within the Statute but is subsequently modified, then if the agreement, as modified, qualifies it within the Statute. That agreement must satisfy the formalities of the Statute regardless of the fact that the original agreement was not within the confines of that section.[427]

2. *Formalities Required by the Statute of Frauds*

When pleading the Statute, the face of the complaint should contain a statement that the Statute has either been complied with or that the complaint represents an exception to it. The Statute is an affirmative defense and if it is not pled it is not said. The single greatest significance of the Statute is that it is a shield against sharp commercial practices.[428]

There must be a writing which must show that the parties have entered into a contract of sale. One court[429] has said that a writing, in order to satisfy the Statute, need only show a reasonable basis for believing that oral evidence rests on a real transaction. The writing must identify the parties by name and not merely buyer and seller. However, the status of buyer or seller need not be shown.

The writing must specify the quantity involved in the transaction. Under the Uniform Sales Act the writing had to reflect the complete integration of the terms of the parties. Under the Code the writing need not contain all the material terms.[430] A requirement of quantity must, a *fortiori,* include a kind. A contract that merely reflects a quantity may be proved by trade customs, usage, course of dealing and other commercial practices.

Other than a quantity term no other term need be stated. It would be far wiser to reduce to writing all material terms to print. Unstated terms are open to interpretation by parol evidence, usage of the trade and so forth. A mistake in any term, except quantity, is correctible by parol evidence.[431]

The form the writing is to take is not enunciated. Section 554.1201(46) defines a writing to include printing, typing or other intentional reduction to tangible form. If it is assumed that a contract does exist, then a writing may include such documents as telegrams, commercial paper, wills, public records,

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424 *Id.* § 554.2304. Because the Code states that payment may be made for goods in money "or otherwise" then the fact that services are payment for goods puts the contract within the Statute if there is a value of $500 or more.

425 *Id.* § 554.2326(4). This concept is new to Iowa.

426 *See In re* Estate of Joseph Karr, 235 Iowa 351, 16 N.W.2d 634 (1944). *Id.* § 554.2201(3)(c).

427 IOWA CODE § 554.2209(3) (1966).

428 Arcuri v. Weiss, 198 Pa. Super. 506, 184 A.2d 24 (1962).

429 Harry Rubin & Sons v. Consolidated Pipe Co., 396 Pa. 506, 153 A.2d 472 (1959).

430 Iowa Code Comment 1, IOWA CODE ANN. § 554.2201 (1967).

431 IOWA CODE § 554.2201(1) (1966).

and any other material to which words may be written no matter what form it takes.

As between merchants, a written confirmation of a sales contract which is sufficient against the sender will also be sufficient to satisfy the statute against the merchant receiving it, if the merchant receiving the written confirmation had reason to know of its content and failed to give written notice of objection to its content within ten days after it was received.[432]

Except as between merchants, any writing must be signed by the party or his authorized agent against whom the contract is being enforced. Signing includes any authentication, form of signature, mark, stamp or identification made with the intent to authenticate the writing.[433] The authentication is merely referable to the writing and is not intended that it satisfy the Statute.

As between merchants, silence may amount to signing. The Code makes no distinctions as to parties except merchants.[434] As to merchants a new set of rules apply in which he may be deemed to be bound whether or not he actually signed the memorandum. For example, if merchant B sends a written confirmation, which recites their telephone agreements to merchant S then the silence of merchant S to that confirmation is construed to mean that he has signed the confirmation and the defense of the Statute is eliminated. In order for this rule to apply it must be shown; that both parties are merchants, the silent merchant received the confirmation within a reasonable[435] time after the transaction was entered into, the confirmation itself satisfies the Statute, the silent merchant knows or has reason to know the contents of the confirmation and that the silent merchant failed to give written notice to the sender of an objection (within ten days after the receipt of the confirmation) to the written confirmation.[436] Silence as well as affirmative action has legal consequence. Any written confirmation of an oral agreement between merchants should be answered quickly, openly, honestly, and concisely either accepting or rejecting the confirmation.[437]

3. *Contracts of Sale not Subject to the Statute of Frauds*

When the circumstances of the transaction or conduct of the parties is one of the certain exceptions mentioned in the Code a writing is not required to meet the Statute's requirements.[438] The exceptions are special manufacturing, admissions, and part payment or part acceptance.

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[432] *Id.* § 554.2201(2).

[433] *Id.* § 554.1201(39). Seals, *Id.* § 554.2203, have no efficacy under the Code; but, a seal on a contract may have the effect of a signature under § 554.1201(39).

[434] Defined, *Id.* § 554.2104(1).

[435] Defined, *Id.* § 554.1204(2).

[436] *Id.* § 554.2201(2).

[437] *Accord,* Lamis v. Des Moines Elevator & Grain Co., 210 Iowa 1069, 229 N.W. 756 (1930). *But see* Ch. 554.1 § 554.4(1) [1962] IOWA CODE wherein the confirmation to have force had to be signed by the party to be charged.

[438] IOWA CODE § 554.2201(3) (1966). "A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . ."

Paragraph "a" of § 2-201(3) speaks of agreements where the seller has begun performance on the manufacture of goods to be specially made for the buyer.

> [I]f the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement.[439]

A special manufacture situation occurs when the seller is not able to do the manufacturing himself but procures another to do it for him and then sells, pursuant to the agreement, those specially manufactured goods to the vendee. The Uniform Sales Act[440] required that the vendor be the manufacturer of the goods or the contract would be considered one for the sale of labor and services and thus void by virtue of the Statute of frauds.[441] The Code eliminates this effect but requires, in order for the contract to be enforceable; (1) that the goods be unsuitable for sale to others in the ordinary course of the seller's business, (2) no notice of repudiation be given to the seller, (3) there by circumstances reasonably indicating that the goods are for the buyer, and (4) the manufacturer made a substantial beginning of manufacturing or commitments for the manufacturing of the goods.[442] In other words, the seller, by making such an agreement, has placed himself in such a vulnerable position that without performance by the buyer he would be materially injured.

An unscrupulous buyer might exploit this exception to his advantage. The fact that goods have been or are being specially manufactured for an alleged vendee does not necessarily indicate the existence of a contract between the parties. The vendor could find himself at the mercy or whim of the vendee as to performance. Since the natural, easy, and now safe device for the satisfaction of the Statute is to send a letter of confirmation, special manufacturers may no longer need the special treatment given them by this section.

Section 2-201(3)(b) is entirely new and provides a last resort to the party seeking enforcement of the agreement. If the party against whom enforcement is sought admits in his pleadings, testimony or otherwise in court that a contract for sale was made, the contract is not enforceable under this provision beyond the quantity of goods admitted.

The purpose of this section is clearly exemplified by the comment 7 to section 2-201(3)(b):

> If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no

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439 *Id.*

440 Ch. 554, § 554.4(2) [1962] IOWA CODE.
The provisions of this section apply to every such contract of sale, . . . but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

441 Bennett v. Nye, 4 Greene 410 (Iowa 1854).

442 IOWA CODE § 554.2201(3)(a) (1966).

> additional writing is necessary for protection against fraud. Under this section it is no longer possible to admit the contract in court and still treat the statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.[443]

The problem, arising in this area revolve around the meaning of the words "otherwise in court." A strict construction of these words, which are no where defined in the Code, would require the admission to be made in proceedings before trial.[444] The comment seems to indicate by the words "statement before the court" that admissions before any court proceedings formal enough to insure its accuracy, should be sufficient to remove the bar of the Statute. Such proceedings would probably include conferences held before trial in the presence of a judge or court commissioner.

A second problem that arises is whether the party against whom enforcement of the agreement is sought can be compelled on the witness stand, under the threat of perjury, to admit that there was an agreement. This problem has in no way been answered by either the comments to the Code or through litigation. One authority in Iowa,[445] suggests that the general intent of such section is to prohibit compelling a party to admit that a contract was made. On the other hand, another noted authority[446] feels that plaintiff should try to compel admission. It may or may not be the intent of this section to compel defendant to make the admission, because, any waiver of the Statute of Frauds should be exercised voluntarily and not under the threat of perjury; but, on the other hand, the Statute of Frauds is not designed to protect sharp commercial practices.

Section 554.2201(3)(c) is designed to enforce the contract with relation to those goods to which part performance or part payment has been rendered. An otherwise unenforceable contract becomes enforceable with respect to goods for which payment has been made and accepted or which has been received and accepted.

This exception changes in part the old sales law which provided that acceptance of,[447] or payment for, a portion of [448] the goods constituted a sufficient act to make the entire contract enforceable. Under the Code, a partial performance places liability on the vendee for only those goods for which partial performance was conducted thereto. If the buyer accepts part of the goods, the seller is entitled to an apportionable part of the contract price.[449] Such a partial enforcement of the oral agreement requires proof of the whole

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443 Comment 7, UNIFORM COMMERCIAL CODE § 2-201.
444 1 HAWKLAND, *supra* note 33, at 30. *In re* Particle Reduction Corp., 5 UCC Rep. Serv. 242 (E.D. Pa. 1968).
445 Hudson, *Contracts in Iowa Revisited—1966*, 15 DRAKE L. REV. 61, 77 (1966).
446 1 HAWKLAND, *supra* note 33, at 30.
447 Hess v. Dicks, 181 Iowa 342, 164 N.W. 639 (1917).
448 Faukman v. Farley Mfg. Co., 78 Iowa 679, 43 N.W. 612 (1889).
449 Iowa Code Comment 2, IOWA CODE ANN. § 554.2201 (1967).

agreement. Were it otherwise, it would not be possible to make a just apportionment of the price to the goods delivered.[450]

The Code[451] subverts the purpose of part performance limitation by allowing into evidence terms relating to a greater quantity of[452] goods than that actually paid for or received. In effect, this would allow a party to provide a larger quantity basis on which to achieve a so called just apportionment. It remains to be seen whether the courts will follow this comment.

Whether or not the Statute becomes the most superlitigated section of the Code, as it was under the Sales Act, remains to be seen. It is unlikely to replace unconscionability for that honor.

IV. Performance

A. *General Obligations to Perform for Both Seller and Buyer*

1. *Good Faith*

Each party to the contract must act in good faith[453] because "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[454] The good faith requirement eliminates the necessity for meticulously detailing every right, duty or obligation of the contracting parties and it puts a built-in flexibility into the contract that accommodates changes in times or circumstances. Thus, merely because a term is omitted there is no excuse for the contract duties not to be performed in good faith.

The parties may not agree to reduce or discard the obligations of good faith, diligent performance, reasonableness and care in performing the contract terms. However, if the parties wish, they may establish a standard of conduct by which their performance will be measured, as long as the standard is not unreasonable.[455]

2. *Cooperation*

In situations where the parties to the agreement do not provide or inadequately provide for the particulars of performance or leave the particulars of performance to be specified by a party to the contract, the party must not only perform his duty in good faith but also has the duty to cooperate in getting his agreement performed.[456]

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450 Comment, *The UCC's Statute of Frauds for Sales of Goods,* 11 Vill. L. Rev. 370, 379 (1966).

451 Iowa Code Comment 2, Iowa Code Ann. § 554.2201 (1967).

452 Comments, *Changes Wrought in the Statute of Frauds By the UCC,* 48 Marq. L. Rev. 571, 580 (1965).

453 Iowa Code § 554.1201(19) (1966).

454 *Id.* § 554.1203.

455 *Id.* § 554.1102(3). *See* Iowa Code Comment 3 to this section. It would be wise to incorporate into any agreement which does set up standards of conduct the provisions of § 554.1205 (course of dealing and usage of trade).

456 *Id.* § 554.2311. Subsection (1) of this section generally is in accord with prior

If one party's co-operation is needed to help the other party perform and that one party does not reasonably[457] give it, then the party seeking the cooperation in addition to all his other remedies may: (1) be excused from any resulting liability arising from the concomitant delay in his own performance,[458] (2) demand that the uncooperative party assure him that performance will be seasonably and properly begun,[459] and (3) proceed either with the contract performance in a reasonable manner[460] or after the time for his own performance has expired, treat the uncooperative party as having breached the contract by failure to deliver or accept the goods.[461] Further, where the provisions of section 554.2311 do not apply, (*e.g.*, where a contingency arose that makes performance impracticable or impossible) then section 554.2614[462] (substituted performance) will modify section 554.2311. Under the substituted performance section, if there is a happening of some circumstance which prevents performance as called for in the contract, the party that is to co-operate is under a duty to proffer or demand (as the case may be) substitute performance as a condition to claiming rights against the noncooperating party.

It would be a wise precaution to consider or modify section 554.2614 when drafting a contract. An affirmative statement as to what substituted service is acceptable to the client, whether or not there is to be any allowance for such service (a liquidated damage clause), or even a statement that performance of the terms as agreed upon is the essence of the contract, prevents a Code interpretation forming the contract in the event that a happening does prevent performance as provided for in the contract.

3. *Proper Performance*

Both parties are entitled to expect that the other party will properly perform his contractual obligation.[463] If one party has reasonable grounds to believe that he is not going to get the performance of contract terms as agreed upon, that party may make a written demand on the other party for assurances that the contract will be performed as agreed.[464] The effect of the demand by the insecure party is to give advance knowledge of a forthcoming breach so that with such knowledge he may take steps to lessen his injury or mitigate

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Iowa law, *see* Balcom v. Serenado Mfg. Co., 193 Iowa 668, 185 N.W. 997 (1922); subsection (2) is new to Iowa jurisprudence; subsection (3) is more restrictive than prior Iowa law, Smith v. Watson, 88 Iowa 73, 55 N.W. 68 (1893).

457 Defined, *Id.* § 554.1204.

458 *Id.* § 554.2311(3)(a).

459 *Id.* § 554.2609. This section's mandate is that due performance is expected. Failure to receive that performance as due creates an insecurity for which the aggrieved party may, in writing, demand that he be assured that performance will be given. Until such assurances are given the aggrieved party may suspend his performance. Failure to give such assurance within a reasonable time, not to exceed thirty days, [subsection (4)] is a repudiation of the contract.

460 *Id.* § 554.2311(3)(b).

461 *Id.*

462 New to Iowa.

463 IOWA CODE § 554.2609(1) (1966).

464 *Id.*

damages. If no assurance of performance is given upon demand or even if assurances are given and they are inadequate, then the asking party can treat their contract as having been repudiated.[465]

As between merchants,[466] what are reasonable grounds to determine insecurity is dictated by commercial standards of usage of the trade.[467] Even these commercial standards[468] must include good faith conduct on the part of the parties to the transaction.

Several circumstances may arise which may be properly considered in determining whether the asking party has reasonable grounds to consider himself insecure.

a. *Nature of the Contract.* The nature of the agreement between the parties is to secure performance of contract terms, not to grant right to assurances of performance. However, between contract date and performance date any number of commercial happenings can threaten a party's ability to deliver or to pay, therefore, the other party at the time of the threatened loss needs protection. It is at this time of potential loss that § 554.2609 allows either party to not only protect himself, but also to protect the other party by mitigating potential loss. Whether or not the party seeking assurances is entitled to them depends on the nature of the contract. For example, any buyer who has received a report of a shipment of defective goods by his seller is entitled to demand assurances of performance under § 554.2609. Yet, if the shipment was made C.I.F. or by any similar arrangement where documents of title are to be delivered then the buyer cannot evade his duty of payment when he receives the documents of title by asking for assurances of performance.[469]

The best test to use in these situations would be: *if the asking party would be excused from making payment under our Code or in contract law then he can be said to have reasonable grounds for insecurity.*

b. *Conduct.* Where prior conduct has given rise to requests for assurance of performance, and that conduct has been repeated, such actions will give rise to a request for assurances. Supposedly a reputation may do the same thing; for example, a known corner-cutter.[470]

c. *Failure of Other Contract Performances.* If there is more than one contract with the same party, (*e.g.* an open account) and one of those performances is not met for which an assurance of performance is sought then the seeking party may deem himself insecure as to the other contracts.[471]

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465 *Id.* § 554.2609(4). Since what constitutes "insecurity" or "assurances" under § 554.2609 is vague it is good contract draftsmanship to include in your contract such standards or criteria as you feel necessary to define and protect your client from "what is" arguments concerning insecurity or assurances of performance.

466 Defined *Id.* § 554.2104(3).

467 *Id.* § 554.1205 says usage of the trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify the expectation that the transaction will be performed in a manner consistent with that observance.

468 *Id.* § 554.2609(2).

469 Iowa Code Comments, IOWA CODE ANN. § 554.2609 (1967).

470 *Id.* Comment 4, § 554.2609.

471 *Id.* Comment 3, § 554.2609.

d. *Change in Business Practices.* Where a party has always dealt in cash and now makes a credit extension request such request can be grounds for insecurity leading to a demand for assurances of performance.[472] Suppose that S has dealt with B for sometime wherein each transaction was invoiced "30 day terms, 3% cash 10 days".[473] As long as S and B have dealt with each other and B has never used the "30 day terms" but had always picked up the "3% cash 10 days", the sudden use of the credit period can create an insecurity upon which S may demand assurances.

e. *Assignment and Delegation.* Prior Iowa law is in substantial agreement with most of the provision of § 554.2210.[474] However, there is a new subsection that states that any party may treat "any assignment which delegates performance as creating reasonable grounds for insecurity"[475] upon which assurances of performance may be sought. Thus any party to a sales contract may treat any delegation of the performance obligations of the other party as creating an insecurity for which the insecure party may seek from the delegee adequate assurance under § 554.2609.[476]

B. *Seller's Obligation to Deliver Contract Goods*

The basic rule of the law of sales is that the seller has "[t]he obligation . . . to transfer and deliver [the subject matter of the agreement of the parties] . . . in accordance with the contract."[477] A delivery conforming in every respect to the contract of sale as to the quantity, quality, price, description, time and place of delivery was known as the Rule of Perfect Tender.[478] There

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[472] Corn Products Ref. Co. v. Fasola, 94 N.J.L. 181, 109 A. 505 (Ct. Err. & App. 1920).

[473] To give you an idea of the pervasiveness of the Truth-in-Lending Act this typical business statement falls within Regulation Z, 12 C.F.R. 226.8(10) (1969). The Regulation treats the discount term as the money that is to be financed and the difference between the two figures, the discount sum and the amount payable on the outside date, as the finance charge for the money loaned. Because there is a loan the seller, S, must then make disclosure and calculate the annual percentage rate for B, his customer. To illustrate what this means in money:

> For example, a sum of $100 payable in 30 days with a 3% discount if paid within 10 days constitutes a finance charge of $3 on a balance of $97 for 20 days. The $3 must be disclosed as a "finance charge."
>
> The "annual percentage rate" [also called APR] must also be disclosed, using that expression. The annual percentage rate is the finance charge ($3) divided by the amount financed ($97) which quotient is then divided by the number of days to which applicable (20) and multiplied by 365 for an annual percentage rate. The example comes out this way: $3÷97=.3092÷20=.00154x365=56.25% to the nearest quarter of 1%.

W. WILLIER & F. HART, CONSUMER CREDIT HANDBOOK § 92B.98, at 257 (1969). A discount rate of interest can be a large rate and if applied to our utility bills, exempt under the Act, Regulation Z, 12 C.F.R. 226.3(b)(d), puts an incredible burden on the user; but, in any event, in sales transactions it is a good item of income.

[474] Iowa Code Comment, IOWA CODE ANN. § 554.2210 (1967).

[475] IOWA CODE § 554.2210(5) (1966).

[476] *Id.* § 554.2609.

[477] *Id.* § 554.2301. Prior Iowa law was in accord. *See* Ch. 554, § 554.42 [1962] IOWA CODE.

[478] *See generally* Filley v. Pope, 115 U.S. 213 (1885); Pitt v. Mallalieu, 85 Cal. App. 2d 77, 192 P.2d 24 (1948).

is no need to cite authorities for the proposition that gained notoriety by judges seeking to prevent harshness in contract suits who apply the substantial performance doctrine to contract law. The strongest indictment against the substantial performance doctrine was made by Judge Learned Hand when he held that, "[t]here is no room in commercial contracts for the doctrine of substantial performance."[479] The Code's statement that the obligation to perform must be in "accordance with the contract"[480] must be looked at closely. The word contract is not to be literally interpreted to mean the particular contract in dispute. Rather, " 'Contract' means the total legal obligation which results from the parties' agreement as affected by this chapter and any other applicable rules of law."[481] The Code means the totality of all rights, duties and obligations flowing from the *agreement* of the parties which are legally enforceable either because the Code says it is enforceable or other rules of law are applicable to make it so enforceable.[482] The agreement is not the contract in the literal sense created by § 554.1201(11). In the Code sense, "[a]greement means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. . . ."[483]

1. *Effect of Tender of Delivery*

The seller's tender of delivery is a concurrent condition (or reciprocal condition) to the buyer's duty to accept the goods delivered and, unless otherwise agreed upon,[484] to pay for the accepted goods according to the contract.[485] "According to the contract" contemplates immediate payment, payment at the end of a credit term, or the agreed upon term, or any payment term agreed upon.

Simply stated the seller expects to be paid when he delivers his goods and the buyer's duty is to accept that delivery and pay for the goods.[486] Because the Uniform Sales Act and the common law did not protect either party from sharp dealings the Code's language is a major step forward in fostering honest commercial transactions. To illustrate how the Code corrects some abuses which arose because of the concurrent payment and delivery doctrines look to forced breaches.

Suppose that the seller is unhappy with a deal he made for tomatoes with the buyer. Seller's price is $1.00 per bushel and due to market fluctuation he could now get $3.00 per bushel. Delivery was called for in nine days. Be-

479 Mitsubishi Goshi Kaisha v. J. Aron & Co., 16 F.2d 185, 186 (2d Cir. 1926).
480 IOWA CODE § 554.2301 (1966).
481 *Id.* § 554.1201(11).
482 Prior Iowa law in accord. Port Huron Mach. Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843 (1929).
483 IOWA CODE § 554.1201(3) (1966).
484 This qualifying phrase takes into account the possibility of a credit term or advance payment having been agreed upon.
485 IOWA CODE § 554.2301 (1966).
486 *Id.* § 554.2511(1).

cause all payments must be made in cash the seller would wait to the last minute to deliver, expecting the buyer to lack cash. The buyer would offer to pay by check and seller would refuse, thus forcing a breach by the buyer. If the buyer expected this trick he would wait with cash in hand. The seller would then refuse to give a receipt and, of course, the buyer would not turn over his cash without a receipt, hence, a breach by the buyer. If the market price dropped to 25¢ per bushel, the buyer would reject the goods on even the most minor of nonconformities. As a consequence "forced breaches" and "surprise rejections" made performance of contracts an adventure.[487]

The Code § 554.1205 will force the issuance of a receipt. The surprise rejection is prevented by § 554.2508 which gives the seller an opportunity to cure his nonconforming delivery. And § 554.2511(2) permits payment in any form that is current in the ordinary course of business.

2. *Unspecified Manner of Delivery*

The Code[488] specifically lists those elements essential to a valid tender of delivery of the goods by the seller. Sections 554.2503 and 554.2504 (shipment by seller) should be read together whenever a tender of delivery problem is being considered. Section 554.2503 covers destination contracts,[489] while § 554.2504 deals specifically with shipment contracts.[490] Care should be taken in the sales contract to specify what manner of delivery is required of tre seller (delivery by documents of title, delivery without moving the goods, delivery to a destination, or delivery by the rules of § 554.2504). Meticulous detail in contract draftsmanship will control the delivery method.

The tender of delivery spoken of in section 554.2503[491] makes no reference to due or proper or plain tender. Yet official comments number 1 speaks of due and proper tender as being synonymous, and meaning that the ability to fully perform by the tendering party is followed by a performance if the other party is also ready to perform. Tender, when not used in this context means that a tender is made as if in fulfillment of the contract even though a defect may exist. The best that can be said of the tender problem is that the performance of the tendering party has made theother party subject to default or breach of the contract if he does not proceed with the contract as created.

Tender should always be controlled by the parties to the agreement. If there is no agreement set down in the contract then there is a presumption that § 554.2503 controls the tender problem.[492] This section clearly sets down the

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487 HAWKLAND, *supra* note 264, at 120.

488 IOWA CODE § 554.2503 (1966).

489 A contract for the delivery of goods at the place at which the goods are to be located.

490 A contract wherein no place of delivery is specified but the seller is authorized to ship the goods. Where he ships to is made known to him by the buyer. If not, he will deliver to the buyer's place of business.

491 *See* Iowa Code Comment for prior Iowa law.

492 Modern commercial practices favor this construction and so this rule of construction should be followed. *See* IOWA CODE §§ 554.1205 and 554.2208 (1966).

mechanics of tender.[493]

Often the goods are in the hands of a bailee.[494] Delivery is agreed upon by the seller and buyer without moving the goods. In the event that the parties agree to a delivery without moving the goods the seller must make his tender of delivery in one of the following ways:

i. *Negotiable document of title.*[495] The seller may deliver a negotiable document of title covering the subject matter of the transaction.[496] This form of tender is aboslute and refusal by the bailee to honor the document defeats the tender.

ii. *Acknowledgment.* The seller may get an acknowledgment of the buyer's right to the goods.[497] Refusal to honor this tender defeats the tender.

iii. *Nonnegotiable document of title.* The tender of a nonnegotiable document of title is not an absolute form of delivery and may be rejected or nullified by the buyer.[498] If the buyer does reject or nullify the tender, he must seasonably notify the seller of his rejection or nullification.

iv. *Order to bailee to deliver.* The seller may give the bailee a written order to deliver the goods to the buyer.[499] This direction is sufficient tender unless the buyer seasonably objects. Refusal by the bailee to honor the document or to obey the direction defeats the tender. Where the bailee refuses to comply with the order of the seller in the third and fourth ways of tendering delivery, the risk of loss remains on the seller. The risk of loss remains on the seller should the buyer refuse, reject or nullify the tender of delivery in the last two methods as long as the notice of refusal, rejection or nullification was seasonably made to the seller. Thus if the buyer fails to so notify the seller it would appear as if the risk of loss is on the buyer.[500]

v. *Delivery of documents.*[501] Where the contract calls for delivery of a title document the tender of delivery is made when the seller has tendered all the documents called for and in their correct form.[502] Should an accompanying draft be dishonored the tender of delivery by document of title is deemed rejected or unaccepted.[503]

3. *Tender of Delivery of Goods in Shipment Contracts*

A shipment contract requires or allows the seller to deliver goods by

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493 *Id.* § 554.2503(1)(a)(b).
494 *Id.* § 554.7102(1)(a). A bailee is someone who by some form of document of title acknowledges possession of goods [and ownership in another] and contracts to deliver those goods.
495 Defined, *Id.* § 554.1201(15).
496 *Id.* § 554.2503(4)(a).
497 *Id.*
498 *Id.* § 554.2503(4)(b).
499 *Id.*
500 *Id.*
501 *Id.* § 554.2503(5)(a).
502 Bills of lading are an exception to this rule. *See Id.* § 554.2323(2).
503 *Id.* § 554.2503(5)(a). *See* Iowa Code Comment 7, IOWA CODE ANN. § 554.2503 (1967). For a discussion of these sections *see* HAWKLAND, *supra* note 264.

sending them to the buyer. But it does not require that the delivery be made to a particular destination.[504] Under prior law the only distinction between a shipment and destination contract concerned who was to pay the cost of transportation. If the agreement contained a cost of transportation clause, it was a destination contract; if not, it was a shipment contract. It was and is important to know the distinction because the rights and duties of the parties differ under each. The Uniform Sales Act was a little ambiguous but the Code is much clearer as to those rights and duties.

Where a seller is required or authorized to ship goods, but not to a particular destination, the seller has three obligations:

a. *Proper Contract of Carriage.* A proper contract of carriage is one that is made with reasonable regard for the goods.[505] A proper contract for carriage would require, for example, that perishable commodities be shipped in a refrigerated vehicle. Improper carriage is a ground for rejection of the tender but only if the buyer suffered a material loss or a delay.[506]

b. *Notice of Shipment.* The seller must promptly notify the buyer that a shipment has been made. Failure to notify the buyer of the shipment is a ground for the rejection of the tender if he suffers a material loss or delay.

c. *Form of Documents.* The buyer is entitled to any documents in any form that would enable him to gain possession of the goods shipped.[507] The mechanics of tendering documents is generally a function of the agreement; but, where the parties are silent the Code provides for the tender of documents.[508]

4. *Shipping Terms*

Where specific shipping terms are used then the mechanics of the tender will depend on the terms. Further, these specific shipping terms set up duties that must be performed by one of the parties; who bears the risk of loss, who pays the expenses, how the goods are to be shipped and what documents must be tendered.[509]

5. *Substituted Performance*[510]

Often some supervening event makes the agreed upon manner of delivery commercially impracticable or even impossible. If neither party is at fault in making the contract tender of delivery impossible, then the seller must use a commercially reasonable substitute, if available. Thus, substituted performance will be made; (a) if the agreed upon manner of delivery is impractical or

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504 *Id.* § 554.2504. Prior Iowa law in accord. *See* Ch. 554, § 554.47 [1962] IOWA CODE.

505 *Id.* §§ 554.2503(2), 554.2504.

506 Presumably the delay is one coupled with a loss.

507 IOWA CODE § 554.2504(b) (1966).

508 *Id.* §§ 554.2503, 554.2504.

509 *Id.* §§ 554.2319-.2326 address themselves to the effect of special mercantile shipping terms, *e.g.*, F.O.B., F.A.S., C.I.F., C. & F. and so on, upon contracts of sale.

510 *Id.* § 554.2614.

(b) the agreed upon berthing, loading or unloading facilities fail or (c) an agreed upon type of carrier is not available.[511] Further, the seller must tender and the buyer must accept a commercially reasonable substitute performance. Section 554.2614(2) makes further distinctions in delivery methods where the supervening event is a foreign or domestic governmental regulation. There is no prior Iowa statute on substituted performance. This section must be read with § 554.2615.

Generally § 554.2615 deals with the excusing of a seller for the non-delivery, delayed delivery or partial delivery due to a reason other than a casualty to the identified goods or a failure of the agreed upon means of delivery.[512] This section excuses the seller's duty of delivery because of an unforeseen supervening circumstance not within the contemplation of the parties at the time of the making of the contract. The excuse is referred to as a failure of presupposed conditions. Under basic contract law the performance is excused because of the impossibility of performing.[513] Because of the casualty to the goods the seller may avoid performance.[514]

C. *Buyer's Rights, Obligations and Duties*

Every contract for the sale of goods has a payment obligation attached to it. Unless otherwise agreed upon the tender of payment[515] is a condition to the seller's duty to tender and complete any delivery.[516] The buyer has a right to inspect the goods tendered before his payment obligation must be fulfilled, unless the agreement is to the contra.[517] The inspection meant here is not the one which identifies the goods to the agreement but, rather, the inspection referred to is the one made to insure that the goods delivered are those agreed upon. Where the seller demands legal tender the buyer has a reasonable time to obtain it for the seller.[518] Where the seller is authorized or required to ship the goods on credit, the credit period runs from the day of shipment. If the seller post-dates the invoice or delays its sending, the buyer has an increase in time accordingly on his credit period.[519]

Unless otherwise agreed upon the buyer must pay at the place at which he is to receive the goods even if the place of shipment and delivery are the same.[520]

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511 *Id.*

512 *See* Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) wherein the court held that the Cape of Good Hope is a commercially reasonable alternate route for the delivery of goods which delivery was prevented by the closing of the Suez Canal. The alternate route must be tendered as substituted performance.

513 L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 164 (2d ed. 1965).

514 IOWA CODE § 554.2613 (1966).

515 *Id.* § 554.2507(1).

516 *Id.* § 554.2511(1).

517 *Id.* §§ 554.2310(b), 554.2513(1).

518 *Id.* § 554.2511(s). Conforms to prior Iowa law. *See* Watson v. Chapman, 244 Iowa 56, 55 N.W.2d 555 (1954).

519 *Id.* § 554.2310(d). No comparable prior Iowa statute.

520 *Id.* § 554.2310(a). Prior Iowa law generally in accord *but see* Rudy-Patrick Seed Co. v. Roseman, 234 Iowa 597, 13 N.W.2d 347 (1944).

The buyer can tender payment to the seller in the agreed upon medium or in legal tender or in any manner current in the ordinary course of business. Where the buyer does not offer to pay in legal tender and the contract is silent as to the medium of payment the seller may demand payment in legal tender; but, the seller must give the buyer a reasonable time to procure the money needed.[521]

Of course where the buyer pays by check the payment is conditional to the check being honored. If the check is dishonored, the payment is not made and the buyer has breached his contract.[522] However, presentment for certification at drawer's brank is an acceptance for payment of the goods by that check and the buyer is discharged.[523] The Code speaks only of a check. Whether or not a negotiable instrument other than a check is subject to these rules has not yet been answered.

1. *Modification of the Buyer's Payment Obligation*

If the buyer cannot perform his payment obligation because the seller has failed to cooperate as required by the agreement then the seller's failure may excuse the buyer from his obligations to pay. If in an agreement between S and B the medium of payment is to be chosen by S who refuses to tell B anything, B at this[524] time is not ogligated to pay and can revoke his acceptance.

2. *Buyer's Right to Inspect*

The Code is silent as to the creation of the right to inspect.[525] However, the right arises inferentially from the affirmative duty to accept and pay for the goods. "Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to ay for them."[526] The Code's mandates of fairness, reasonableness and good faith (and common sense) would tell anyone that no buyer will accept goods and pay for them without first inspecting them. Because the buyer's payment is conditioned on the seller's proper tender, only an inspection will affirm a proper tender which will give rise to the buyer's obligation to pay.

The general rule is that the right to inspect before payment rests in the buyer on most occasions. The buyer always has the right to inspect the goods before he has made an acceptance of those goods delivered to him.[527] "Inspection, therefore, always comes before the buyer is obligated to perform

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521 *Id.* § 554.2511(2).
522 *Id.* §§ 554.2511(3), 554.2802.
523 *Id.* § 554.3411(1). By the way the discharge would also discharge all indorsees of that check.
524 *Id.* § 554.2311(3)(b). Do not forget to read this section with § 554.2614, under the provisions of which section the parties must demand or proffer substituted performance before a claim of any right can be made—in proper circumstances of course—against the non-cooperating party.
525 The Code merely states that the buyer has the right to inspect. *Id.* § 554.2513.
526 *Id.* § 554.2508(1).
527 *Id.* § 554.2606(1)(b).

completely, and usually it comes before he is obligated to perform at all."[528] The expenses of an inspection and on the buyer. However, if the buyer, upon inspection finds the goods nonconforming and rejects them he may recover his expenses from the seller.[529] The reason for recovery of expenses for a nonconforming shipment is simply that the buyer contracted for a conforming shipment. To make him pay the expenses on improper tender, not his doing, violates the spirit of sales law and the Code. The improper tender of nonconforming goods which was rightfully rejected by the buyer upon inspection entitles the buyer to reasonable expenses incurred in inspecting the goods.[530]

In the following situations the buyer has no right of inspection before he has made payment: (a) in any delivery where the delivery term is C.O.D. or on other like term confers,[531] or (b) where the buyer is to pay on the presentation of documents of title and a proper presentation has been made.[532]

Wherever the seller is authorized to ship the goods to a buyer that buyer is entitled to make an inspection at any reasonable time, even after the goods have arrived. The inspection may be made in any place as long as the choice of location is reasonable. The inspection may be made in any reasonable manner.[533]

3. *Buyer's Acceptance*

Section 554.2301 states that the obligation of the buyer is to accept and pay for the goods in the manner specified in the contract's terms. Upon the making of a proper tender of delivery, the seller having no other parts to perform, the buyer must accept the conforming delivery.[534] Under the rules of the Code the buyer is required to accept substituted performance.[535]

Whenever the seller tenders an improper or nonconforming shipment of goods the buyer has several options open to him. The buyer can accept the improper tender,[536] or he can reject the improper tender,[537] or he can accept any commercial unit or units and reject the rest. Where goods have suffered a casualty without fault of either party in a "no arrival, no sale" contract the buyer may accept those goods, deduct the cost of the casualty and in so doing has no further claims against the seller.[538]

Section 554.2606[539] relates to what conduct will amount to an acceptance.

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528 1 HAWKLAND, *supra* note 31, at 185.
529 *Id.* § 554.2573(2). In accord with prior Iowa law.
530 *Id.* § 554.2715. Supported by case law. *See* Reed v. Bunger, 255 Iowa 322, 122 N.W.2d 290 (1963).
531 *Id.* § 554.2513(3)(a).
532 *Id.* § 554.2513(3)(b).
533 *Id.* § 554.2513(1).
534 *Id.* § 554.2507(1).
535 *Id.* § 554.2614.
536 *Id.* § 554.2601(b).
537 *Id.* § 554.2601(a).
538 *Id.* § 554.2613. For prior Iowa law *see* Iowa Code Comment. *See also Id.* § 554.2324.
539 For the most part prior Iowa law is in accord.

Obviously an express acceptance is an acceptance. However, the buyer can accept by failing or wrongfully rejecting the goods, or act in a manner that is inconsistent with the ownership of the goods.

Any manifestation by the buyer of his intention to accept those goods identified to the contract and which goods conform to the contract terms is an acceptance.

Oddly, payment is not mentioned as a form of acceptance. However, Comment 3 to § 554.2606 states, "payment made after tender is always one circumstance tending to signify acceptance of the goods but in itself can never be more than one circumstance and is not conclusive." The circumstance of payment may be rebutted by showing payment before acceptance was required by the contract, or that payment was for a nonconforming shipment and the buyer is revoking his acceptance,[540] or payment is against documents and the goods are nonconforming or any number of possibilities may arise to show that the buyer had to pay but such payment is not acceptance.[541]

V. Breach and Remedies

A. *What Constitutes a Breach*

Williston lists approximately 45-50 methods that are directly involved with the breach of a contract.[542] There are almost that many in sales law, yet, the Code does not clearly state what does constitute a breach of sales contract. Thus, we must look to the individual sections of Article 2 to determine what is a breach[543] or can be determined to be a breach.[544]

Without getting too simplistic it is necessary to know what a contract is before determining what constitutes a breach. We all know that an agreement is a promise, or a set of promises, or performance, or set of performances, the combinations of which determines whether they are bilateral, unilateral and so on. A breach is the failure, without legal excuse, to perform the promise, set of promises, or performance, or set of performances or any combination thereof. The Restatement broadens these concepts slightly by calling a breach the "non-performance of any contractual duty of immediate performance."[545]

In spite of the multiplicity of breach methods this Article will deal briefly

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[540] Iowa Code § 554.2608 (1966).

[541] One court stated flatly that goods received and paid for are accepted goods. General Foods Corp. v. Bittinger Co., 77 York Legal Rec. 543, 31 Pa. D. & C.2d 282 (C.P. York Co. 1963).

[542] S. Williston, Selections from Williston's Treatise on the Law of Contracts 964-65 (student ed. 1938).

[543] A definite statement as to what constitutes a breach is found in Iowa Code § 554.2311(3)(b) (1966) wherein a party who is supposed to act, as in specifying the method of delivery, but fails to act and as a result of the failure to act he has breached his contract.

[544] A failure to particularize a defect that is a breach may lead to a waiver of that defect being used to establish that a breach occurred. Iowa Code § 554.2605(1) (1966).

[545] Restatement of Contracts § 312 (1932).

with seven instances that most often will give rise to conduct which is characterized as a breach.

B. *Instances that Give Rise to a Breach*

1. *Nonconformity*

Part 6 of Article 2 is entitled "Breach, Repudiation and Excuse". While nonconformity is not called a breach it is obvious that the drafters meant that it could be so considered. No buyer is required to accept a delivery of goods that is patently not in conformity with the agreed upon goods. In fact, § 554.2601 permits the buyer to reject or accept in whole or in part those nonconforming goods. If he has accepted the shipment expecting that the nonconformity will be seasonably cured and it has not been cured, or he was induced by the seller's allowances to accept, or the nonconformity was difficult to discover, that buyer has the right to revoke[546] his acceptance.[547] Revocation of acceptance must be made in a reasonable time. It is not effective until the buyer has notified[548] the seller that it has been invoked; and must be made before there is any substantial change in the condition of the good which was not caused by the defect.[549] The sale criteria built into the revocation is that the non-conformity substantially impairs the value of goods. Thus a minor defect that can be corrected easily is not a substantial impairment that may lead to revocation of acceptance.[550] The test of what is substantial is not a question of value impairment in terms of money, but is the effect the defect has on the intended user of the purchased materials.[551] While this test may be a subjective one, the elements of good faith, unconscionable conduct, and fair play will control the issue of whether or not the buyer has the right to revoke his acceptance. There mere fact that a buyer suspects a defect does not give rise to the immediacy of his notice to the seller or for that matter that a defect does exist.[552] The fact that the buyer has accepted the goods precludes the ability to "unaccept" them.[553] If the buyer falls within § 554.2608 he has the right to revoke his acceptance and pursue his remedies.

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546 Revocation of acceptance is a modern commercial term and performs the same function as common law rescission without the problem of rescission. Rescission at common law was an election of remedy and no damages could be obtained if a rescission was granted. Under the Code revocation acts as rescission but is not an election of remedy and so damages may be had as well as "rescission". *See* Iowa Code Comment, IOWA CODE ANN. § 554.2608 (1967).

547 IOWA CODE § 554.2608 (1966).

548 *Id.* § 554.1201(26).

549 *Id.* § 554.2608(2).

550 Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 224 A.2d 782 (1966).

551 Campbell v. Pollock, 221 A.2d 615 (R.I. 1965).

552 Lanners v. Whitney, 247 Ore. 223, 428 P.2d 398 (1967).

553 Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965). This case is one of the most unique in the annals of horse trading legerdemain—two horse dealers made a mistake of fact: that a gelding was a stallion. The whole case was made funnier to me by the question from the Bench to the attorney asking counselor whether or not he knew what a gelding was. The earthy response is not printable here and was stricken from the record, but it broke up the court, and the other attorneys and the audience.

The buyer who has revoked his acceptance of the goods may plead, prove and recover damages even though he has asked for inconsistent remedies. "Under the Code, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him, and the two remedies are nonalternative in character."[554]

If the rightfully rejecting buyer has paid some part of the purchase price he has a security interest in the goods he has rejected which are in his possession or control. He also has a security interest (really a lien) for any expenses incurred in the inspection, receipt, transportation, care and custody. He may hold these goods as if he were an aggrieved seller[555] and resell them to recover those moneys spent for price or expenses.[556] The buyer's sale is the foreclosure of his lien and is permitted by the Code as long as he does so in a manner consistent with § 554.2706. He must account for any profit above the lien he has. This rule is not new to Iowa.[557]

If the seller became insolvent at the time of the receipt of the first installment on the price of the goods or becomes insolvent within ten days thereafter, the buyer's right to those goods are paramount to the trustee in bankruptcy as long as the buyer keeps good his tender for the unpaid portion of the price.[558] It is in a situation such as this that the Code rules as to the unimportance of title has effect, because the buyer's reclamation rights in the goods do not depend on his having title. However, to reclaim he must be a genuine buyer[559] and the insolvency of the seller must be present when the seller received his first payment, or within ten days thereof. In no event will he be a buyer if the goods are nonconforming. Whether his rights will be good as against a trustee in bankruptcy has not yet been tested. However, it seems in accord with the Code's[560] mandate that the good faith buyer will not be cut off by the trustee.

The buyer's right to damages are found in sections 554.2712-2715, and 554.2717 in which the buyer's duties are outlined before recovery is permitted. The buyer must[561] attempt to cover the seller's breach by purchasing substitute goods[562] conforming to the contract or sufficient to fill buyer's needs.[563] In view of the fact that § 554.2614 makes substitute performance mandatory in some situations it is difficult not to employ the same requirement to the

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554 Schneider v. Person, 34 Pa. D.&C.2d 10, 30 Lehigh L.J. 416, 2 Rep. Serv. 37, 40 (C.P. Pa. 1964).

555 IOWA CODE § 554.2706 (1966) defines aggrieved party in *Id.* § 554.1201(2) as one entitled to resort to a remedy.

556 *Id.* § 554.2711(3).

557 Ch. 554, § 554.70(5) [1962] IOWA CODE.

558 IOWA CODE § 554.2502 (1966). Generally, more specific, but in accord with prior Iowa law.

559 *See Id.* § 554.2501 as when he is a buyer.

560 *Id.* § 554.2402. No prior comparable law in Iowa.

561 The Code says "may" but it is believed that the potential award is or will be determined by whether or not the buyer actually did or did not make a bona fide attempt to cover.

562 *Id.* § 554.2712(1).

563 *Id.* § 554.2712. Generally in accord with prior Iowa law.

cover situations.

Damages ought to be sufficient remedy for any buyer in ordinary business transactions. However, where goods are unique the buyer wants specific performance. To this end the common law and the Code gave the buyer the right to recover specific unique goods.[564] The Code, unlike the common law, does not require that the goods be specific or ascertained. The mandate is that specific performance may be had where the goods are unique or "in other proper circumstances".[565]

2. *Tender of Delivery*

Any improper tender of delivery, *e.g.* an improper contract of carriage such as shipping on the Boll Weevil Airline, is an improper delivery and a breach of that contract. Any tender of delivery that does not conform in every respect to the contract is a breach of that contract.[566]

3. *Failure to Deliver*

The failure to deliver the goods contracted for is a breach of that contract.[567]

4. *Wrongful Rejection*

Where the buyer wrongfully rejects a proper tender his rejection is a breach of the contract.[568] Section 554.2703 is an index of seller's remedies in the event the buyer has breached the agreement. The seller's remedies are not exclusive and are cumulative. Whether or not one remedy bars another remedy is dependent entirely on the facts of the individual case and must be determined within the Code's mandate of liberally interpreting the code.[569]

5. *Payment*

If a buyer is to fulfill his payment obligation on or before delivery and he fails to do so that failure is a breach of contract.[570] The Code says that the buyer who "fails to make a payment due" has breached his contract. A payment due includes a refusal to pay, default in payment, dishonor of a check, non-acceptance of a draft and failure to furnish an agreed upon letter of credit.[571] Though not stated anywhere it is safe to assume that any default in any agreed upon medium of payment is a failure of payment due. A common occurrence in this problem is in the instance where a seller agrees to accept a

564 *Id.* § 554.2716.
565 *Id.* § 554.2716(1).
566 *Id.* § 554.2601.
567 *Id.* § 554.2711(1).
568 *Id.* § 554.2703.
569 *Id.* § 554.1106. Iowa law in accord.
570 *Id.* § 554.2703.
571 Iowa Code Comment 3, IOWA CODE ANN. § 554.2703 (1967).

check from buyer for his goods only to find that the bank will not honor buyer's check though there is sufficient funds because buyer is in bankruptcy. Buyer has the goods. To be determined in these cases is the type of sale involved. This was a cash sale conditioned upon honor of the check. The check having been dishonored the seller's rights are paramount to those of the trustee. Seller ought to be able to get his money; but, most assuredly, can reclaim his goods.[572] Were this a credit sale then the rights of the trustee would be superior to those of the seller.[573] The theory of the trustee having superior rights is that the seller's right to reclamation (§ 554.2702) is subject to a lien creditor and the trustee is a lien creditor (§ 554.9301 and § 70 of the Bankruptcy Act).

6. *Repudiation*[574]

Should either party repudiate[575] his obligations under the contract, that repudiation is a breach of that contract. Repudiation, of course, is applicable only to the executory portions of the contract. The Code has made the test of loss whether or not the loss of the performance will substantially impair the value of the contract to the nonrepudiating party. Such a test is subjective but is still a question of fact and over which subjectivity the obligation of good faith is imposed. Whether or not a repudiation may be retracted is determined by the action that the nonrepudiating party took upon learning of the repudiation.[576] If the nonrepudiating party has not cancelled or materially changed his position or shown that he considers the repudiation final then the repudiating may retract his repudiation. The retraction does nothing to the rights of the parties except to allow the aggrieved party to perform in accordance to the delay caused by the repudiation.[577] Of course, a repudiation followed by a retraction ought to be followed by a demand for assurances of performance under § 554.2609. Such a demand will help the nonrepudiating party make a determination as to the capabilities for performance of the repudiating party. If the aggrieved party is not satisfied then he may follow the option available to him under § 554.2610.

7. *Failure of Specifications of Performance*

In an open term contract wherein the particulars of performance are left

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572 *In re* Mart Co., 208 F. Supp. 309 (E.D. Pa. 1962).

573 *In re* Kravitz, 278 F.2d 820 (3d Cir. 1960). This case is odd in that the trustee prevailed over a defrauded (false financial statement) seller because the peculiarity of Pennsylvania law (before the Code) gave the lien creditor rights superior to all. At any rate the problems of Articles 2 and 9 are excellently described in, Kennedy, *The Trustee in Bankruptcy Under the UCC: Some Problems Suggested by Articles 2 and 9*, 14 RUTGERS L. REV. 518 (1960).

574 IOWA CODE § 554.2610 (1966).

575 Undefined in the Code; but, from the general tenor of the code repudiation is any statement or conduct by one that further performance is impossible or shows that further performance is useless. *See* § 554.2610, Comment 1.

576 IOWA CODE § 554.2611(1).

577 *Id.* § 554.2611(3).

open to be specified by one of the parties and that party fails to specify the other party may treat the failure to specify the particulars of performance as a breach.[578] An open payment term under § 554.2305 controls that open term but open performance terms are governed by § 554.2311. The specifying of the particulars in performance must be made in good faith and with commercial reasonableness.[579]

In the event that the agreement is silent as to which party shall do the specifying, the buyer shall specify those goods identified to the contract but the details as to shipment rest in the seller.[580]

C. *Remedies*

Assuming there is a breach, the remedies that flow therefrom will depend on the time in the performance that the breach occurred. The following charts[581] are the easiest way for an attorney to become acquainted with the rights, duties and obligations flowing between a breaching and a nonbreaching party at various stages of performance.

VI. Conclusion

Although this article is not the alpha and omega of sales law in Iowa, it does represent a complete picture of those areas that are recurrent problems in commercial transactions involving sales. Coverage of warranties is not included. An article almost as lengthy as this would be required to provide adequate coverage. Further, a good review of warranties has already been done in a prior law review treatment.[582]

On the whole, the changes under the Code are not so great that a lawyer must retrain but a careful examination of Article 2 is warranted. However, the material presented herein is somewhat unique to sales law, and it is hoped it will be helpful to the practicing attorney.

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578 *Id.* § 554.2311(3). Prior Iowa law not as specific as this subsection. *See* Smith v. Watson, 88 Iowa 73, 55 N.W. 68 (1893).

579 *Id.* § 554.2311(1).

580 *Id.* § 554.2311(2).

581 The following chart, pages 82-84, modified slightly to reflect Iowa statute sections, is reprinted by permission of the author, Professor Stanley V. Kinyon, and the Minnesota Law Review. *See* Kinyon, Outline of Buyer-Seller Rights and Remedies in Default and Breach Situations Under the UCC, 53 Minn. L. Rev. 729, 734-37 (1969).

582 *See* Collins, *Warranties of Sale Under the UCC*, 42 Iowa L. Rev. 63 (1956).

STAGE AT WHICH BREACH OCCURS	BREACH BY SELLER (Buyer vs. Seller)	BREACH BY BUYER (Seller vs. Buyer)
BREACH AFTER RECEIPT AND ACCEPTANCE AS PER § 554.2606	Buyer discovers hidden defects, Seller fails to cure as promised, or, despite known defects in goods or tender, Buyer accepts but gives Seller notice as per § 554.2607(3) so as to preserve his rights. 6) Buyer may be entitled to *revoke* his acceptance as per § 554.2608. 7) Whether or not Buyer revokes, if he gives Seller the required notice of defects, § 554.2607(3)(a), and carries his burden of proof as per § 554.2607(4), he is entitled to *damages*: under §§ 554.2714 and 554.2715 if there has been no revocation of acceptance; under §§ 554.2711, 554.2712 or 554.2713, and 554.2715 if Buyer rightfully revokes acceptance; or under §§ 554.2718 and 554.2719 if there has been an agreement for liquidated damages or remedy.[580]	A breach by Buyer after acceptance is usually a breach in payment obligations, or breach of the security agreement if a credit sale. However, Buyer may default with respect to the goods by wrongfully revoking acceptance, or may lose rights by failing to give notice. 4) Seller's remedies upon Buyer's wrongful revocation of acceptance are summarized in § 554.2703 and detailed in §§ 554.2706, 554.2708, 554.2709 and 554.2710. 5) Buyer's failure to give notice as required by § 554.2607(3)(a) may preclude him from recovery for defects, unless Seller waives notice under § 554.2209.[583]

[583] Note that upon default or threat of a default of an IOWA CODE § 554.2612 (1966) installment contract, or at various stages of other contracts, the aggrieved party may be entitled to demand *adequate assurance* of performance as per IOWA CODE § 554.2609 (1966). For detailed discussion of these various options and remedies, see Hey, *Remedies for Breach of Contract Under the Code*, 7 WASHBURN L.J. 35 (1967); Peters, *Remedies for Breach of Contracts Relating to Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199 (1963).