

A SKETCH OF THE CONSEQUENCES FOR LOUISIANA  
LAW OF THE ADOPTION OF "ARTICLE 2: SALES"  
OF THE UNIFORM COMMERCIAL CODE\*

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The Uniform Commercial Code is presently under study by the Louisiana Law Institute. This article is a partial synopsis of a more detailed report that the author prepared for the Institute. It has the limited purpose of introducing the Louisiana Bar to a few of the concepts and innovations of the UCC in comparison with the existing principles of the Louisiana law of sales. However, the reader is requested to excuse, in an avowedly "sketchy" treatment, an occasional lapse into hypertechnical discussion. One of the inevitable difficulties in comparing sets of legal principles is to decide with any degree of certainty what either or both might mean standing alone.

I. THE SCOPE OF ARTICLE TWO

Article 2 of the UCC can be adopted with only minor amendments to the Civil Code. Most of the general provisions of the Code on conventional obligations would remain applicable in respect of transactions subject to the UCC,<sup>1</sup> and the existing law of sale would yet apply to sales of immovables. The effect of the adoption of article 2 would simply be to remove questions of sales of movables from the "sales law" scheme of the Civil Code. This removal would be virtually complete. Article 2 is in no sense a special law for "commercial" sales or for "merchants." The concept of "merchant" has some importance in the UCC, but its effect is merely to bring into play certain special standards of care and skill in specific instances.<sup>2</sup> All sales of goods are meant to be covered.

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\* All Uniform Commercial Code citations are to the 1962 Official Text; the Uniform Commercial Code is hereinafter cited as UCC.

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<sup>1</sup> UCC § 2-103 provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

<sup>2</sup> UCC § 2-204(1) provides:

(1) Merchant means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

### A. Sale

As might be expected "sale" covers something more than its definition in the UCC, "the passing of title from the seller to the buyer for a price."<sup>3</sup> As in Louisiana<sup>4</sup> "contracts to sell" or sales of future goods are also covered.<sup>5</sup> No attempt is made to set forth a rule for distinguishing sales from other transactions, such as, service contracts,<sup>6</sup> leases<sup>7</sup> or partnerships.<sup>8</sup> Such determinations are left to pre-existing law.<sup>9</sup>

The article 2 provisions would also apply to exchanges of goods and to that portion of a transaction involving goods where the exchange is of movables for immovables.<sup>10</sup> This application of sales law to exchanges is substantially in accordance with the present Louisiana position,<sup>11</sup> and would result only in the elimination of any distinction between the remedies available for breach of warranty of title in sale<sup>12</sup> and exchange transactions.<sup>13</sup>

### B. Goods

The definition of "goods" in the UCC could cause some confusion in Louisiana unless the purpose of the definition is kept clearly in view. The difficulties arise in respect of goods attached to realty, that is, common law "fixtures" or our immovables by destination<sup>14</sup> and occasionally by nature.<sup>15</sup> Should the UCC, if adopted, govern the sale separate from land of a structure attached to it, of growing crops, of uncut timber, of minerals or machinery in place; or would such transactions be subject to the pre-existing law of sales in respect of immovables? The solution, a not too happily drafted one, is found in UCC § 2-107:

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<sup>3</sup> UCC § 2-106(1).

<sup>4</sup> See *Plaquemines Equipment & Mach. Co. v. Ford Motor Co.*, 245 La. 201, 157 So. 2d 884 (1963).

<sup>5</sup> UCC § 2-106.

<sup>6</sup> See *Papa v. Louisiana Metal Awning Co.*, 131 So. 2d 114 (La. App. 2d Cir. 1961).

<sup>7</sup> See *General Talking Pictures Corp. v. Pine Tree Amusement Co.*, 180 La. 529, 156 So. 812 (1934).

<sup>8</sup> See *Kennedy v. Perry Timber Co.*, 219 La. 264, 52 So. 2d 847 (1951).

<sup>9</sup> See *Epstein v. Giannattasio*, 197 A.2d 342 (Conn. 1963) (service contract).

<sup>10</sup> UCC § 2-304(1) and (2).

<sup>11</sup> La. Civil Code arts. 2660-67 (1870).

<sup>12</sup> La. Civil Code art. 2506 (1870).

<sup>13</sup> La. Civil Code art. 2663 (1870).

*Dation en paiement* would also be covered where movables were given, and the treatment of *dation* as a "delivery" contract for purposes of risk of loss would continue under the scheme of UCC §§ 2-509 and 2-510.

<sup>14</sup> La. Civil Code art. 468 (1870).

<sup>15</sup> La. Civil Code art. 467 (1870).

### Goods to Be Severed From Realty: Recording.

(1) 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 the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

The basic idea here is fairly clear. The subsection (1) items are considered so intimately connected with realty that they will be treated as subject to legal rules governing the sale of goods only where the buyer is not given a right against the land to accomplish their severance from it. Subsection (2) things, on the other hand, are viewed primarily as moving in trade and as not partaking of those attributes of immovables which result in special legal treatment for transactions involving real rights.

Obviously section 2-107(1) would result in some change in present movable/immovable classifications for sale purposes. A sale of standing timber,<sup>16</sup> of minerals in place<sup>17</sup> or of a structure on land<sup>18</sup> would under existing law be considered the transmission of an interest in real property. Arguably a sale of timber<sup>19</sup> or minerals<sup>20</sup> with severance by the seller could be considered a "contract to sell" goods in Louisiana, but certainly the sale of a building would be considered in all cases the sale of an immovable.

The effect of such a reclassification, abstractly considered, is to allow oral<sup>21</sup> sales of buildings, minerals and timber, to make the

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<sup>16</sup> La. R.S. 9:1103 (1950).

<sup>17</sup> Long-Bell Petroleum Co. v. Tritico, 216 La. 426, 454, 43 So. 2d 782, 791 (1949).

<sup>18</sup> La. Civil Code art. 464 (1870).

<sup>19</sup> La. Civil Code art. 465 (1870).

<sup>20</sup> Such an interpretation would avoid giving real rights such as have resulted in the classification of sales of minerals in place as predial servitudes in Louisiana.

<sup>21</sup> La. Civil Code art. 2277 (1870).

concept of lesion<sup>22</sup> inapplicable to their transfer and to eliminate preferential access to specific performance<sup>23</sup> in respect of such transactions. However, what the real effects of such a change would be cannot be assessed without an appreciation of the UCC's formality requirements,<sup>24</sup> the extent to which situations involving lesion may be covered by the UCC concept of "unconscionability,"<sup>25</sup> and the criteria for specific performance under UCC § 2-716.<sup>26</sup> This article will not cover all these issues; suffice it to say that little difference in practical effect is to be expected.

The effect of section 2-107(2) is more difficult to assess. At most the provision on growing crops will add an additional instance in which crops are de-immobilized by anticipation.<sup>27</sup> The provision on articles severable without "material harm" has an echo in the Louisiana test for the identification of immovables by distinction under articles 468-69—a test that has also been made applicable to article 467 immovables by nature in the context of a determination of the continued existence of a vendor's privilege.<sup>28</sup> In fact apart from the vendor's privilege cases the question of the mobility or immobility of "fixtures" has arisen almost exclusively in the context of a dispute over what is covered by a sale of real property or a real mortgage. The UCC provisions on sale of goods do not purport to cover these questions.<sup>29</sup>

The section 2-107(2) classification would, like that in section 2-107(1), only affect issues which are strictly related to the law of sales, such as, the requirement of a writing, the applicability of lesion on the availability of specific performance. The question of whether a separate sale of property which would be classified as immovable under articles 467-69 of the Civil Code presently works an immediate anticipatory de-immobilization as contemplated in UCC § 2-107(2) has apparently never arisen in Louisiana in a situation presenting any of these issues. Query why items considered immovable under those much-litigated articles should in relation to their sale receive special treatment in terms of formalities, hard bargains or remedies.

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<sup>22</sup> La. Civil Code art. 2589 (1870).

<sup>23</sup> La. Civil Code art. 2462 (1870).

<sup>24</sup> UCC § 2-201. Note also that third party rights will not be affected without recordation under existing law as continued by UCC § 2-107(3), and thus a writing should remain customary in such sales.

<sup>25</sup> UCC § 2-302. See Comment, 42 Tul. L. Rev. 193 (1967).

<sup>26</sup> See discussion *infra* at notes 159 and 170 and accompanying text.

<sup>27</sup> See discussion in A. Yiannopoulos, Civil Law Property 133-37 (1966); *Citizen's Bank v. Witz*, 31 La. Ann. 244, 246 (1879).

<sup>28</sup> *Cottonport Bank v. Dunn*, 21 So. 2d 525 (La. App. 1st Cir. 1945).

<sup>29</sup> That property is expected to be classified differently for different purposes is indicated, for example, by the adoption of a different definition of goods in the secured transactions article of the UCC. See UCC § 9-105.

## II. FORMATION OF SALES CONTRACTS

### A. *Consent*

Broad in scope the UCC is also occasionally radical in design, at least when compared with our Civil Code provisions. This should be expected. The Civil Code was drafted in an era in which political liberalism and laissez-faire economics had as their counterpart in the private law of contract an emphasis on the exercise of the individual will. This general idea, that no obligation is incurred until two wills freely exercised are united on a single point, lies at the base of our Civil Code provisions which require the attainment of a high degree of certainty of obligation before a contract is perfected.

The UCC approach is markedly different. It is after all a twentieth century document influenced by the concern in all branches of learning with patterns of group behavior. Although largely designed to solve specific problems arising under the common law and Uniform Sales Act, the UCC provisions on offer and acceptance exhibit a reasonably clear policy. It is a policy which favors the upholding of a general commercial expectation that "the deal is on" where circumstances warrant that expectation and, if necessary, in the face of particular, verbalized demands or expectations which indicate a lack of complete agreement. A couple of examples are in order.

#### 1. *Open term contracts*

Section 2-204(3) of the UCC provides:

Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

The language of this subsection does not specify what terms may be left open, but sections 2-305 and 2-306 clearly indicate that agreement on price or quantity or both may be omitted without *necessarily* preventing the formation of a sales contract.

#### The Price Term

In Louisiana there must be agreement on the price,<sup>30</sup> or at least submission of its determination to an impartial arbitrator,<sup>31</sup> in order to perfect a contract of sale. The necessity for certainty of price is apparently a particular application of the Civil Code's

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<sup>30</sup> La. Civil Code arts. 1764, 2439, 2464 (1870).

<sup>31</sup> La. Civil Code art. 2465 (1870).

general theory of potestative conditions—there is no contract where one or both of the parties have not bound themselves as to the essential stipulations of the agreement.

However, the courts dealing with certainty of price have not always kept this policy basis in view. They have denied validity to sales where the price was ascertainable by a prescribed method<sup>32</sup> and where ascertainment would not have depended on the will of one of the parties.<sup>33</sup> These cases should be ignored in favor of later cases<sup>34</sup> which admit that that which may be made certain is certain for purposes of the law, at least in situations where there is little or no danger that the price can or will be manipulated by one party to the disadvantage of the other. Thus, for example, it should be possible under present law to make a sale at the “market price” on a future date, provided it is sufficiently clear what “market” is intended, how that price is to be determined, and by whom.<sup>35</sup>

Even given the more liberal approach of recent jurisprudence, the Louisiana law does not contemplate the existence of a sale where the price is “open” in the sense of UCC § 2-305, which provides:

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

- (a) nothing is said as to price; or
- (b) the price is left to be agreed by the parties and they fail to agree; or
- (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

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<sup>32</sup> *E.g.*, Clark v. Comford, 45 La. Ann. 502, 12 So. 763 (1893).

<sup>33</sup> *E.g.*, Wise v. Guthrie, 11 La. Ann. 91 (1856).

<sup>34</sup> *E.g.*, Brown v. Shreveport, 15 So. 2d 234 (La. App. 2d Cir. 1943).

<sup>35</sup> *See* Princeville Canning Co. v. Hamilton, 159 So. 2d 14 (La. App. 1st Cir. 1963) (enforcement denied for lack of above-mentioned elements).

This article seems to presume in accordance with the better reasoned Louisiana decisions that there is no problem in respect of contracts where the only uncertainty is the reduction of unliquidated amounts to absolutely certain sums. It goes on from there to allow enforcement of contracts for sale where no price has been agreed upon and/or the method for determination has failed.

*Nothing said about price.* The provision for finding a reasonable price where nothing has been said as to price seems to be directed at situations in which the parties are dealing on the basis of tag or catalogue prices which are known to both of them or where a buyer, relying upon past experience that the price will be competitive, places an order with his traditional supplier for goods whose price he does not know. In other words, the situations covered by section 2-305(1) (a) appear to be those in which a course of dealing or commercial practice has been relied upon and in which a finding that there was no contract would clearly be at variance with the parties' expectations. Unless these commercial expectations were present, a court would not be justified in finding, in the absence of some stipulation as to price, that there was the necessary intent to conclude a contract for sale within the meaning of section 2-305(1).

There is some question whether this provision would make any change in the Louisiana law. If there is a price but it is simply not stated in a written contract, article 1900 of the Civil Code would allow a showing of an agreed price. Such a showing might involve proof that goods were normally billed at tag or catalogue price and that the parties operated on this assumption. If the goods have been delivered and accepted by the buyer there is no great problem concerning whether there is or is not a contract. If there is a contract the seller is entitled to the price, if not, he is entitled to the value of the goods in quasi-contract. Whether the court implies a "reasonable" price or establishes a "fair value" should be of little moment.<sup>36</sup>

For this reason it is virtually impossible to determine whether Louisiana courts dealing with situations where there has been no mention of price are thinking in terms of a contract, with an implication of assent from conduct and a judicially supplied "price," or of a quasi-contractual obligation to pay the value of received goods.<sup>37</sup> The language of article 1816 of the Civil Code seems to be applicable to an open price situation: "To receive goods from a merchant without any express promise and to use them, implies a

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<sup>36</sup> See *Charles Wernar Co. v. Pokorny & Son, Ltd.*, 7 La. App. 562, 565 (1928). Of course, if "special damages" were involved, the distinction between contract and quasi-contract would make a difference.

<sup>37</sup> See, e.g., *Myers Implement Co. v. Deboer*, 9 So. 2d 832 (La. App. 1st Cir. 1942).

contract to pay the value." Moreover, this article is one containing examples of implied assent in the formation of contracts. Yet, the article speaks of "value," and it has occasionally been held to refer to a quasi-contractual obligation.<sup>38</sup>

*H. T. Cotton Co. v. Moises*,<sup>39</sup> seems the strongest Louisiana authority for the proposition that the court may supply the price in an open price contract. There the vendee refused to accept the goods; hence, no "use" giving rise to a quasi-contract was involved. The court found that the billing price was the fair market value of the goods and allowed the vendor to recover the difference between the market (billing) price and the resale price. This result would certainly follow from UCC § 2-305(1)(a) and from UCC § 2-204(3), which requires only that the court find a "reasonably certain basis" for giving an appropriate remedy.

The converse and more difficult problem of the buyer's ability to collect damages for non-delivery where the price was open because nothing had been said about it has apparently not been litigated in Louisiana.

*Price left to agreement.* Where the price is left to be agreed upon by the parties at a later time, the Louisiana position would clearly be that there is no sale until such agreement is reached. If there is no agreement, there is no sale. Under UCC § 2-305(1)(b), however, a reasonable price might be supplied, if the court finds an *intent to contract*. Where the agreement specifically leaves the price to future agreement alone it would seem difficult for a court to find an intent to be bound absent that agreement. Nor would there be a "reasonably certain basis for giving an appropriate remedy," other than restitution or quasi-contractual relief as provided in section 2-305(4). In such situations section 2-305(1)(b) might have no practical effect on Louisiana law.

On the other hand, where there is some indication of a standard which limits the possibilities of future agreement, the UCC approach might yield different results. Should the contract provide that the price is to be agreed upon subject to a maximum price (*e.g.*, highest price charged other large customers), the court might find a reasonably certain minimum of damages due a buyer who has been forced to "cover" in a rising market.<sup>40</sup> The provision of a minimum-remedy rule where the exact terms of agreement are in-

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<sup>38</sup> *E.g.*, *Duggan Mach. Co. v. Consolidated Well Serv. Co.*, 187 So. 2d 124 (La. App. 2d Cir. 1966).

<sup>39</sup> 149 La. 305, 88 So. 916 (1921).

<sup>40</sup> See discussion of *Sun Printing & Pub. Ass'n v. Remington Paper Co.*, 235 N.Y. 338, 139 N.E. 470 (1923) in 1 Report of the New York Law Revision Commission on the Uniform Commercial Code 278 (1955) [hereinafter cited as N.Y. Rep.].

definite, but where it is commercially certain that the parties intended to be bound, seems to be the primary thrust of section 2-204(3). It is very doubtful that a court is meant to do any more than this under section 2-305(1)(b), for subsection (3) of that section makes it clear that failure to agree through the fault of one party does not give the other party the right to consider the condition as fulfilled.

In terms of economic effect this result does not seem objectionable. Agreement on price fixes the risks of the parties in respect of rise and fall in the market. If they are unwilling to accept these risks absolutely, but provide a partial allocation by reference to a limitation on the possibilities for subsequent agreement, there seems no reason why this partial allocation of risks should not be given effect through a remedy based on the contract.

*Failure of external standard.* A reasonable price may also be supplied under the Commercial Code if an external standard fails to materialize or an arbitrator fails to fix the price. This is directly contrary to Louisiana Civil Code article 2465. The UCC provision is probably the better rule. That provision is of course qualified by the intent criterion of section 2-305(4) and thus relies on the trier of fact to determine whether the particular external indicator was an essential condition of the contract. If not, a substitute may be supplied. Article 2465 of the Civil Code excludes the possibility of fulfillment of the condition by an equivalent act, thus presuming that the particular person (or market, etc.) is absolutely necessary to the fulfillment of the condition in the contemplation of the parties. This strict view of the fulfillment of conditions is not found in the general article on the performance of conditions, article 2037.

*Price left to one party.* There can be little doubt that Louisiana law would not give effect to a purported sale which left the price to the decision of one of the parties. Article 2464 clearly states that the parties must fix the price, and the rationale for the certain-price rule is virtually unanimously found in preventing the dependency of the price on the will of one of the parties.<sup>41</sup> UCC § 2-305(2), on the contrary, presumes that the price may be left to one of the parties and imposes on that party an obligation of good faith in fixing the price.

There seems nothing objectionable in this change. Article 2464 should not really be considered as describing a requirement based

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<sup>41</sup> M. Planiol & G. Ripert, 10 *Traité Pratique de Droit Civil Français* 36-7 (2d ed. 1956) suggest that there is in such cases an obligation on the vendor to accept the price set and that when it is set there is a sale. However, there is apparently no support for this proposition in the jurisprudence under Article 1591 of the French Civil Code, the equivalent of article 2464 of the Louisiana Civil Code.

on the theory of potestative conditions. To leave the price to one of the parties is not to predicate the existence of his obligation on a purely potestative condition any more than is the suspension of the perfection of a contract until one party has the view and trial of the object. If the latter is an acceptable suspensive condition,<sup>42</sup> there seems no reason why the Civil Code should prohibit the former. "Good faith" can form as effective a check on abuse of the power to fix the price, as on the power to accept or reject after trial. Of course there are greater difficulties in the price situation in determining what remedy to apply should the party having the power to set the price fail to set it. The Civil Code solution of treating the condition as fulfilled will not suffice to determine the amount. UCC § 2-305(3) solves this problem by giving the other party the option of fulfilling the condition or treating the contract as cancelled.

*An exemplary case.* A recent example of the Louisiana approach to open price terms can be found in *Princeville Canning Co. v. Hamilton*.<sup>43</sup> There the buyer and seller contracted for future delivery of seed potatoes with the stipulation that the price was subject to "market rise." When the seller failed to deliver the buyer sued, apparently for the difference between the contract price and the price at which he had to cover. The seller claimed that the contract price alleged by the buyer was too low, that there was no method established in the contract for determining market price and that the contract was therefore unenforceable. The court agreed.

In a case of this type there is, perhaps, no difference between finding a contract and not finding one. The buyer should have to show that the "cover" price was reasonable, that is, at or near "market" price. Since the latter price is the contract price there are no damages. Yet, this is not always the case. A buyer may have special damages, for example, in a situation where he is unable to cover at all or only after a delay which causes a shutdown of operations. Contract or no contract may well be a distinction with a difference.

The *Princeville Canning* case seems to be the type of situation in which the buyer is attempting to secure a source of supply and the seller a market, but the latter is unwilling to take the risk of unfavorable price fluctuations. The present Louisiana approach permits the seller to use a clause inserted for his protection as an escape route from all obligation under the contract. Of course, it is not really clear in *Princeville Canning* what "subject to market rise" meant: (1) renegotiation of price in the light of the market,

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<sup>42</sup> La. Civil Code art. 2460 (1870).

<sup>43</sup> 159 So. 2d 14 (La. App. 1st Cir. 1963).

(2) market price was to *be* the contract price, or (3) buyer (or seller) could reset the price in accordance with a rise in the market. Whatever the interpretation there was an apparent intent to contract and a reasonably certain basis for giving a minimum remedy, although that remedy may have turned out to be general damages in the amount of zero plus any provable special damages. That is all that would be required under UCC §§ 2-204 and 2-305.

### The Quantity Term

The elimination of the certainty of price rule in article 2464 would not result in any inconsistencies in the Louisiana law. It would bring the treatment of open price contracts into line with the treatment of open quantity, that is, "requirements" or "output," contracts. These contracts have been consistently upheld, in the face of challenges on the ground that they embody potestative conditions, by imposing a standard of good faith performance through interpretation of the agreements.<sup>44</sup> This result and its rationale would be continued under UCC § 2-306(1) :

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

Moreover, where the question was one of damages, at least one Louisiana court has been willing to accept a projection of the quantity which would have been required had the buyer performed as a reasonably certain basis for giving a remedy.<sup>45</sup> Hence, in respect of open quantity terms UCC §§ 2-204 and 2-306(1) would make no change in the Louisiana position.

### Other open terms

UCC § 2-311(1) provides:

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such

<sup>44</sup> See *United Carbon Co. v. Interstate Natural Gas Co.*, 176 La. 929, 147 So. 37 (1933); *C. A. Andrews Coal Co. v. Board of Directors*, 151 La. 695, 92 So. 303 (1922); *Crusel v. Tierce*, 118 La. 292, 42 So. 940 (1907); *Dockson Gas Co. v. S. & W. Constr. Co.*, 12 So. 2d 847 (La. App. 2d Cir. 1943) (distinguishing earlier apparently contrary cases).

<sup>45</sup> *Dockson Gas Co. v. S. & W. Constr. Co.*, 12 So. 2d 847 (La. App. 2d Cir. 1943); see also *Alexandria Cooperage Co. v. E. S. Duck Lbr. Co.*, 153 La. 438, 444-45, 96 So. 24, 28 (1923). *But see* *Mason v. Ruffin*, 130 So. 843 (La. App. 2d Cir. 1930).

specification must be made in good faith and within limits set by commercial reasonableness.

Two particulars commonly left to specification after "closing a deal" are "assortment" and shipping arrangements. UCC § 2-311 (2) provides:

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1)(c) and (3) of Section 2-319 specifications or arrangements relating to shipment are at the seller's option.

At least one Louisiana case clearly holds that leaving specification of shipping instructions open does not make the contract unenforceable because uncertain.<sup>46</sup> There the buyer had the option as to shipping instructions. The court found that, having failed to give them in a reasonable time, he could not hold the seller in breach for non-delivery. Presumably he would also have been required to give "commercially reasonable" instructions.

The problem of "assortment" is more difficult. Buyer's option as to assortment may mean that the total price of the goods is uncertain until the option is exercised. For example, in a leading common-law case, *Wilhelm Lubrication Co. v. Bratrud*,<sup>47</sup> the contract called for definite quantities of various types of motor oil, but left the choice of weight of oil within the type to be specified by the buyer. Since the price varied with the weight, the buyer's repudiation of the contract left the total price under the contract uncertain. In this situation the court found itself unable to award damages because it did not know what assortment the buyer would have taken and, therefore, could not determine what loss the seller had in terms of profit or resale. The result would clearly be the same under Louisiana certainty of price requirements.

Not so under UCC §§ 2-204, 2-305, and 2-311. Only intent to contract and a reasonably certain basis for giving an appropriate remedy are required. Assuming the first is found, the court need not determine the *exact* loss to the plaintiff in order to make a minimum award. It can merely take the assortment in respect of which a subsequent breach would result in the least damage to the plaintiff. He has surely suffered that much loss.

## 2. *Acceptance not conforming to the offer*

One of the major innovations of the Code is section 2-207:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable

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<sup>46</sup> *W. E. Robinson Co. v. Louisiana Box Co.*, 1 La. App. 272 (1924).

<sup>47</sup> 197 Minn. 626, 268 N.W. 634 (1936).

time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

This section is designed primarily to solve the problems which arise in the so-called "battle of the forms," that is, the common situation of disagreement between standard clauses in the purchaser's order form and the seller's acknowledgement form.

The traditional "acceptance-must-conform-to-the-offer" rule treats contracts entered into on forms containing such printed "boilerplate" as negotiated agreements. Where buyer's and seller's terms disagree, and there is no conduct establishing a contract, there is said to be no contract. Where there has been shipment and acceptance of the goods, courts find a contract on the terms of the party who last sent a form before performance. The rationale for this "last shot" rule is that the terms of the party last verbalizing his demands have been impliedly accepted by the other party's unqualified action under the contract.

Both results ignore the realities of the situation. In most cases there has been no haggling over terms such that differences in the printed forms indicate failure to agree; the reasonable commercial expectation is that there is "a deal." Moreover, who sends the last form before performance may be purely fortuitous. A seller mailing his acknowledgment form before shipment gets his terms in, but if he ships first, he has accepted the buyer's terms.

Section 2-207(1) would solve the "no contract" problem by treating a definite and seasonable acceptance as an acceptance, notwithstanding its conflicting terms, unless such acceptance is

“expressly conditional” on assent to the additional or different terms. In practice, accepting parties wishing to avoid the offeror’s terms will probably put “expressly conditional” language in their forms. Moreover, offerors can be expected to expressly limit acceptance to the terms of the offer under section 2-207(2) (a). Here irresistible force meets immovable object, and there is no contract until performance. When there is such performance, however, the party firing the last shot does not get a contract on his lopsided terms. Section 2-207(3) abrogates the “last shot” principle by making the contract contain only agreed terms and the suppletive provisions of the Code.

“Battle of the forms” has not been a significant problem in adjudicated cases in Louisiana, but disagreement between the terms of offers and acceptances has been. Article 1805 of the Civil Code requires that an acceptance “be in all things conformable to the offer.” This strict rule is mitigated only where the circumstances are such that the offer *necessarily implies* assent to the modification contained in the acceptance.<sup>48</sup>

*Mason v. Ruffin*,<sup>49</sup> typifies the strict conformity approach. In that case it appears that the defendant in reconvention offered to sell all his cattle, estimated to number about 125 to 150, to the plaintiff. The latter accepted. After delivering 34 the defendant refused to make further deliveries. Plaintiff claimed that although there was no agreement on the exact number, he had accepted the offer for a minimum of 100 by writing on a check he gave to the defendant the words “deposit on 100 head of cattle.” This claim to have accepted for 100 seems to have been made in order to fix the amount of damages, *i.e.*, lost profits on the resale of 66 cows. The result was the court’s finding that there was never any contract. The court reasoned that under the prevailing rule the acceptance for 100 was not conformable to the offer of total output. Hence, there was no contract unless the defendant could be held to have accepted the counteroffer (acceptance) for 100 by his acceptance of the check.<sup>50</sup> Even with convincing proof of the check’s notation, its acceptance is not a totally unambiguous acceptance of the plaintiff’s terms. Here the check when offered in evidence had no notation. The plaintiff claimed it had been erased, but with this weakness in the evidence the court was understandably reluctant to say that the defendant had accepted a counteroffer for 100.

Perhaps the plaintiff made a tactical error. His approach did not really give the court a chance to assess the contract as one

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<sup>48</sup> La. Civil Code art. 1807 (1870).

<sup>49</sup> 130 So. 843 (La. App. 2d Cir. 1930).

<sup>50</sup> See, *e.g.*, *Chiquita Trinkets, Inc. v. Mardi Gras Prod., Inc.*, 164 So. 2d 375 (La. App. 4th Cir. 1964).

involving an indeterminate quantity. Had he done so it is at least possible that the court would have found a contract and would have awarded damages based on the defendant's estimated (125-150) "output." Certainly, this result would be reached under UCC §§ 2-204(3) and 2-306, unless the defendant showed that after a good faith effort his output was or would have been less than the estimate.

Since section 2-207 of the UCC applies to situations of nonconforming acceptances generally, not just battle of the forms problems, we might well consider how it would affect the decision in a case like *Mason*. Subsection (1) of section 2-207 requires only that there be a "definite and seasonable" acceptance, notwithstanding the inclusion of additional or different terms. If the check were such an acceptance, and we shall assume for the moment that it was, it clearly was not expressly conditional on assent to its additional or different terms. It is therefore not a counteroffer and we have a contract. The only problem is on whose terms.

Subsection (2) of section 2-207 speaks to this problem. If the acceptance contains additional terms, they become proposals for additions to the contract. Here the acceptance contains not an "additional" but a "different" term. Hence, that term would not become part of the contract. Even were it construed as "additional" and had the defendant (merchant) failed subsequently to object to it, the parties would not have had a contract for 100 head on this set of facts under section 2-207. The offer itself objects to terms "different" from the ones proposed,<sup>51</sup> and moreover it would materially alter the contract.<sup>52</sup> The contract is, thus, on the seller's terms, that is, for his total output.

The alternative approach to the *Mason* facts under section 2-207 would be to find that there was no definite and seasonable acceptance verbally or in writing. The question then is how to account for the delivery of 34 head of cattle. Obviously the parties are acting as if they have a contract, and under section 2-207(3) such conduct may establish a contract. The terms of the agreement are those on which the parties agreed (the price per head) and those supplied by other sections of the Code. To supply the quantity we are thrown back on section 2-306. But section 2-306 does not really cover this situation. The question is not the permissibility of an indefinite term, but whether a definite or an indefinite term was contemplated.

Failing to prove that either the definite or the indefinite term was finally agreed upon, the buyer might yet rely on section 2-204

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<sup>51</sup> UCC § 2-207(2) (c).

<sup>52</sup> UCC § 2-207(2) (b).

(3). A clear intent to contract can be derived from the delivery and acceptance of the thirty-four head of cattle. The issue could then be cast in terms of whether there was a reasonably certain basis for giving a remedy. On this question it would not be unreasonable for the trier of fact to conclude that a minimum of 100 cows were to be transferred and to award damages on that basis. Of course, it might be equally reasonable to conclude that no figure had been proved with sufficient definiteness. In that case the buyer would lose. He would lose, not on the artificial ground that there was never a contract, but on the ground that he failed to prove with sufficient definiteness what minimal compliance with the contract would have entailed.<sup>52a</sup>

In modern commercial dealings involving large numbers of transactions which require pre-planned rather than negotiated terms, the approach of section 2-207 seems a considerable advance over the old common law or Louisiana "mirror image" rules. Similarly, the UCC provisions on open term contracts add needed flexibility to the law of sales; a flexibility which may allow courts and lawyers to come to grips in a more meaningful manner with commercial practices ranging from highly informal agreements to increasingly sophisticated techniques for allocating market and other risks.<sup>53</sup> There has always been a degree of prepositional ambiguity in the freedom of contract principle. The UCC might be viewed merely as emphasizing freedom to contract, whereas the Louisiana Civil Code emphasizes freedom from contract.

## B. *Other requisites to formation*

### 1. *Formalities*

As mentioned earlier, the UCC contains no general provisions on conventional obligations. The requirements of party capacity, of a legal subject matter, and of cause and/or consideration are left to pre-existing law. The UCC does, however, contain formal requirements in its "statute of frauds" section.<sup>54</sup> These provisions

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<sup>52a</sup> The buyer would also have a statute of frauds problem. See UCC § 2-201, *infra* at note 54.

<sup>53</sup> The present failure of commercial law and the court system to provide adequate solutions to business problems is reflected in the increasing referral of disputes to the more flexible procedures of commercial arbitration. See Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 *Law & Contemp. Prob.* 698 (1952).

<sup>54</sup> UCC § 2-201 provides:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states

would radically change existing law,<sup>55</sup> and in this writer's opinion, for the worse. Common law jurisdictions seem to have had a great deal more difficulty with writing requirements in the sale of goods than Louisiana has had with attempts to enforce non-existent transactions.<sup>56</sup> Fortunately, the UCC has altered some of the more objectionable features of previous statutes<sup>57</sup> and may through its exceptions now render unenforceable only the oral contracts of persons willing to risk perjuring themselves.<sup>58</sup>

A discussion of the effects of running afoul of the statute or of the requisites of a sufficient memorandum to take a contract out of the statute are really beyond the scope of this article. Roughly speaking a contract made unenforceable for lack of a sufficient writing would operate as a natural obligation,<sup>59</sup> and the liberality of

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a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

- (a) if 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; or
- (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
- (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

<sup>55</sup> La. Civil Code art. 2277 (1870). The jurisprudence has been extremely lenient with the article 2277 requirements. *See, e.g.,* Cormier v. Douet, 219 La. 915, 54 So. 2d 177 (1951).

<sup>56</sup> *See generally* Corbin, *The Uniform Commercial Code—Sales*, 59 Yale L.J. 821 (1950); Holahan, *Contract Formalities and the Uniform Commercial Code*, 3 Vill. L. Rev. 1 (1957). *But see* Comment, *The Statute of Frauds and the Business Community*, 66 Yale L.J. 1038 (1957) (suggesting that statutes merely require some improvements to reflect general business practice and understanding).

<sup>57</sup> *E.g.,* UCC § 2-201(2) which eliminates the possibility that one party is bound where the other is not.

"Merchant" here will apply to virtually anyone acting in a mercantile capacity. *See* UCC § 2-104, Comment 2.

<sup>58</sup> UCC § 2-201(d) and (b).

<sup>59</sup> La. Civil Code arts. 1758(1) and 1759 (1870). These articles when combined with articles 3036 and 3299 and with the jurisprudence under article 2275 (*see, e.g.,* Emerson v. Shirley, 188 La. 196, 175 So. 909 (1937)) suggest that an unenforceable oral contract for sale would have many of the same effects on the legal relations of the parties in Louisiana as in common law jurisdictions. *See generally* 2 A. Corbin, *Contracts* § 279, 20-23 (1950). The only subsidiary effect listed by Corbin which would clearly not be applicable

the memorandum requirement is perhaps only exceeded by the French doctrine of "beginning of proof."<sup>60</sup>

## 2. *A return to civilian principles*

Strangely enough all United States jurisdictions other than Louisiana now have, through adoption of the UCC, statutory provisions which make firm offers binding for a stated or reasonable period<sup>61</sup> and which eliminate the necessity for consideration in contract modifications.<sup>62</sup> Louisiana on the other hand is left with common law principles on revocability of offers<sup>63</sup> and on the necessity for consideration to support contract modifications<sup>64</sup> which were accepted by the jurisprudence in the face of specific codal provisions<sup>65</sup> and general civilian theory.<sup>66</sup>

a. *Firm offers.* The adoption of the firm offer provision of UCC § 2-205 would not have the broad effect of a proper interpretation of article 1809 of the Civil Code because only *written* offers giving an *assurance* that they will be held open would be irrevocable. These requirements are apparently meant to have the cautionary effect of consideration, as well as to serve evidentiary purposes, and they therefore should dispose of any submerged policy grounds in the Louisiana jurisprudence which has denied effect to article 1809. Of course a bargained-for option under article 2462 could still be made informally and for a longer period than the three month limit on firm offers in section 2-205 of the UCC.

b. *Modifications.* The UCC provision on modification, section 2-209, is not a model of clarity. It provides:

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

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in Louisiana is the allowance given a creditor elsewhere to impute payment to an unenforceable obligation. La. Civil Code art. 2166 (1870).

<sup>60</sup> The Louisiana jurisprudence under article 2275 has also been very liberal. See discussion in 21 Tul. L. Rev. 706, 709 (1947); *but see* Bordelon v. Crabtree, 216 La. 345, 43 So. 2d 682 (1949).

<sup>61</sup> UCC § 2-205.

<sup>62</sup> UCC § 2-209.

<sup>63</sup> See, e.g., National Co. v. Navarro, 149 So. 2d 648 (La. App. 4th Cir. 1963); Loeb v. Johnson, 142 So. 2d 518 (La. App. 1st Cir. 1962).

<sup>64</sup> E.g., John M. Parker & Co. v. Guillot, 118 La. 223, 42 So. 782 (1907). However, a very liberal view has been taken toward what constitutes a sufficient consideration. See O'Brien v. Willis, 14 La. App. 638, 129 So. 440 (1930).

<sup>65</sup> La. Civil Code arts. 1809 and 2201 (1870).

<sup>66</sup> See, e.g., Smith, *A Refresher Course in Cause*, 12 La. L. Rev. 2 (1951).

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

The basic change is in subsection (1). Comment 2 to section 2-209 indicates that the protection which consideration afforded a party against "forced" modifications during performance are henceforth to be supplied by the UCC requirement of good faith. Nor will a mere technical consideration support a modification made in bad faith. There seems no reason to treat the "good faith" standard as exclusively applicable here. The UCC concept of "unconscionability" should also apply and Louisiana developments on "economic duress"<sup>67</sup> would remain in force.

Difficulties in interpretation arise when we attempt to sort out the relationship between "modification," "waiver" and "estoppel" in subsections (2) through (5) of section 2-209. It is particularly troublesome to keep these concepts distinct when we realize that all of them may be accomplished by conduct as well as verbally.<sup>68</sup> The Louisiana jurisprudence, for example, has tended to lump all three together by finding that the acceptance of performance which deviates from the express terms of the contract operates as a "waiver" or "modification," which "estops" the accepting party from demanding strict compliance with those terms.<sup>69</sup>

The question of whether one is dealing with a "modification" or a "waiver" or an "estoppel" becomes critical where a court must decide whether a party who is "estopped" by previous conduct from demanding strict compliance as to executed portions of the contract has also irrevocably "waived" his right to strict compliance on the executory part, that is, whether the parties have by their conduct agreed to a "modification" of the contract. This should rarely be a problem where modification requires consideration, but, of course, UCC § 2-209(1) abolishes that requirement. Moreover, that section really gives no guidance on whether an interpretation

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<sup>67</sup> See especially, *Bryant v. Levy*, 52 La. Ann. 1649, 28 So. 191 (1900).

<sup>68</sup> UCC § 2-208(3).

<sup>69</sup> See, e.g., *Lillis v. Owens*, 21 So. 2d 185 (La. App. Orl. 1945); *Bacas v. Mandot*, 3 Orl. App. 324 (1906).

favoring "modification" or simply "waiver" should be applied to ambiguous conduct. One should think the latter would be preferred in an ambiguous situation because of its more limited effect. Any problems of detrimental reliance in respect of future performance could be handled under the provisions of subsection (5).

A second terminological difficulty involves the interpretation of "waiver" in subsection (4). How can an agreement which fails as a "modification," because the contract requires such modifications to be in writing, yet serve as a "waiver"?<sup>70</sup> Presumably a contractual provision requiring written modifications would, with the exception of waivers effecting an "estoppel" in the sense of the final clause of subsection (5), also require written "waivers." The solution seems to be to read subsection (4) as simply classifying an unenforceable "modification" as a "waiver," whose effect will then be determined in accordance with subsection (5). Of course subsection (5) has nothing to say about the effect of a subsection (4) "waiver" on executed portions of the contract, but it is highly likely that there will appear in such cases sufficient reliance to result in an estoppel.

### III. PERFORMANCE

Buyers and sellers under the UCC are expected to do the customary things—the former to accept and to pay, the latter to deliver and to warrant. Section 2-301 actually describes the seller's obligations as "to transfer and deliver," but it is obvious from other sections that he also impliedly warrants. Moreover, the significance of "transfer" is elusive, apart from warranty of title questions, in a code which seeks to insure that no rights of the buyer or seller turn on the position of abstract title.

There are, of course, many special provisions and problems in respect of these simply-stated obligations. The discussion of a few of them will suffice to give something of the flavor of the UCC approach to performance.

#### A. *Perfect tender by sellers: A methodological exercise*

The buyer's right to reject a non-conforming tender seems unqualified under UCC § 2-601:

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of

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<sup>70</sup> The one court which had an opportunity to rule on this point failed to mention the UCC. *C.I.T. Corp. v. Jonnet*, 419 Pa. 435, 214 A.2d 620 (1965).

delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

There is considerable Louisiana authority which would support that proposition where the nonconformity relates to the contract of shipment,<sup>71</sup> the form of documents<sup>72</sup> or the quantity delivered.<sup>73</sup> (We shall for the moment ignore defects in quality.) Yet, as in many instances in the Commercial Code, the broad statement of one section may be significantly qualified by other provisions.

For example, section 2-614(1) provides:

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

Further, section 2-504<sup>74</sup> allows rejection for lack of notification of shipment or failure to make a proper contract for shipment only where "material delay or loss ensues." The question in these situa-

<sup>71</sup> *Baltic American Feed Corporation Cases*, 152 So. 105, 107, 108 (La. App. 3d Cir. 1934); *California Fruit Exchange v. Meyer*, 8 La. App. 198, 201 (1927).

<sup>72</sup> *Lundy v. Pfeifer*, 162 La. 355, 110 So. 556 (1926).

<sup>73</sup> *T.A.D. Co. v. Savage*, 6 La. App. 570 (1927).

<sup>74</sup> Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

- (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and
- (b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and
- (c) promptly notify the buyer of the shipment. Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

tions is thus not perfect tender, but materiality of the breach. Section 2-504 along with sections 2-310<sup>75</sup> and 2-505<sup>76</sup> would, for example, definitely change present Louisiana rules on the effect of an unjustified reservation of security.<sup>77</sup>

Breach by reason of any improper tender may also be avoided under section 2-508:

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

The application of this section, particularly sub-part (2), will depend much on factual context, but certainly a seller who intends to perform should seldom find himself in the position of irretrievably breaching his obligation to tender goods in accordance with the contract, thereby giving the buyer the right to reject the whole of his performance. The "commercial reasonableness" of these solutions is patent.

A somewhat comparable result has been reached in Louisiana in relation to questions of shortages in tendered goods by distinguishing between "entire" and "divisible" contracts.<sup>78</sup> Thus existing law is more favorable for the seller than UCC § 2-601 standing alone, which seems to give the buyer an option to treat the contract either as entire or divisible, yet less favorable than UCC § 2-508's right to cure, which should apply even where the seller's obligation is entire.

One hazy spot in this picture is what the UCC intended to do about defects in the tender of documents. Presumably section 2-508

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<sup>75</sup> (b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513).

<sup>76</sup> (2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

<sup>77</sup> See, e.g., *California Fruit Exchange v. Meyer*, 8 La. App. 198, 201 (1927).

<sup>78</sup> Compare *J. K. Armsby & Co. v. Santo Oteri*, 4 Or. App. 385 (1907) with *Wrenn v. Lafayette Furn. Co.*, 151 So. 148 (La. App. Or. 1933).

applies to such defects. The materiality standard of section 2-504 and the substituted performance provisions of section 2-614 also seem to allow the making of contracts for shipment, and hence the tender of documents of title, which are not strictly in accordance with the contract. Yet comment 7 to section 2-503 indicates a very strict attitude toward contractually required documents, section 2-504 excludes documentary defects from its materiality standard, and section 2-612(2), while otherwise liberalizing the perfect tender rule of section 2-601 in relation to installment contracts, allows rejection of any installment for any documentary defect unless the seller gives adequate assurance of cure.

These sets of provisions are not in direct conflict but they at least tend to "look in different directions." Also, there is some difficulty in determining just what defect in documents should include. Is, for example, the use of a shipper's-order-notify-shipper bill under a contract requiring notification to the buyer an improper contract for shipment which allows rejection only if materially prejudicial to the buyer, or is it the tendering of defective documents permitting rejection at the buyer's option?<sup>79</sup>

Traditionally strict compliance with documentary terms has been required, perhaps on the theory that this is justified in a situation where the buyer must pay without inspection of the goods. If that is the rationale, a court faced with this problem of the effect of documentary defects under the UCC should then examine the sections on buyer's rights of inspection to determine whether it is dealing with a situation where payment is due against documents before inspection. In so doing it would find that the right to inspection before payment is preserved wherever feasible even in contracts requiring payment against documents.<sup>80</sup> Moreover, payment before inspection is not an acceptance and does not bar the right to inspection, to reject the goods or any other remedy.<sup>81</sup> Hence under the UCC there may be little need to treat documentary defects differently than other defective tenders. This conclusion would suggest a preference for treating such defects as involving only improper contracts for shipment wherever possible.

However, there are other considerations involved here. First, payment against documents will often be required before the goods are available for inspection. More importantly, the buyer may be financing on the documents or reselling without taking delivery. If so, any documentary defect could be critical. Indeed, the commer-

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<sup>79</sup> *Lundy v. Pfeifer*, 162 La. 355, 110 So. 556 (1926) treats a similar defect as permitting rejection.

<sup>80</sup> UCC § 2-321(3).

<sup>81</sup> UCC § 2-512(2).

cial importance of this use of documents of title virtually requires that we read the UCC as continuing the perfect tender rule, undiluted by reclassification of problems into the contract-for-shipment mold, whenever a defect in necessary documents is involved. As the above discussion illustrates, article 2 functions as a code. Its provisions are interconnected and the use of one section requires some considerable appreciation of its relationship to many others. Moreover, like any code it has gaps, and underlying policy decisions are not always apparent. Louisiana lawyers are not unaccustomed to dealing with such legislation.

*B. Assurance of performance: A new right*

The discussion of defective tender should also serve to illustrate the UCC's concern in the performance area with the provision of flexible procedures for adjustment of differences while maintaining contractual relationships.<sup>82</sup> But the maintenance of these relationships is only valuable if security of expectations is preserved. Enter UCC § 2-609:

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

When required to permit cure or prohibited from rejecting a defective tender, either party, if insecure, may require that some security be given to insure performance. Failure to give such security is a repudiation of the contract.

Of course, section 2-609 is not limited to "defective tender" situations. It can apply to any situation where the seller or buyer has reasonable grounds to fear non-performance. The concept of

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<sup>82</sup> See also UCC § 2-511(2).

assurance of performance thus becomes a general device whereby one party may be given a means for determining whether he should treat the contract as breached.

A major field for application of section 2-609 would seem to be in cases involving what is commonly called "anticipatory breach," that is, defective part performance<sup>83</sup> or anticipatory repudiation.<sup>84</sup> Under previous common law rules the seller and buyer were in a difficult position where the problem was a prospective inability to perform. If, for example, it appeared that the buyer would wrongfully reject a tender when made because of financial difficulties, this was not necessarily an anticipatory breach of the contract. The seller had two choices: (1) perform in the hope that the buyer would reciprocate, or (2) change position and hope that he had done so justifiably. If so, any breach would be chargeable to the buyer.<sup>85</sup> The buyer, on the other hand, was faced with the possibility of being held in breach of the contract although willing and able to perform when the time came for performance.

Under UCC § 2-609 the seller could in the described situation demand assurance of performance and failing to obtain it within a reasonable time treat the contract as repudiated. The buyer who is not yet in breach of the contract apparently has the right to give an assurance, thereby preserving his rights under the contract.<sup>86</sup>

Section 2-609 would change the Louisiana law in some respects. Although it now seems clear that anticipatory repudiation will give the aggrieved party a right to an immediate action for breach<sup>87</sup> or a defense when sued for non-performance<sup>88</sup> there is some question concerning the seller's rights in relation to a prospective inability to perform not amounting to a repudiation. Article 2042 of the Civil Code presently allows conservatory action in a situation of prospective non-performance, presumably including suspension of the insecure party's performance, but there is no general right to demand security. Article 2488 contains provisions similar to section 2-609, including the giving of security, but it applies only to situations of insolvency or bankruptcy. Moreover, while allowing a suspension of performance, it is not clear that a failure to give security under article 2488 would result in a repudiation justifying other remedial action.

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<sup>83</sup> UCC § 2-612.

<sup>84</sup> UCC §§ 2-610 and 2-611.

<sup>85</sup> Restatement (First) of Contracts § 323 (1932).

<sup>86</sup> See *Wrightstone, Inc. v. Motler*, 11 Cumb. L.J. 165 (Ct. Com. Pleas Pa. 1961).

<sup>87</sup> *Marek v. McHardy*, 234 La. 841, 101 So. 2d 689 (1958).

<sup>88</sup> *Pacholik v. Gray*, 187 So. 2d 480 (La. App. 3d Cir. 1966); see generally Comment, 7 Tul. L. Rev. 586 (1933) and Comment, 20 La. L. Rev. 119 (1959).

There is nothing essentially contrary to existing Louisiana law in section 2-609. It merely establishes a right in each party to a sale to reasonable security of expectations under the contract. If on demand for assurance the obligor refuses or fails to provide it, there is an active breach. Article 2052's proscription of premature demand would not be infringed. UCC § 2-609 creates a separate right to security of expectations which is demandable when the cause for insecurity arises.

There is some question in this writer's mind that section 2-609 will have very significant effects. Although it changes the difficult question of "Will he breach?" to the somewhat narrower one of "Am I sufficiently insecure to treat a failure to give security as a repudiation?", the answering party still acts at his peril. However, section 2-609 at least gets the relevant problem, security of expectations, into the forefront of any subsequent judicial inquiry.

### C. *Warranty*

Any discussion of performance must concern itself with warranty, if for no other reason than the quantitative importance of warranty issues in reported appellate cases. In this area the UCC may appear a radical departure from the simple, almost classical, provisions of the Civil Code, but there are few differences of substance.

#### 1. Warranty of Quality

##### a. *Express warranty.*

Section 2-313 of the UCC provides:

(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant"

or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Express warranty of quality is treated in two articles of the Louisiana Civil Code.

Art. 2529. A declaration made in good faith by the seller, that the thing sold has some quality which it is found not to have, gives rise to a redhibition, if this quality was the principal motive for making the purchase.

Art. 2547. A declaration made by the seller, that the thing sold possesses some quality which he knows it does not possess, comes within the definition of fraud, and ought to be judged according to the rules laid down on the subject, under the title: *Of Conventional Obligations*.

It may, according to circumstances, give rise to the redhibition, or to a reduction of the price, and to damages in favor of the buyer.

Leaving aside for the moment<sup>89</sup> the question of what is recoverable for breach of an express warranty, the Louisiana position on what constitutes such a warranty seems generally in accordance with section 2-313.

While the jurisprudence on the effect of a sale by "sample" is something less than consistent,<sup>90</sup> the courts are agreed that the bulk delivered must conform to the sample. Exemplary of the present approach is *Whitman & Co. v. Solomon*.<sup>91</sup> The court there clearly indicated, without once mentioning the word warranty, (1) that an offer of a sample is a declaration of quality giving the purchaser the power of rejecting or diminishing the price of a non-conforming bulk and (2) that the buyer cannot reject the goods on the basis of defects discoverable on simple inspection, unless he does so within a reasonable time after delivery. This is something less than a statement that a sale by sample creates an express warranty, but the court certainly seems to be thinking in terms of redhibition and cites article 2521 as its only codal authority.

"Description" also creates an express warranty under present law, if (and this applies equally to sample) the statement goes to the "principal motive" of the transaction. This principal motive limitation seems to be essentially the same as UCC § 2-313's requirement that the statement go to the "basis of the bargain." The question under both Codes would be whether the statement should

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<sup>89</sup> See discussion *infra* at notes 188-92 and accompanying text.

<sup>90</sup> See Comment, 23 Tul. L. Rev. 83, 94-5 (1948).

<sup>91</sup> 144 So. 292 (La. App. Orl. 1932).

reasonably be construed as a significant inducement to the buyer's purchase.<sup>92</sup>

Louisiana law would be changed by UCC § 2-316's provision that express warranties cannot be disclaimed, for the existing jurisprudence has consistently allowed disclaimer of warranty by sample.<sup>93</sup>

b. *Implied warranty.*

(1) *Merchantability.* The basis provision here is section 2-314:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality; within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

The corresponding Civil Code provision is article 2520:

*Redhibition* is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice.

These statutes hardly appear comparable, but their general effect is similar. The basic criterion under article 2520 is whether

<sup>92</sup> Compare *Atlantic-Gulf Supply Corp. v. McDonald*, 175 So. 2d 6 (La. App. 4th Cir. 1965) with *Seely v. White Motor Co.*, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

<sup>93</sup> See cases cited at 23 Tul. L. Rev. 83, 95, n.89 (1948).

the goods are fit for the general purpose for which such goods are normally sold.<sup>94</sup> It is not necessary to show an actual "defect."<sup>95</sup> The same may be said of UCC § 2-314, although some more specific indicia of "warranted" quality, drawn from case law, have been included. The comment to section 2-314 makes it fairly clear that subsection 2(c) is the basic guideline, that the list in subsection (2) is not exhaustive and that the content of the warranty is a question of commercial practice.

The extension of implied warranty to sales of food in a restaurant in section 2-313(1) would not change Louisiana law.<sup>96</sup> However, the limitation of implied warranty to sales by a "merchant with respect to goods of that kind" would work a change. Presently the implication of warranties extends to sales by any vendor. Assuming that the redhibition articles of the Civil Code were not repealed on adoption of the UCC, and they probably should not be since they apply equally to sales of immovables, difficult problems of gauging the effect of the enactment of the UCC arise.

One interpretation might be that section 2-314 would merely remove merchant sales from the Civil Code scheme, leaving non-merchant sales subject to redhibition. This interpretation is questionable. The UCC has in most other jurisdictions replaced statutory or common law principles of implied warranty which involved a similar limitation.<sup>97</sup> Hence a retention of redhibition in non-merchant sales would be non-uniform.

Yet there is some authority in the UCC itself for bringing redhibition back through a side door. We have already mentioned UCC § 1-103's express retention of pre-existing obligations theory except where explicitly pre-empted. This provision thus confirms the continued general applicability of the Civil Code principles on error<sup>98</sup> of which redhibition is but a specific application.<sup>99</sup>

Moreover, the principle of interpretation for uniformity is itself subject to interpretation. Does that principle extend to essentially "non-commercial" matters having only minimal effect on interstate transactions? The early history of the UCC as a proposed federal statute would indicate a negative response.<sup>100</sup> Hence it

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<sup>94</sup> *E.g.*, *Hemenway, Inc. v. Williamson*, 173 So. 781 (La. App. 2d Cir. 1937).

<sup>95</sup> *Id.* at 783.

<sup>96</sup> *Ogden v. Rosedale Inn*, 189 So. 162 (La. App. Orl. 1939).

<sup>97</sup> *See* 1 S. Williston, *Sales* § 233a, at 598 (1948).

<sup>98</sup> La. Civil Code arts. 1820-46 (1870).

<sup>99</sup> *Morrow, Warranty of Quality: A Comparative Survey*, 14 Tul. L. Rev. 529, 552-56 (1940); *compare* La. Civil Code art. 1825 (1870) *with* La. Civil Code art. 2520 (1870).

<sup>100</sup> *See* Sachse, *Report to Louisiana Law Institute on Article Nine of the Uniform Commercial Code*, 41 Tul. L. Rev. 505, 519-21 (1967).

would not seem illegitimate to continue to apply the error concept to sales by non-merchants, and within that framework to develop remedies which will necessarily be very similar to the present redhibitory action,<sup>101</sup> or to specifically retain the redhibition provisions for non-merchant sales.

(2) *Fitness for a particular purpose.* The UCC provides in section 2-315:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

The Louisiana law also extends implied warranty to cover fitness for particular uses of a buyer, if known to the seller,<sup>102</sup> but apparently without the additional requirement that the buyer be relying on the seller to select suitable goods. Yet the only Louisiana case that this writer could uncover which involved a successful claim of breach of warranty for a particular purpose and which could not have been decided on the basis of an express warranty or failure of the goods to live up to a general standard of merchantability was a case in which the buyer relied on the seller's determination of whether the goods would suit her needs.<sup>103</sup>

c. *Disclaimer of warranty.*

Although disclaimer of express warranties is prohibited, section 2-316 takes a more liberal approach toward disclaimers of implied warranties than under existing jurisprudence.<sup>104</sup> A disclaimer may

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<sup>101</sup> La. Civil Code arts. 1881-82 (1870).

<sup>102</sup> *E.g.*, *Diamond Music Co. v. Lamazon*, 5 La. App. 113 (1926).

<sup>103</sup> *Stewart v. Scott*, 6 La. App. 744 (1927).

<sup>104</sup> UCC § 2-316 provides:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warrant of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

even be implied from conduct or usage of the trade. This would significantly change present law under which derogations from implied warranties must be express and explicit and will be strictly construed.<sup>105</sup>

Query whether section 2-316 should be read as limiting the development of the principle enunciated in *Henningsen v. Bloomfield Motors, Inc.*,<sup>106</sup> that a disclaimer of warranty, at least in a situation involving inequality of bargaining power and lack of competition among sellers in respect of warranties offered, might be declared void as against public policy. One court has found such a limitation implicit in section 2-316.<sup>107</sup> Yet there is dicta in other opinions which would indicate that a *Henningsen* type result might be reached under the Code through the use of the concept of unconscionability.<sup>108</sup>

This latter position is made somewhat suspect by the comment to section 2-719's provision that limitation of contract remedies for personal injuries in the sale of consumer goods is *prima facie* unconscionable, which states, "The seller in all cases is free to disclaim warranties in the manner provided in § 2-316." However, there is certainly an interpretation of section 2-316 which would leave section 2-302 in full force. The provisions on disclaimer may be read merely as indicating the acceptable modes of disclaiming warranties. Whether a particular disclaimer made in accordance with section 2-316 is effective depends, not only on compliance with that section, but also on compliance with any other provision of the UCC or pre-existing general contract law which bears on the validity of the contract as a whole or any part of it. On this reading of section 2-316 the unconscionability concept remains applicable to disclaimer of warranty, as should pre-existing principles of public policy like those operative in *Henningsen*. Moreover, there is a strong policy argument that some general control over disclaim-

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- (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
  - (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
  - (4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

<sup>105</sup> *Meyer v. Mack Mtr. Trucks, Inc.*, 141 So. 2d 427 (La. App. 4th Cir. 1962).

<sup>106</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>107</sup> *Marshall v. Murray Oldsmobile Co.*, 4 UCC Rep. 172 (Va. Sup. Ct. 1967).

<sup>108</sup> See *Electronics Corp. v. Lear Jet Corp.*, 4 UCC Rep. 647 (N.Y. Sup. Ct. 1967); *Vlases v. Montgomery Ward & Co.*, 4 UCC Rep. 164 (3d Cir. 1967).

ers should be exercised, if, as is possible, the UCC provisions on warranty are held to supplant the developing doctrine of strict liability in tort.<sup>109</sup>

d. *Persons to whom warranty extends.*

The drafters of the UCC have provided three alternative provisions for section 2-318:

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

Alternatives "B" and "C" are variations on the original drafts of the section before the committee was forced back toward alternative "A" by manufacturers' hue and cry.

Alternative "A" seems objectionable. Although the Comment to section 2-318 says that "A" is neutral on the question of the liability of a manufacturer to the ultimate consumer, the "his buyer" language certainly seems to speak to that issue. This alternative might thus be a step back from the Louisiana jurisprudential development whereunder (1) the subvendee is subrogated to the rights of his vendor,<sup>110</sup> and (2) at least the end user of intimate bodily products has a direct action against the manufacturer without a showing of privity or subrogation.<sup>111</sup>

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<sup>109</sup> See generally Franklin, *When Worlds Collide: Liability Theory and Disclaimers in Defective Products Cases*, 18 Stan. L. Rev. 974 (1966).

<sup>110</sup> See La. Civil Code art. 2503 (1870); *McEachen v. Plauche Lbr. Co.*, 220 La. 696, 57 So. 2d 405 (1952).

<sup>111</sup> *Leblanc v. Coca-Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952).

Whether Louisiana courts would extend the intimate-bodily-products rationale to reach the result of alternative "B," or combine it with the subrogation doctrine to include property damage as under alternative "C," is an open question. Rather than taking any of the alternatives or attempting to "codify" the present uncertain position of the Louisiana jurisprudence, it might be desirable to leave section 2-318 blank for the time being. The Permanent Revision Committee exhorts us to take the alternative that fits state law; but none do, and the provision is not "uniform" anyway.

There is some danger in leaving the question to jurisprudential development. The liberal allowance of disclaimers of warranty could cause considerable surprise to sub-vendees were the courts to base future development of warranty liability in "non-privity" situations on subrogation. Hence, it might be a good idea to attempt a legislative extension of warranty coverage, that is, alternative "B" or "C." Presumably a disclaimer of warranty would under those provisions affect a sub-vendee only if it appeared in his contract in addition to appearing in the contract between his and the original vendor.

## 2. Warranty of Title

Section 2-312 provides:

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

- (a) the title conveyed shall be good, and its transfer rightful; and
- (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

This warranty is not unlike the present Louisiana position. Although the Civil Code warranty is against "eviction," additional warranties approaching warranty of title have been developed

under article 2452.<sup>112</sup> The plaintiff need not show perfect outstanding title in another, but only a "just fear" of being disquieted.<sup>113</sup> This is basically the same as the common law rule, that a party must be "sufficiently exposed to a lawsuit" before he may claim that his title is not "good,"<sup>114</sup> which is continued under the UCC.<sup>115</sup> The Louisiana position is similarly in accordance with subsection (1) (b) of section 2-312, that the buyer's warranty action is barred where he has actual knowledge of the outstanding claim at the time of sale.<sup>116</sup>

The disclaimer provision of subsection 2 also comports with existing law, whereunder a disclaimer of warranty may be express<sup>117</sup> or result from the type of sale involved, *e.g.*, a quit-claim deed.<sup>118</sup> However an express disclaimer of warranty or circumstances amounting to a disclaimer would result in complete freedom from liability under the UCC, whereas article 2505 of the Civil Code would require restitution of the price even where warranty was disclaimed, unless the vendee knew of the danger of eviction at the time of the sale and purchased at his risk.

The UCC rule seems preferable. The lack of warranty should be reflected in the price, and the common sense understanding of the exclusion of warranties is that the buyer has accepted the risk of a title defect. The Louisiana jurisprudence had made some movement in that direction by treating strongly worded non-warranty clauses as making the sale one at the buyer's "peril and risk." However, these developments have left the question of what language is sufficient to shift the risk to the buyer in considerable doubt.<sup>119</sup>

It should perhaps be noted here that the common law warranty of "quiet possession" is abolished by section 2-312 as a separate warranty, although disturbance of possession would certainly go to establish a warranty of title breach. This creates a problem for a buyer whose possession is disturbed more than four years from the date of sale. The warranty of title action will have prescribed<sup>120</sup> and there will be no action for warranty of quiet possession to accrue at the time of disturbance.

This situation presents an additional problem in Louisiana. Presumably our counterpart of the warranty of quiet possession,

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<sup>112</sup> See, *e.g.*, *Bonvillain v. Bodenheimer*, 117 La. 793, 42 So. 273 (1906).

<sup>113</sup> *Beckham v. Kelly*, 162 La. 421, 110 So. 637 (1926).

<sup>114</sup> See, *e.g.*, *Hale v. Cochrane*, 24 Colo. App. 528, 135 Pac. 980 (1913).

<sup>115</sup> UCC § 2-312, Comment 1.

<sup>116</sup> *Tomlinson v. Thurman*, 189 La. 959, 181 So. 458 (1938).

<sup>117</sup> La. Civil Code arts. 2503-05 (1870).

<sup>118</sup> *Waterman v. Tidewater Assoc. Oil Co.*, 213 La. 588, 35 So. 2d 225 (1947).

<sup>119</sup> Compare, *e.g.*, *Lyons v. Fitzpatrick*, 52 La. Ann. 697, 27 So. 110 (1900) with *Lemoine v. City of Shreveport*, 184 La. 221, 165 So. 873 (1936).

<sup>120</sup> See UCC § 2-725.

*i.e.*, the warranty against eviction, will remain on the books to cover sales of immovables. A cause of action in respect of that warranty will accrue only upon suit for eviction by a third party, and any party running afoul of the prescription provisions of the UCC could be expected to attempt to hold his vendor on the basis of the Civil Code's provisions. Should the UCC be adopted it seems clear that he should not be allowed to do so. The elimination of the "quiet possession" warranty is apparently an attempt to cut off the vendor's liability and with it the necessity for retaining records after four years have elapsed from the date of sale.<sup>121</sup> Retention of the warranty against eviction in Louisiana would be non-uniform and contrary to the policy of the UCC.

### 3. Warranty against Infringement

The provision of section 2-312(3) is new to common law states as well as to Louisiana. Presumably infringement might also result in failure to give "good" title or make a "rightful" transfer. Note that this warranty applies only to merchants "regularly dealing in goods of the kind," that is, persons who can be expected to be knowledgeable enough to be aware of patent or trademark problems in respect of the goods.

#### D. *Excuse: A return to failure of cause?*

UCC § 2-615 provides:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

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<sup>121</sup> See 1 W. Hawkland, *A Transactional Guide to the Uniform Commercial Code* 92-93 (1964).

- (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

This section is in effect a provision on failure of cause.<sup>122</sup> It is potentially applicable to any contingency other than casualty to identified goods<sup>123</sup> or problems in respect to an agreed mode of delivery,<sup>124</sup> which are subject to other specific provisions.

The general tenor of the section, the pre-existing common law jurisprudence and the comment explanation all suggest that section 2-615(a) is intended to establish a more liberal position or excuse than that developed by Louisiana courts under Civil Code article 1933(2). A survey of the existing jurisprudence leaves little doubt that Louisiana law is stricter in its requirements for excusable breach than the French or common law. Moreover, it seems clear that the applicable general provisions of the Civil Code on failure of cause, articles 1897-99, have been neglected and that those provisions suggest a general approach very similar to that embodied in section 2-615(a) of the UCC.<sup>125</sup>

The remaining portions of sections 2-615 and 2-616<sup>126</sup> deal primarily with allocation on partial inability to perform and the buyer's option to accept or reject the proffered modification of the contract. There seem to be no guidelines in the Civil Code or the Louisiana jurisprudence on this problem. The one striking thing about these provisions is the ability of the seller to pro-rate among customers to whom he is not at the time under contract. As we noted in relation to problems of formation, the UCC attempts to take account of on-going commercial relationships which slip between the closed categories of pre-existing contract law. Here the relationship of a supplier to "regular customers" is recognized as

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<sup>122</sup> See Smith, *A Refresher Course in Cause*, 12 La. L. Rev. 2 (1951).

<sup>123</sup> See UCC § 2-613.

<sup>124</sup> See discussion *supra* at text following note 73.

<sup>125</sup> See Comment, 21 Tul. L. Rev. 603 (1947).

<sup>126</sup> (1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2-612), then also as to the whole,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

tantamount to a contractual association as against third parties who have a right to proportional allocation.

Strangely enough section 2-615 has no counterpart excusing buyer's performance. As we noted earlier, section 2-614 requires acceptance of substituted performance in case of governmental interference with an agreed mode of payment, but it does not say anything about when such interference would excuse tender of payment by a substitute method. Section 2-614 does, however, make clear that payment in accordance with the regulatory measure causing the difficulty will not discharge the buyer's obligation if the regulation is "discriminatory, oppressive or predatory."

Presumably, the UCC does not contemplate denying excuse by failure of presupposed conditions to buyers, although one would think that appropriate situations for the application of such an excuse to the buyer's performance would be less frequent than in the case of sellers. The principal situation is probably failure to accept goods under a requirements contract due to "commercial impracticability." This problem is dealt with in section 2-306.<sup>127</sup>

If the UCC were adopted in Louisiana a buyer's claim of "commercial impracticability" or failure of cause would raise an interesting methodological problem: Should UCC § 2-615 be applied by analogy or should pre-existing law on excuse control. Again the general question of the pre-emptive force of the Commercial Code arises, but in this context in the form familiar to civilian lawyers of whether the text is both law and a source of law. The legal literature is about evenly divided on this issue.<sup>128</sup> Without attempting to take sides in the controversy we might suggest that the problem is almost certain to be simpler within the confines of specific cases. In relation to a buyer's defense of failure of cause, for example, a Louisiana court might by emphasizing Civil Code article 1897 rather than 1933(2) find that Civil Code and UCC criteria would be comparable and thus render a choice between them unnecessary.

#### IV. RISK OF LOSS

Under present law the buyer bears the risk of loss from the time of perfection of a contract for sale.<sup>129</sup> This rule is not necessarily based on a concept of abstract title, yet Louisiana courts have insisted on analyzing risk of loss cases in terms of the locus of title.

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<sup>127</sup> See § 2-306, Comment 2 and § 2-615, Comment 9.

<sup>128</sup> Compare Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 Law & Contemp. Prob. 330 (1951), and Hawkland, *Uniform Commercial "Code" Methodology*, 1962 Ill. L. Forum 291, 312 with Kripke, *The Principles Underlying the Drafting of the UCC*, 1962 Ill. L. Forum 321, 331, and Paterson, *The Codification of Commercial Law in the Light of Jurisprudence*, 1 N.Y. Rep. 68 (1955).

<sup>129</sup> La. Civil Code art. 2467 (1870).

In so doing they have managed to mangle the Uniform Bill of Lading Act by interpreting a shipment to seller's order as a reservation of "title" rather than of a security interest, thereby placing the risk of loss on the seller until receipt of the goods by the buyer.<sup>130</sup> Similarly, the courts have been quick to seize upon almost any stipulation for inspection as a suspensive condition<sup>131</sup> keeping title and risk of loss in the seller until its fulfillment.<sup>132</sup>

Both of these approaches seem an understandable attempt to move away from the very early shifting of risk in the Civil Code. The buyer is unlikely to have insurance covering goods that are not in his possession. Moreover, there is the possibility of double recovery by the seller—from his insurer and from the buyer.<sup>133</sup> But the courts have gone too far. The retention of the risk of loss in the seller under a shipper's-order-notify bill continues risk past completed performance, and the inspection-as-a-suspensive-condition cases make too much of the contractual confirmation of the buyer's normal right to inspect.

The UCC provisions avoid the pitfalls of title by what is commonly called the Code's "narrow issue" approach. The question sought to be answered is not "where is title and therefore risk," but only "where is the risk." In the first instance allocation of risks is contractual.<sup>134</sup> If risks are not allocated contractually UCC § 2-509 controls.<sup>135</sup>

<sup>130</sup> *E.g.*, California Fruit Exchange v. Meyer, Inc., 8 La. App. 198 (1927).

<sup>131</sup> La. Civil Code arts. 2044, 2457, 2460, 2471 (1870).

<sup>132</sup> American Creosote Works v. Boland Mach. Co., 213 La. 834, 35 So. 2d 749 (1948).

<sup>133</sup> See McCoid, *Allocation of Loss and Property Insurance*, 39 Ind. L.J. 647, 649 (1964).

<sup>134</sup> UCC § 2-303.

<sup>135</sup> (1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of non-negotiable document of title or other written direction to deliver, as provided in subsection (4) (b) of Section 2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement

Subsections (1) and (2) of section 2-509 are directed at standard commercial sale situations and make risk a function of the seller's completion of his delivery obligations under the contract. When the seller has completed delivery the buyer is liable for the price and has the risk of loss, even though the seller may have retained a security interest by a shipment under reservation.<sup>136</sup>

Where no shipment or third party is involved subsection (3) provides a rule apparently based on the likelihood of one or the other party's having insurance. Where the seller is a merchant and therefore likely to carry insurance on his stock he does not shift the risk to the buyer (who may be an uninsured non-merchant) until receipt of the goods. Conversely, a non-merchant seller would shift the risk of loss to a merchant buyer by tender of delivery. In such situations the Louisiana position would be that risk passes to the buyer at the perfection of the contract and that the seller's duty to care for the goods until delivery does not include insuring them for the buyer's benefit.<sup>137</sup> The UCC rules seem clearly preferable.

Where sale is on approval, risk does not pass to the buyer with acceptance under UCC § 2-327. This is, of course, the true suspensive condition situation, and to that extent the Louisiana position under articles 2460 and 2471 of the Civil Code would be retained. UCC § 2-327 also makes the same distinction between suspensive conditions (sale on approval) and resolutive conditions (sale or return) that should be made under existing law.<sup>138</sup> However, a simple stipulation for inspection should not under the UCC be read as importing a suspensive condition affecting risk of loss into the contract. Risk of loss does not depend on title or on what the courts derive from other contract terms about the parties' "intentions" on title passage. Moreover, as was mentioned earlier, the UCC is very clear in its confirmation of a buyer's right to inspect goods before acceptance. Therefore, the courts should require a clear indication of "sale on approval" in order for section 2-327 to come into play.

Should a buyer rightfully reject defective goods or an otherwise non-conforming tender, the risk of fortuitous loss remains on the seller until cure or acceptance.<sup>139</sup> If the breach is discovered after

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of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).

<sup>136</sup> UCC § 2-505.

<sup>137</sup> *Acme Burlap Bag Co. v. Hardin Bag Co.*, 1 La. App. 379 (1925).

<sup>138</sup> La. Civil Code art. 2471 (1870).

<sup>139</sup> (1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

UCC § 2-510(1).

acceptance, or in situations involving buyer's breach before delivery, the injured party may under the UCC treat the risk as on the breaching party to the extent of any deficiency in his insurance.<sup>140</sup>

Comparison of these provisions with the effect of breach on risk of loss under present law is difficult because there is in Louisiana no well delineated concept of buyer's right of rejection. The Civil Code seems to presume that a defect in quality should always give rise to a redhibitory action and shifts the risk back to the seller only from the time of suit.<sup>141</sup> But the buyer may simply refuse to accept the goods because defective. Should this be considered tantamount to a failure by the seller to "deliver," other articles of the Code might allow the buyer to shift the risk back to the seller by a complaint in writing sufficient to put the seller in default.<sup>142</sup> At any rate the provisions of UCC § 2-510 which make allocation of risk depend on a deficiency in effective insurance work a change—a change with the beneficial result of protecting innocent parties while precluding possibilities of double recovery by them.

Special provisions for allocation of risk in sales subject to a suspensive condition,<sup>143</sup> sale by weight, tale or measure,<sup>144</sup> situations where delivery is delayed,<sup>145</sup> or in alternative sales<sup>146</sup> are not necessary under the UCC scheme because risk does not pass to the buyer until delivery anyway.

## V. REMEDIES

The remedies sections of article 2 seem the most confused and confusing in the UCC. A part of the problem stems from the inter-related and cumulative nature of the remedies provided.<sup>147</sup> Another difficulty involves simply getting at the meaning of individual sections—the seller's right to "cancel," for example.

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<sup>140</sup> (2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

UCC § 2-510(2-3).

<sup>141</sup> La. Civil Code art. 2533 (1870). (Destruction due to a defect in the goods is always at seller's risk. La. Civil Code art. 2532 (1870)).

<sup>142</sup> See La. Civil Code arts. 1910-12, 1933(4), 2219, 2470 (1870).

<sup>143</sup> La. Civil Code art. 2471 (1870). Compare UCC § 2-613.

<sup>144</sup> La. Civil Code art. 2458 (1870).

<sup>145</sup> La. Civil Code art. 2470 (1870).

<sup>146</sup> La. Civil Code arts. 2472-73 (1870).

<sup>147</sup> See generally the "roadmap" provided by Peters, *Remedies for Breach of Contract*, 73 Yale L.J. 199 (1963).

### A. Cancellation

As one of his remedies section 2-703 provides that "the aggrieved seller may . . . cancel." A Louisiana lawyer will quickly apprehend what this must imply, a suit for dissolution<sup>148</sup> whereby the seller retrieves the goods and collects damages. Not so, or at least apparently not so.

Section 2-106 (4) provides:

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

This language indicates that cancelling a contract is not really a remedy at all but a means for categorizing or declaring an existing situation.<sup>149</sup> Such a declaration has no effect on the availability of other remedies<sup>150</sup> and we must pursue these other remedies in order to determine the effect of "cancellation."

There is little doubt that the default which gives rise to cancellation will allow a suit for damages.<sup>151</sup> The tricky problem is whether the seller may also, as in judicial dissolution in Louisiana, repossess the goods.

At common law, "rescission" or "cancellation" after delivery gives no right to specific restitution save in exceptional cases of unique objects. The normal recovery is in quasi-contract for the value of the performance rendered.<sup>152</sup> There are strong indications that this position was meant to continue under the UCC. The only provision in the UCC for reclamation in a credit sale is concerned with recovery from an insolvent buyer. Section 2-702:

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser [or lien creditor] under this Article

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<sup>148</sup> La. Civil Code arts. 2046, 2561 (1870).

<sup>149</sup> *But cf.*, UCC § 1-106(2).

<sup>150</sup> UCC § 2-720.

<sup>151</sup> UCC § 2-708.

<sup>152</sup> 3 S. Williston, Sales § 593 (Rev. ed. 1948).

(Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

The last sentence of this provision, excluding all other remedies where reclamation is effective, casts doubt on an interpretation of the right to cancel under the UCC which would give restitution plus damages as a normal remedy. Of course insolvency could be a special case where remedies are restricted, but this hardly seems a plausible reading given the common-law background against which these provisions were drafted. Section 2-702(2) and (3) actually strengthen the seller's right to reclaim specific goods under the pre-existing common law and Uniform Sales Act.<sup>153</sup> The clear implication is that specific restitution is a special remedy under section 2-702 and not one generally flowing from "cancellation."

Moreover, the remedy is not very useful. The reclaiming creditor's rights are subordinated to good faith purchasers or lien creditors. Subordination to the latter class of persons has been removed in the latest formulation of section 2-702,<sup>154</sup> but even so the right of reclamation remains weak.<sup>155</sup>

To the extent that there is a general right to reclaim specific goods in the UCC, it would have to be found as an incident to cancellation of a cash sale under the conditions specified in section 2-507(2) :

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

Even here no specific right of reclamation is given, and there is no clear agreement on whether one is implied.<sup>156</sup> At least one case has assumed that specific restitution could be had under section 2-507(2).<sup>157</sup> But that case also illustrates the weakness of the remedy under the UCC in relation to third parties.

On balance, one should conclude that "cancel" in section 2-703 bears little or no relation to "dissolve" or "resolve" as understood in the Louisiana law of remedies. It seems certain that it will not be read in that light in other jurisdictions. Hence in adopting the UCC, "dissolution" as it is understood under the "Sales" articles of the Civil Code should be suppressed. This would involve only the elimination of articles 2564 and 3229-31. Other articles dealing

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<sup>153</sup> 1 N.Y. Rep. 214 (1955).

<sup>154</sup> Report No. 3 of the Permanent Editorial Board for the UCC 3 (1967).

<sup>155</sup> Sachse, *supra* note 100, at 822.

<sup>156</sup> *Compare*, 1 Hawkland, *supra* note 121, at 299, with 1 N.Y. Rep. 148 and Peters, *supra* note 147, at 218.

<sup>157</sup> *See* Evans Prod. v. Jargensen, 421 P.2d 978 (Ore. Sup. Ct. 1966).

with dissolution apply equally to sales of immovables and hence could remain in force. Indeed, if the reported appellate cases are a significant indication, it is in regard to immovables that the right to "revendicate" presently finds its almost exclusive utility.

The effect of the loss of the right of rescission on Louisiana vendors should be weighed primarily in terms of its function as a security device, for it adds nothing to a seller's measure of recovery. In this writer's opinion the elimination of revendication as a general remedy in the sale of goods will be, if anything, salutary. Either the right to revendicate gives the same security as a vendor's privilege, in which case it is otiose, or it gives a greater right, in which case it seems unduly preferential and adds confusion to the priority of security interests under Louisiana law.<sup>158</sup>

#### B. Seller's action for price or resale

Of course all is not chaos in the remedies sections and some improvements in existing law are to be expected. One such area is that of the seller's choice between a suit for the price or resale followed by an action for damages.

The favored seller's remedy under the UCC is resale. An action for the price is allowable only under the conditions specified in section 2-709:

- (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price
  - (a) of goods accepted or of conforming goods lost or damages within a commercially reasonable time after risk of their loss has passed to the buyer; and
  - (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.
- (2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the con-

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<sup>158</sup> See generally Yiannopoulos, *supra* note 27, at 323-27. The position of the revendicatory action under the Federal Bankruptcy Act is far from clear. It could be treated as adding nothing to an unsecured party's rights, as a special "sales law" right which is unaffected by even the hypothetical lien creditor or bona fide purchaser, or as in essence a statutory lien. The latter seems the most sensible approach, which would mean that revendication would be a right of the same magnitude as the vendor's privilege. Under amended section 67(c) (1) (B) this is a dubious distinction. Moreover, the same analysis could be made in respect of UCC § 2-702's right of reclamation and stoppage in transit under section 2-705. Hence, the amendments to section 2-702 based on *In Re Kravitz* (see Sachse, *supra* note 100) may not have really gotten at the heart of the bankruptcy-reclamation problem—but this is a topic for a separate article.

tract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

This provision probably changes the present Louisiana law. Although resale is not provided in the Civil Code, it was adopted by the jurisprudence at an early stage and has in some cases been suggested as the sole remedy in preference to an action for the price.<sup>159</sup> However, the better view seems to be that the seller has alternative remedies where the buyer breaches before delivery. He can resell and claim damages or tender and hold the goods for the buyer while suing for the price. The only restriction on this choice is the mitigation of damages rule, which would require resale of perishables and of other goods in a falling market.<sup>160</sup> Yet we can only say that the Louisiana rule is "probably" changed because (1) the "seller's option" analysis is not clearly preponderant and (2) the mitigation rule might logically encompass a duty to sell wherever commercially reasonable in order to terminate the risk of price fluctuations.<sup>161</sup>

1. *Goods in respect of which the remedies are available; salvage*

It will be noted that section 2-709 (1) (b) speaks in terms of goods "identified to the contract." The concept of "identification" is explained in section 2-501:

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

- (a) when the contract is made if it is for the sale of goods already existing and identified;
- (b) if the contract is for the sale of future goods other

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<sup>159</sup> See generally Comment, 4 Tul. L. Rev. 92 (1929).

<sup>160</sup> Leon Godchaux Clothing Co. v. DeBuys, 10 La. App. 635, 120 So. 539 (1929).

<sup>161</sup> See Mutual Rice Co. v. Star Bottling Works, 163 La. 159, 111 So. 661 (1927).

than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

- (c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

Actually, questions of identification to the contract are given little influence elsewhere in the UCC. The presence or absence of identification does not, for example, have any effect on the shifting of the risk of loss. The concept is not therefore akin to "appropriation" under article 2458 of the Civil Code. Nor are remedies really affected. Although sections 2-709 and 2-706 on resale seem to give some efficacy to identification as a prerequisite to suit, this is contradicted by section 2-704 which provides for the accomplishment of such identification after breach:

- (1) An aggrieved seller under the preceding section may
  - (a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;
  - (b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.
- (2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

Although nothing in the Louisiana jurisprudence is quite so explicit as section 2-704 concerning the option to salvage or complete manufacture, this provision would probably make no change in present practice. An aggrieved seller is bound to do whatever is reasonable to minimize damages and no more than is reasonable.<sup>162</sup>

## 2. Price

Aside from its possibly more limited application, the action for the price seems to conform to the present Louisiana model. In addi-

<sup>162</sup> See, e.g., *Carrol v. Hartford Acc. & Indem. Co.*, 52 So. 2d 258 (La. App. 1st Cir. 1951); cf. *Dairy Spec. Inc. v. Verbene*, 117 So. 2d 632 (La. App. Orl. 1960) (inability to resell as salvage excused subtraction of salvage value from damages).

tion to the price the seller may collect incidental damages under section 2-710:

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

Presumably the same result would obtain under Louisiana Civil Code articles 1930 and 2555.<sup>163</sup>

"Incidental expense" under UCC § 2-710 is, of course, an expansive concept. One case, *Procter & Gamble Distrib. Co. v. Lawrence Amer. Field Whse. Corp.*,<sup>164</sup> has suggested that damages recoverable under section 2-710 includes legal expenses. However, the statement is pure dictum. Since legal expenses and innumerable other out-of-pocket expenses are not specified in section 2-710, it is apparently up to each jurisdiction to develop its own concept of "incidental," keeping in mind the desirability of uniformity.

Although section 2-709(2) requires only that the seller "hold" goods for the buyer, he will, in accordance with the present Louisiana precondition to a suit for the price, have already tendered. Otherwise, the buyer will be under no obligation to pay.<sup>165</sup> The ability to resell after judgment is new, but it is not contrary to any previous holding.

### 3. Resale

The general right of resale is provided in section 2-706(1):

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

This provision changes the rule but not the practice under existing law in relation to the determination of damages. The rule has always been that the measure of damages was the contract price less the market price at the time for delivery, but in practice the resale price is considered to establish the market price if carried

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<sup>163</sup> *But see* La. Civil Code arts. 1934-35 (1870).

<sup>164</sup> 16 N.Y.2d 344, 213 N.E.2d 873 (1965).

<sup>165</sup> UCC § 2-507(1).

out in a reasonable manner.<sup>166</sup> Under the UCC market price is relevant only in determining the reasonableness of the resale.

Section 2-706(1) appears to limit the seller's recovery where he has resold to the difference between contract and resale price plus incidental damages. This would mean that the UCC was consistent with the *Mossy Motors v. McRedmond*<sup>167</sup> approach, that is, that anticipated profits from loss of "a sale" are not recoverable. However, such is not the case. The measure of damages under section 2-706(1) is not mandatory. The seller may instead employ section 2-708 in order to put himself in as good a position as if the buyer had performed.

Section 2-708:

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

These alternative provisions have two consequences in the case of resale:

First, the *Mossy Motors* approach is rejected by section 2-708 as it should be. The ultimate conclusions to be drawn from *Mossy* are either that there is no right of resale in Louisiana or that the seller should always sue for specific performance in order to protect his profit. Both results are commercially unacceptable, for they have the effect of tying up goods for the benefit of buyers who do not want them. The alternative to specific performance under present law, barring resale, is to sue for rescission with damages and then resell, which, of course, also preserves the right to the profit on both sales. There, thus, seems no reason why the resale remedy should not be rationalized in order to provide the same benefit through a less cumbersome procedure.

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<sup>166</sup> See, e.g., *E. & W. F. Peck, Ltd. v. Southwestern Lbr. Co.*, 131 La. 177, 59 So. 113 (1912).

<sup>167</sup> 12 So. 2d 719 (La. App. Orl. 1943).

Second, the option to use "market" instead of resale price under section 2-708(1) gives the seller the benefit of a resale made at above a provable market price. If the seller can pull this off, he certainly should get the benefit. However, the seller does not receive all the benefits of an above-market resale. If he seeks to recover lost profits under section 2-708(2) he will apparently have to account for these proceeds. This seems inconsistent with the policy of section 2-708(1). The same result would occur where the seller resold for not only more than the market, but for more than the contract price. Although section 2-706(6) specifically states that the seller is not accountable for profits on the resale (by "profits" presumably is meant excess over contract price), a claim for "profits" under section 2-708 would in all cases be offset by the "proceeds" of the resale. The benefits of section 2-706(6) and section 2-708(1) are thus limited to cases where lost profits are not recovered under section 2-708(2).

The above analysis is not supported by any reported cases, but it seems the only means of rationalizing section 2-706 with section 2-708. The alternative is to consider section 2-708 damages inapplicable where there is a resale. This possibility is negated both by the language of section 2-708(2) and by the illogicality of allowing a greater measure of damages where goods are retained until after suit than where they are promptly resold.

The provision of section 2-706(6) whereby the vendor retains the excess, if any, over the contract price on resale is contrary to present law, if *Mossy Motors* is representative; but it probably accords with the Louisiana position under older cases which treat resale as for the vendor's account.<sup>168</sup> Moreover, the positions of sections 2-706(6) and 2-708(1) are supported by the logic of *Friedman Iron & Supply Co. v. J. B. Beaird Co.*<sup>169</sup> The vendor there was allowed to measure damages as the difference between contract and market prices at the time of the breach, although he had retained the goods and could at the time of suit have sold them at above the contract price. Assuming that he did so immediately after judgment, it is obvious that he was allowed to retain "profit" in the section 2-706(6) sense and an excess above market as under section 2-708(1).

### C. *The preference for cover*

We might note in passing that the UCC's preference for substitutional redress is carried forward in relation to buyer's remedies. Like the Louisiana jurisprudence, the UCC views specific

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<sup>168</sup> *H. T. Cottam & Co. v. Moises*, 149 La. 305, 88 So. 916 (1921).

<sup>169</sup> 222 La. 627, 63 So. 2d 144 (1953).

performance as exceptional.<sup>170</sup> However, the UCC would force the making of a substitute contract, that is, "cover," where the Louisiana jurisprudence seemingly would not.

UCC § 2-715(2) (a) limits buyer's consequential damages to "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." Although Louisiana has a standard mitigation of damages rule, it has not been applied to limit recovery of "profits" where cover might have been possible and damages therefore measured by the difference between contract and market prices.<sup>171</sup> Louisiana courts have not allowed the double recovery of expenses of cover *plus* lost profits; they have merely solved the cumulation problem in favor of recovery of profits. The UCC reverses this preference.

#### D. Remedies for breach of warranty of quality

##### 1. Mechanics of buyer's "recission" or "revocation of acceptance."

One often hears that a basic difference between common law and civil law approaches to dissolution of contracts lies in the distinction between judicial (civil law) and extra-judicial (common law) procedures. Certainly the bare statement of existing principles under the Louisiana Civil Code and the UCC would lead to this conclusion. Article 2047 of the Civil Code provides:

In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolatory condition is an event, not depending on the will of either party, the contract is dissolved of right; but, in other cases, it must be sued for, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition.

Whereas under UCC § 2-608:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

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<sup>170</sup> See UCC § 2-716(1). The one modern Louisiana case giving specific performance in a contract for the sale of movables was decided in federal court, *Gray v. Premier Inv. Co.*, 51 F. Supp. 944 (W.D. La. 1943), and would certainly have been decided the same way under the UCC.

<sup>171</sup> See, e.g., *Usrey Lbr. Co. v. Huie-Hodge Lbr. Co.*, 146 La. 296, 83 So. 578 (1920); *E. B. Williams & Co. v. Bienvenue*, 109 La. 1023, 34 So. 63 (1903).

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

The most frequent application of these procedures is doubtless in relation to breach of implied warranty of quality. Strangely enough, in most cases, the distinctions between these provisions will yield no differences in result. The Louisiana buyer who has not paid the price will normally tender back the goods, and if the seller accepts them the sale is dissolved. Should the seller deny the existence of defects, he will then have to sue for the price, and the buyer will defend on the basis of redhibitory vice. The same practice may be expected under the UCC. Although UCC § 2-717 expressly authorizes deduction of unliquidated claims from the purchase price, this really changes nothing, for the buyer may always withhold payment and risk suit by the seller.

Apparent differences arise in a situation where the buyer has made part or full payment. Under the Civil Code we would expect the buyer to sue in redhibition for return of the payments, whereas under UCC § 2-608(3) the buyer is given the same rights as if he had "rejected" the goods, including resale in order to realize his "security interest" in the goods. In fact the same procedure can be used under existing law. Inability to return the goods prevents an action in redhibition, but not an action in *quanti minoris*.<sup>172</sup> Hence a complaining buyer may resell and then either defend or sue on the basis of *quanti minoris* with due allowance for the extent of his recovery on the resale.

A more meaningful effect of requiring judicial dissolution is the opportunity for the court to prescribe curative remedies, such as reduction of the price<sup>173</sup> or additional time for performance.<sup>174</sup> In the UCC these devices are provided under the cure concept of section 2-508, and presumably the buyer's failures to allow appropriate curative action would make his revocation wrongful. A court

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<sup>172</sup> Ehrlich v. Roby Mtrs. Co., 166 La. 557, 139 So. 686 (1928).

<sup>173</sup> La. Civil Code art. 2543 (1870).

<sup>174</sup> La. Civil Code art. 2047 (1870).

should then make any warranty action or defense on the part of the buyer conditional on allowing the seller to cure or to attempt to cure the defects or to make money allowance for uncured items.<sup>175</sup>

Section 2-608 operates in other respects much as the Louisiana action in redhibition. Apparent defects are excluded as grounds to substantiate breach,<sup>176</sup> but seller's assurances not rising to the level of express warranties might excuse close inspection.<sup>177</sup> The standard for determining breach is also very similar, although arguably the UCC language, "substantially impairs its value to him," establishes a subjective standard as compared with the seemingly objective criterion of article 2520 of the Civil Code, "so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice." The real issue here is whether it is necessary that the seller know, actually or constructively, of the intended use or of other factors affecting the "value" of a particular item to the buyer.<sup>178</sup> The comment to section 2-608 indicates that this is not necessary under the UCC, but that statement is difficult to square with the distinction in UCC §§ 2-314 and 2-315 between warranties of merchantability and of fitness for a particular purpose. It is at least doubtful that any change in existing practice would result.

The UCC approach to delay in effecting a dissolution for breach of warranty diverges from the present Louisiana position. Apparently the Louisiana vendee need only sue within one year from the date of the sale.<sup>179</sup> Although breach of implied warranty of quality is a "passive" breach,<sup>180</sup> the Civil Code seems to presume that "putting in default" is not necessary. Article 1912 of the Civil Code makes putting in default a prerequisite to suit "in the cases hereinafter provided for." The redhibition articles are silent on default, and given the effects of formal default this is understandable. "Putting in default" normally affects the right to damages and the shifting of risk of loss,<sup>181</sup> but the redhibitory action precludes damages<sup>182</sup> and risk can be shifted back to the vendor only by

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<sup>175</sup> See *Wilson v. Scampoli*, 228 A.2d 848 (D.C. Ct. App. 1967). One Louisiana court has recently taken a very restrictive view of the ability of a seller to cure performance—a view which seems unnecessary under the codal provision, although perhaps warranted on the facts of the particular case. *Cain v. Rapides Dodge Inc.*, 207 So.2d 918, 920-21 (La. App. 3rd Cir. 1968).

<sup>176</sup> Compare UCC § 2-316(3)(b), with La. Civil Code art. 2521 (1870).

<sup>177</sup> Compare UCC § 2-608(1)(b), with *Melancon v. Robichaux*, 17 La. 97, 101 (1841).

<sup>178</sup> See La. Civil Code art. 1826 (1870).

<sup>179</sup> La. Civil Code art. 2534 (1870).

<sup>180</sup> See La. Civil Code art. 1931 (1870).

<sup>181</sup> La. Civil Code art. 1912 (1870).

<sup>182</sup> La. Civil Code art. 2531 (1870). (Of course damages are recoverable where the vendor is in bad faith, but this would seem an "active" breach not requiring formal default.)

suit.<sup>183</sup> However, there are some essentially "estoppel" cases which deny the buyer's right to recover for defects or to use a defect defensively where an inordinately long time has elapsed between discovery and notice of the defect or where the seller's opportunity to reduce his loss has been prejudiced.<sup>184</sup>

UCC § 2-608(2), on the other hand, requires that "revocation of acceptance" be made within a "reasonable time" after discovery of the defects. Apparently "unreasonableness" does not require proof of estoppel, but beyond this observation it is difficult to apprehend in the abstract what factors might be determinative on the question of reasonableness of the time of revocation. However, in addition to exercising section 2-608 rights within a reasonable time, the buyer will also have to have given notice of the breach in accordance with UCC § 2-607(3) (a) which provides:

- (3) Where a tender has been accepted
  - (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . .

After giving such notice the buyer may attempt to obtain curative action by the seller without forfeiting his right to revoke acceptance,<sup>185</sup> but should he delay unduly long in exercising this right he will yet have an action in damages which prescribes in four years.<sup>186</sup>

Thus, where rescission and restitution are involved the UCC seems to agree with Civil Code's policy of a short prescriptive period without going to the extreme of cutting off the warranty action in damages at the same time.

## 2. Damages

To speak of damages for breach of warranty is normally inappropriate in Louisiana. Redhibitory defects give rise to rescission with return of the full price or an action in quanti minoris for diminution of the price. In the former case there may be an award of "expenses occasioned by the sale" which could perhaps properly be considered incidental damages. But the idea of awarding damages qua damages applies only in the case of bad faith or fraud.<sup>187</sup> Quite simply put, a suit in redhibition is not a suit for breach of

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<sup>183</sup> La. Civil Code art. 2533 (1870).

<sup>184</sup> See *American Law Book Co. v. Jones*, 9 La. App. 280 (1928); *Interstate Elec. Co. v. Adamant Porcelain Co.*, 7 La. App. 577 (1928).

<sup>185</sup> UCC § 2-608, Comment 4.

<sup>186</sup> UCC § 2-725.

<sup>187</sup> La. Civil Code arts. 2545-47 (1870).

promise, whereas under the UCC "breach of warranty" and "breach of contract" make available the same remedies.<sup>188</sup>

Article 2531 of the Civil Code provides the measure of recovery in redhibition:

The seller who knew not the vices of the thing, is only bound to restore the price, and to reimburse the expenses occasioned by the sale, as well as those incurred for the preservation of the thing, unless the fruits, which the purchaser has drawn from it, be sufficient to satisfy those expenses.

Without going into any extended discussion of what may be awarded by way of buyer's consequential damages under the UCC or of what "expenses occasioned by the sale" includes in Louisiana, it is obvious that the former includes satisfaction of expectancy interests and that the latter does not. It is suggested that the UCC rule is preferable.

The Louisiana provision has been explained in terms of the underlying theory of the French and Louisiana Codes that a failure of the goods to live up to their supposed quality is comparable to error as to their substance. Therefore, the remedial provisions are designed to put the parties back in the status quo ante. Moreover, since the vendor has made no actual or implied-in-fact promise he should not be held for breach of promise damages. The equation with vices of consent is carried further by making a vendor who knew of the defects liable as in fraud.<sup>189</sup>

This system is logical but it is not necessarily desirable. There is really no good reason for allowing breach of contract remedies where warranties are implied *in fact* and denying them when implied *in law*. In either case an express promise is lacking and often in a concrete instance the distinction is subject to manipulation. No one would suggest that other implied-in-law terms, for example, the reciprocal obligations of delivery and removal, should be subject to breach without incurring ordinary breach of contract damages. It is perhaps for this reason that the French courts have gone very far in allowing ordinary breach of contract damages against good faith vendors under the rubric of "expenses occasioned by the sale."<sup>190</sup>

Of course, as we noted earlier, the Louisiana action in redhibition covers both express and implied warranties and hence part of the logic of the French system is inapplicable here. For some ob-

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<sup>188</sup> UCC §§ 2-714 and 2-715.

<sup>189</sup> Morrow, *Warranty of Quality: A Comparative Survey*, 14 Tul. L. Rev. 529, 552-56 (1940).

<sup>190</sup> *Cf.*, *id.* at 539-43.

scure reason the drafters of the Louisiana Civil Code provided that not even a breach of promise is a breach of promise, if the promise was made in good faith. In other terms, standard breach of contract damages are never awardable under the Louisiana scheme where the contract contains an express warranty. If the promisor is in good faith, the redhibition measure of damages is applicable; if he is in bad faith recovery is as in fraud, which includes "unforeseeable" consequential damage.<sup>191</sup>

Indeed it is possible that the good faith/bad faith distinction goes further to eliminate the normal breach of contract recovery of "foreseeable" damage in all cases of breach of warranty in Louisiana. Article 2545 says that a seller who knows of the vice and fails to declare it is answerable in "damages." The question then is how to measure the damage under article 1934, by the good faith or the bad faith standard? There is of course a distinction between the "bad faith" which gives rise to damages for breach of warranty under article 2545 and "bad faith" as used in article 1934. Article 2545 is concerned with bad faith at the time of formation, while 1934 relates to bad faith breach.<sup>192</sup> Yet the party who knows of a vice at formation must also know of it at performance, and we should note here that a manufacturer is held to have constructive knowledge of defects for purposes of article 2545.

Of course there is a good argument to be made that "knowledge" of a defect and certainly "constructive" knowledge thereof is not sufficient to put a party in "bad faith" under article 1934. What little case authority there is on point, *Doyle v. Fuerst & Kramer*,<sup>193</sup> presumes that only foreseeable damages are recoverable, but there is some doubt concerning its vitality. The decision is based in part on negligence principles and in part on French commentary which is inappropriate. The French Civil Code gives all causally connected damages only for fraudulent breach, not for bad faith breach.<sup>194</sup>

Were the UCC adopted, section 2-715 would simply strike the middle ground by providing normal breach of contract damages, including expectation interests, in the ordinary breach of warranty situation, while a "true" fraud remedy could remain under section 2-721 and the existing Louisiana Code provisions. The use of constructive knowledge under Civil Code article 2545 in order to circumvent the limited recovery in redhibition in "products liability" cases would no longer be necessary because personal injury and

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<sup>191</sup> La. Civil Code arts. 2547, 1934(2) (1870).

<sup>192</sup> See *Christie & Low v. Pennsylvania Iron Wks. Co.*, 128 La. 208, 54 So. 742 (1911).

<sup>193</sup> 8 Orl. App. 408 (1911).

<sup>194</sup> French Civil Code art. 1150.

property damage are explicitly made recoverable by section 2-715 (2) (b).

## VI. CONCLUSION

This discussion has hit only a few high points, and it should certainly not be thought to have covered even all the major areas of sales law which would be affected by adoption of Article Two of the UCC. Moreover, it has had little or nothing to say about the desirability of adopting Article Two. On that question this writer has been unable to arrive at a firm conclusion.

There are, of course, advantages and disadvantages. The UCC's general approach to sales problems—the attempt to provide a “commercially reasonable” set of standards—seems a move in the right direction. The provisions we have discussed on contract formation, on cure, on security of expectations, on warranty and in a number of other areas carry through on this basic theme. However, this attempt to get away from lawyer's law toward merchant's law was not made systematically. The Code sections are not based on field study but on the accumulated experience of the drafters and on problems as they appear in reported appellate cases. Hence it is not really possible to know whether the UCC solves the present commercial sale problems of this or any other jurisdiction. Yet, certainly the Sales article of the UCC solves many specific problems under prior jurisprudence by breaking issues down into functional categories—what Professor Llewellyn called “narrow-issue thinking.” But in so doing the Commercial Code loses much of the systematic clarity to which we are accustomed in our private law of obligations.

There are many other arguments pro and con.<sup>195</sup> On perhaps the most significant question we have no data: What would be the effect on the economic posture of this state were it to remain non-conformist in the area of commercial sales law? Should the effect be felt to be significant, that consideration is very likely to override all others. We could after all rejoin the union and give everyone the benefit of our civilian training in the continuing process of revision and redrafting.

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<sup>195</sup> See discussion in Sachse, *supra* note 100, at 845-46.